

# **INVESTIGATIVE REPORT**

*(Final Finding and Closure)*

**\*\*\*PUBLIC VERSION\*\*\***

*The names of complainants and other identifying information have been changed in this public report to protect their privacy and to safeguard confidential information.*

Alaska Ombudsman Complaints J096-0208 and J096-1873

September 2, 1998

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## **SUMMARY OF THE COMPLAINT**

In mid-1996, two employees of the Department of Health and Social Services (department) contacted the Office of the Ombudsman with complaints about the agency's investigation of alleged violations of the Executive Branch Ethics Act. Each of the complainants, H.G. of the LMN Agency and D.N. of the XYZ Division, had alleged unrelated violations of the ethics act within their workplace. H.G.'s allegation was investigated, but the department refused to report its findings to her. D.N.'s allegation was also investigated. D.N. was given a copy of the findings, but complained that the investigation was inadequate. The investigation was subsequently reopened; D.N. was also notified of the results of the second investigation.

The allegation under investigation by the Ombudsman was:

***The Department of Health and Social Services unreasonably lacks a consistent process for handling reported violations of the Executive Branch Ethics Act.***

The elements of the allegation investigated by the Ombudsman were as follows:

*(1) Without reason, the department treated differently two persons who came forward with ethics concerns.*

*(2) The department conducted inadequate investigations of reported ethical violations.*

*(3) The department's procedures for handling reported violations of the*

*ethics act are inconsistent with the law.*

Assistant Ombudsman Tom Webster began the investigation, which was later assigned to Assistant Ombudsman Mark Kissel. On March 7, 1997, written notice of investigation was mailed to the Department of Health and Social Services' designated ethics supervisor, Jo Olson, in accordance with AS 24.55.140. The preliminary investigative report was mailed to Ms. Olson and Commissioner Karen Perdue on June 1, 1998, in accordance with AS 24.55.180. Ms. Olson responded for the department on June 15.

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## **BACKGROUND**

On June 4, 1996, the Office of the Ombudsman received a complaint from a state employee who alleged that executive staff in the LMN Agency misused leave and travel privileges and retaliated against the complainant for raising the issue. Assistant Ombudsman Tom Webster directed the complainant, H.G., to the ethics supervisor in the Department of Health and Social Services to determine whether there was evidence of violations under the Executive Branch Ethics Act (AS 39.52) and the Whistleblower Act (AS 39.90).

The department investigated the allegations but refused to supply H.G. with information concerning the disposition of her complaint. On November 18, 1996, H.G. returned to the Office of the Ombudsman and formally complained about this lack of information.

On July 12, 1996, D.N., another department employee, complained to the Office of the Ombudsman that the department conducted an inadequate investigation of an ethics complaint she made against a co-worker. According to D.N., this co-worker was supervising her own son and improperly soliciting work for him from other office staff. The department investigated her allegation and sent her a copy of the investigative report. She then complained to the Ombudsman. On October 24, 1996, the department notified the Office of the Ombudsman that the investigation into D.N.'s allegations had been reopened. When the new report was completed on January 29, 1997, it was tagged confidential. The department sent D.N. a letter summarizing the disposition of her complaint, but D.N. remained dissatisfied with the results.

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## **STANDARDS**

The allegation is that the department performed unreasonably.

The Office of the Ombudsman Policies and Procedures manual at 4040(2) defines unreasonable as:

- (A) a procedure adopted and followed by an agency in the management of a program [that] is inconsistent with, or fails to achieve, the purposes of the program,
- (B) a procedure that defeats the complainant's valid application for a right or program benefit, or
- (C) an act that is inconsistent with agency policy and thereby places the complainant at a disadvantage to all others.

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## **INVESTIGATION**

Ombudsman investigators interviewed the following individuals in the course of the investigation:

- **H.G.**, complainant
- **D.N.**, complainant
- **Robert Bacolas**, Labor Relations Specialist, Department of Health and Social Services
- **Neil Slotnick**, Assistant Attorney General, Alaska Office of the Attorney General
- **Jo Olson**, Human Resources Manager, Department of Health and Social Services, and the department's designated ethics supervisor
- **Kathleen Strasbaugh**, Assistant Attorney General, Alaska Office of the Attorney General

Additionally, the investigator reviewed:  
AS 39.52, Alaska Executive Branch Ethics Act

9 AAC 52, Executive Branch Code of Ethics

Memo, January 2, 1987: Randall P. Burns, Special Assistant, Department of Law, to all commissioners

Script, undated, Department of Law: Information for Persons Wishing to Report a Potential Violation of the Ethics Act

Script, undated, Department of Law: Information for Callers Wishing to File a Complaint under the Ethics Act

Memo, January 29, 1997: Jo Olson to Russ Webb, Deputy

Commissioner, DH&SS --Ethics Investigation Report--D.N.

Memo, August 16, 1996: Jo Olson to Yvonne Chase, Deputy  
Commissioner, DH&SS --Ethics Investigation Report--LMN Agency

### **The Executive Branch Ethics Act**

The Alaska Executive Branch Ethics Act (ethics act), AS 39.52, took effect January 1, 1987. The law established a code of ethics for public officers, methods for declaring and reporting potential violations, and procedures for complaints, hearings, enforcement and remedies. In the law's declaration of policy (AS 39.52.010) the legislature stated its intent to (1) discourage ethical violations by public officers, (2) improve standards of public service and (3) "promote and strengthen the faith and confidence of the people of this state in their public officers."

The ethics act makes a distinction between actions that are "minor and inconsequential" and those that are "substantial and material." At AS 39.52.110(b), the act states:

Unethical conduct is prohibited, but there is no  
substantial impropriety if, as to a specific matter, a public  
officer's

...

(2) action or influence would have insignificant or  
conjectural effect upon the matter.

Although primary responsibility for enforcing the ethics act rests with the Department of Law (Law), each department has a "designated supervisor" to advise employees on ethical matters, handle reports of potential violations, and make quarterly reports to Law. According to the ethics act, each department's commissioner is the designated supervisor, although the commissioner may assign that duty to a member of his or her staff. The designated supervisor for the staff of a board or commission is the executive director of the board or commission.

The ethics act requires that the designated supervisor submit quarterly reports to Law stating the facts, circumstances and disposition of ethics reports and disclosures made to the agency. Although these reports are confidential, Law is required to make available to the public a summary of the reports with deletions as necessary to protect the identity of those involved.

### ***Code of Ethics***

Article 2 of the ethics act sets out a basic code of ethics and states that efforts to benefit a personal or financial interest through official action is

a violation of the public trust. At AS 39.52.120, the ethics act prohibits certain actions defined as “misuse of official position”:

(a) A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.

(b) A public officer may not...

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest;

AS 39.52.150 prohibits improper influence in state grants, contracts, leases or loans:

(a) A public officer, or an immediate family member, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease, or loan if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant, contract, lease, or loan.

***Reports of Potential Violations (AS 39.52.210-.260)***

Article 3 of the ethics act seeks to prevent violations by encouraging persons to disclose to the designated supervisor matters that may be a violation of the code of ethics. Two kinds of reports may be filed when a person believes an ethical problem may exist. The first is a report by a public employee about his or her own potential problem. The second is a report by a third party, who may be another employee or a member of the public.

When an employee is troubled about his or her own ethical standing, the ethics act requires the employee to disclose the potential violation in writing and refrain from taking any further action in the matter pending a determination from the designated supervisor. The designated supervisor must decide whether the matter would be a violation of the ethics act and, if necessary, decide how to resolve the conflict, perhaps by reassigning duties or requiring the employee to withdraw from the conflicting interest. A third party may report potential violations to the public officer’s designated supervisor under oath and in writing. The supervisor provides a copy of the report to the subject of the report and proceeds, as above, to determine whether a violation may exist.

Since the ethics act gives designated supervisors authority to determine whether a public officer’s conduct is ethical, the act also requires Law to assist the designated supervisors and review their determinations. Designated supervisors can turn to Law for opinions and advice

regarding the ethics act. AS 39.52.260 requires designated supervisors to submit quarterly reports to Law with the facts, circumstances and disposition of any reports of potential violations. Law is required to review the reported determinations and may request additional information concerning them. The quarterly reports are confidential.

AS 39.52.260 continues:

(c) The attorney general shall, however, make available to the public a summary of the reports received under this section, with sufficient deletions to prevent disclosure of a person's identity.

***Complaints (AS 39.52.310-.390)***

While reports of potential violations alert designated supervisors that a public officer is involved in a matter that may result in a violation of the ethics act, complaints allege an actual violation of the ethics act. Complaints are filed with Law; like third-party reports of potential violations, they are required to be in writing under oath. Law may also treat as a complaint any report of a potential violation.

Law reviews each complaint to determine whether, if true, it would constitute a violation of the ethics act. If Law determines that the allegations do not warrant investigation, the complaint is dismissed with notice to the complainant and the subject of the complaint. Law may refer a complaint to the subject's designated supervisor for resolution as a potential violation.

If Law decides to investigate the complaint, the subject of the complaint will receive notice and must respond to it. If Law's investigation fails to show probable cause that a violation of the ethics act occurred, Law will dismiss the complaint with a confidential summary to the personnel board. Law must inform the complainant and the subject of the complaint of this disposition.

If Law determines that the complaint does not warrant a hearing before the personnel board, it may recommend action to cure or prevent a violation. The Attorney General will communicate the recommended action to the complainant and the subject of the complaint. Unless the matter goes to a hearing before the personnel board, the investigation is confidential and all persons must keep information regarding the investigation confidential.

***Ethics Regulations (9 AAC 52)***

Regulations adopted by Law explain areas of the ethics act in greater detail. The regulations make clear that Law can refer a complaint to the subject's designated supervisor for resolution as a potential violation,

while at the same time notifying the subject that a complaint has been filed and launching an investigation. The regulations also state that if Law refers a complaint to the designated supervisor, the supervisor shall forward his or her findings to Law.

### ***Confidentiality***

The ethics regulations amplify Law's policy on confidentiality in an ethics investigation. Section 9 AAC 52.160 states:

(a) The attorney general will keep confidential the information obtained in the course of an ethics investigation that is not relevant to an accusation or subsequent ethics proceedings.

(b) The attorney general will, in the attorney general's discretion, forward information obtained in the course of an ethics investigation to the subject's designated supervisor or other appropriate superior for potential disciplinary action... Information forwarded under this subsection remains confidential, and the subject's designated supervisor or other appropriate superior may share the information only with a person who needs to know the information to consider potential disciplinary action.

(f) If, after an ethics investigation, the attorney general does not initiate formal proceedings, then information and material discovered in the course of the ethics investigation, as well as the existence of the ethics investigation, must remain confidential unless disclosure is otherwise permitted under the Ethics Act or this chapter.

### **The Ethics Act and the Department of Law**

The Department of Law has primary responsibility for administering the ethics act. Law has assigned a supervisory level attorney, Steven (Neil) Slotnick, as its ethics attorney, but has allocated no money toward administration of the law. Mr. Slotnick has supervisory responsibilities and provides counsel to a division in the Department of Revenue. He undertakes his responsibilities under the ethics act as he finds time between his other duties.

Law produced a video and, in conjunction with the Office of Management and Budget in 1986, two booklets explaining the ethical responsibilities of public officers under the law. Law issued numerous

advisory opinions defining what is ethical and what is not. Law writes these opinions largely in response to questions from designated supervisors. Law sends these opinions to all designated supervisors to help them make determinations on reports of potential violations.

When the ethics act took effect in 1987, Law produced several documents that explain the ethics act to designated supervisors and to persons reporting potential violations or lodging complaints.

### ***The Burns Memo***

On January 2, 1987, Randall Burns, special assistant at Law, sent a memo through the acting attorney general to all commissioners regarding the Executive Branch Ethics Act. This memo provides to designated supervisors a full explanation of the ethics act, their responsibilities under it, and the way Law expects those duties to be carried out.

Page 3 of the memo includes a section on reports by third parties regarding a public employee's conduct. The section concludes, "...the third party should be informed of the disposition of the matter."

### ***The Department of Law Scripts***

When the Executive Branch Ethics Act became effective, Law developed scripts for agency staff to use when persons called or wrote with ethics concerns. Law sent several of these scripts to the Ombudsman investigator in response to a request for training materials and other aids regarding the ethics act. All of the scripts provide identical information regarding the ethics act, but the scripts are intended to be used in different situations--one for a telephone caller reporting a potential violation, another for a letter writer who wants to make a complaint, for example.

In the script titled "Information for Persons Wishing to Report a Potential Violation of the Ethics Act," Law presents the basics of the ethics act and what it means for someone who wishes to report a potential violation. It tells the prospective reporter to file the report with the agency's designated ethics supervisor. It tells him to file the report in writing, signed under oath. It notifies the reporter that a copy of his report will be provided to the public officer who is the subject of the report, and that the officer will be asked to respond to the allegations. It tells the reporter that the designated supervisor will make a determination of whether the matter reported would constitute a violation of the Code of Ethics. The script explains:

If the designated supervisor determines that the public officer's continued involvement in the matter reported

would not constitute an ethical violation, then you will be notified of that decision.

A designated supervisor may seek the advice of the Attorney General whenever (s)he has a question regarding the conduct of a public officer... Because all requests for advice from the Attorney General are confidential, any report of a potential violation of AS 39.52 is also considered confidential.

In reporting a potential violation of the code of Ethics rather than filing a formal complaint, we assume that you are seeking a review of a particular matter that you find troublesome but about which you are unclear or unsure. In such instances, the designated supervisor will generally opt for an administrative remedy when it appears the matter you reported actually uncovers a public officer's potential --rather-- than knowing-- violation of the Code of Ethics. Similarly, if the designated supervisor determines that you were right in questioning the conduct of the public officer..but it appears that the officer's conduct does not warrant a formal hearing (i.e., the conflict was not substantial or material or the conduct of the public officer was not particularly harmful to the public interest), then the designated supervisor will recommend action to correct or prevent a violation of the ethics act...this recommendation could include a reassignment of duties or some other appropriate administrative remedy, or it could require that the public officer divest or remove himself or herself from the conflicting interest or risk the loss of employment.

Needless to say, while these reports are confidential, you will be informed of the disposition of the matter you originally brought to the State's attention.

.. please be assured that we do ask and encourage citizens with real questions concerning a public officer's conduct to come forward and report potential violations of the Code. The Legislature...stated, in enacting this legislation, that it believed a Code of Ethics would "promote and strengthen the faith and confidence of the people of this state in their public officers" (AS 39.52.010). This will occur only if citizens believe their concerns are being fairly addressed and given proper

consideration, and only if they come forward when they sincerely question the conduct of public officers.

***Steven Slotnick Interview***

The Ombudsman investigator interviewed Mr. Slotnick on February 12, 1998. Mr. Slotnick is an assistant attorney general with the Department of Law. In addition to his duties as ethics attorney, Mr. Slotnick provides legal services to the Income and Excise Audit Division, Department of Revenue.

As ethics attorney, Mr. Slotnick gives informal advice to state agency officials every day. He usually assigns ethics investigations and requests for ethics opinions to other assistant attorneys general to spread the ethics work among staff. Mr. Slotnick reviews all opinions and is involved in any settlements offered as the result of an ethics complaint. Often he refers complaints to the agencies for investigation.

Mr. Slotnick noted the ethics act does not specifically require that the agency report back to persons who report potential violations (under AS 39.52.230) as the law does for persons who make complaints (under AS 39.52.310). He said he does not support giving notice of disposition to persons who report potential violations because it is not in the law. He said he was unaware that Law's early interpretation of the ethics act, as recorded in the Burns memo and the Law scripts, supported giving such notice.

"It might be something worth reviewing further," he said. "I agree it makes sense. It's a common sense kind of thing to follow up. Possibly we could consider adopting a regulation to that effect."

Mr. Slotnick said it is unusual for a person to file a written report of potential violation with the designated supervisor as provided in the ethics act. Usually by that time, he said, the concerned person is speaking with an attorney from Law.

Agencies and Law consider several factors in deciding whether to treat a violation as an ethics violation or a personnel violation, Mr. Slotnick said. Among the considerations are the deterrent value of a public investigation and whether additional punishment seems appropriate beyond what can be enforced under personnel rules, he said. Often, the punishment provided under personnel rules is all the action necessary, he added. If the agency has done a good job with the personnel aspects of the complaint and imposed appropriate discipline, there may be no need to open a separate ethics investigation, he said.

Even if the person making the complaint files a written and sworn

statement, the ethics act provides that Law can refer a complaint to the agency involved. "If I think the agency has taken appropriate action, I will dismiss the ethics action and I will write up a report to the complainant and to the personnel board," Mr. Slotnick explained.

Mr. Slotnick believes most ethics supervisors probably do not know the distinction in the ethics act between complaints and reports, but most phone him when these issues come up. If he had the resources, he said, he would conduct annual training for the designated ethics supervisors. Law no longer even requests funding for ethics act activities, according to Mr. Slotnick.

### **Procedures at the Department of Health & Social Services**

Jo Olson, department human resources manager, was appointed the department's designated ethics supervisor by Commissioner Karen Perdue on October 12, 1995. As ethics supervisor, Ms. Olson said, she reviews outside employment declarations and investigates alleged violations of the ethics act.

#### ***Training and Policies***

Ms. Olson said she never received training for her role as ethics supervisor. She has read the ethics act and cites it in investigative reports. She is familiar with the January 2, 1987, memo by Randall Burns. She also has a file of Law's ethics opinions and department ethics memos for guidance. She said she has not seen the scripts produced by Law.

Ms. Olson said her department has no written procedures for the ethics supervisor. The agency has investigation guidelines for personnel investigations in its Supervisory Training Material, Labor Relations Series manual. That manual has a brief section on grievance investigations and how to conduct an investigatory interview, but nothing regarding ethics investigations and complaint handling specifically. Her unwritten procedure for third-party ethics complaints and reports is straightforward: interview the complainant and the subject, consider the facts and make a determination. If she is not sure about the finding or the law, she consults with an assistant attorney general.

This lack of written ethics procedures is not unusual; the Ombudsman investigator called each state department and none of them had developed written procedures for handling ethics complaints. Several said they use the ethics act itself or the Burns memo for guidance as necessary.

Ms. Olson said she does not ask for a written and sworn statement when persons report a potential violation of the ethics act. She said she was not aware written and sworn statements were required. She said she treats ethics reports no differently than she treats reports of violations of personnel rules. Ms. Olson said she did not know the ethics act made a distinction between complaints and reports of potential violations.

Ms. Olson said that if she is doing a personnel investigation along with an ethics investigation of the same matter, she will put both strands in one report, which would be confidential under personnel rules and not released even to the person who made the original report. That was what happened with the H.G. complaint, she said. The D.N. complaint was strictly an ethics complaint, Ms. Olson said, and for that reason she agreed to give the complainant a copy of the initial report. After the second D.N. investigation, she did not release the full report. However she did report to D.N. the disposition of the matter.

### ***The H.G. Complaint***

H.G., was a secretary with the LMN Agency since October 1989. As such she provided clerical support for the director and a small staff. She also made travel arrangements and handled all accounting and purchasing for the agency.

On June 4, 1996, H.G. complained to the Office of the Ombudsman, alleging misconduct by LMN Agency employees. Her allegations included multiple instances of leave and travel abuses over several years. She also alleged that she was punished for reporting these abuses. She said she delivered documentary evidence supporting her allegations to department Labor Relations Analyst Robert Bacolas in October 1995, but Mr. Bacolas failed to act on the information.

Assistant Ombudsman Tom Webster wrote to department Human Resources Manager Jo Olson on June 24, 1996. He asked Ms. Olson, as the department ethics officer, to determine whether “there is sufficient evidence of ethics violations to refer the matter to the Department of Law for further review.” Mr. Webster then closed the complaint pending a response from the department.

On August 16, 1996, Ms. Olson sent a confidential investigation report to Deputy Commissioner Yvonne Chase. In the report, Ms. Olson concluded that there had been no ethics violations at LMN Agency. H.G. was not informed of the disposition of her complaint, even though she asked about it. Suspecting that the department had again failed to take her allegations seriously, H.G. complained a second time to the Office of the Ombudsman.

### *A Troubled Agency*

The LMN Agency has between 9 and 18 board members appointed by the governor. The agency hires an executive director who serves at the pleasure of the members. The director heads a small staff of classified employees who belong to the state's General Government Bargaining Unit. Organizationally, LMN Agency is part of the Department of Health and Social Services, which provides administrative support to the agency.

At the time H.G. was hired in 1989, LMN Agency's executive director was E.J. H.G. reported misuse of travel funds to the LMN Agency in 1990, and E.J. resigned soon afterwards. The department disciplined H.G. for her admitted involvement in the travel abuses.

During the next five years, H.G. became increasingly dissatisfied with the LMN Agency staff and leadership. She experienced continuous conflicts with the LMN Agency planner and with the new director, L.P. H.G. felt that L.P. favored the planner and gave her preferential treatment. On August 31, 1995, H.G.'s labor union filed a grievance on her behalf requesting adequate staffing of the LMN Agency office and accommodation of her leave requests.

In September 1995, H.G. sent packets to members of the LMN Agency executive committee. In them she recounted her experiences with LMN Agency management and staff and reported some ethical concerns. In October she provided similar information to department Labor Relations Specialist Robert Bacolas.

H.G. alleged that L.P. filed false travel reports and collected travel funds to which she was not entitled. She objected to flexible work hours granted to the part-time planner. She believed the planner was paid for hours not worked.

H.G.'s concerns were not centered on ethical issues, however. She wrote also concerning a dozen other personnel issues unrelated to her ethics concerns.

L.P. was terminated by the LMN Agency on October 2, 1995. The department later audited L.P.'s travel and found that she had been overpaid nearly \$110 for travel expenses during Fiscal Year 1995.

### *The Investigation*

Mr. Bacolas began a review of H.G.'s accusations. He interviewed H.G. on November 17. The department Finance Section reviewed L.P.'s travel. Ms. Olson's August 16, 1996, report to Deputy Commissioner

Chase summarized the findings:

.. an investigation was conducted which entailed the Finance Section reviewing all of her travel documents. Similar to other managers, they do not complete their own travel paperwork but instead rely on the Clerk or Secretary to handle the reporting and receiving of travel funds. [L.P.] relied on [H.G.] to properly complete the travel paperwork and it was those documents that contained errors which caused [L.P.] to be overpaid... Because the discrepancies were inconsequential and in fact we found [L.P.] was not directly involved in the errors, it was determined that an ethics violation did not occur.

Mr. Bacolas also looked at the issue of leave abuse by the LMN Agency planner. The department determined that the planner did not misuse leave, but worked irregular hours with the director's approval.. The department advised the LMN acting director that a continuing flexible schedule was not appropriate. Wrote Ms. Olson:

...employees need a set schedule for reasons of determining average number of hours work for leave accrual, health insurance and charging leave when absent during regularly scheduled hours of work. [the acting director] notified the employee of such a requirement.

H.G. had been party to a series of personnel actions in the department. She filed several grievances against her agency. These were handled as grievances under the collective bargaining agreement and resolved with union representation. The last of her grievances against the LMN Agency was resolved in April, 1997. H.G. has since transferred out of LMN Agency to another job in another city.

#### Law Involvement

Assistant Attorney General Kathleen Strasbaugh said the Department of Law looked at H.G.'s allegations when the department asked for a review of related personnel actions. The issues were presented as personnel--not ethics--issues, she explained. Under the circumstances, she would not expect the agency to interpret H.G.'s issues as ethics issues, she said. In her opinion, H.G.'s ethics allegations suffered from poor evidence and weak credibility. This was underscored during the department investigation when H.G. admitted to Mr. Bacolas that some of her evidence was inaccurate.

H.G. requested the results of the investigation but was denied. When the Office of the Ombudsman asked why H.G. could not see the results of the ethics investigation, the department consulted its attorney, Assistant Attorney General Patrick Gullufsen, who advised against giving such

information to H.G.. According to Ms. Olson:

H.G. did not receive final findings due to conflict related to active stages of her filed grievances/complaints. Once an employee files a grievance or complaint, communication on any matters related to the case must be conveyed directly with Union Representative and/or Labor Relations staff, Department of Administration.

H.G. told the Ombudsman she wanted to know the results of the department investigation into her allegations because the information could assist her in her grievances against LMN Agency.

### ***The D.N. Complaint***

D.N. was a well-respected staff member of the XYZ Division, where she had worked as a project manager for five years. During a reorganization of the division, D.N. was assigned supervisory responsibilities and attended supervisor training classes. At these classes, D.N. said, she learned of her obligations as a supervisor and became concerned about a situation involving one of her co-workers, T.F., who was soon to become her subordinate.

T.F. was a manager with XYZ. She spent about 40 percent of her work time on the X project that she administered. For about a year, her son, R.F., had volunteered at the XYZ office, helping with mailings and other clerical duties. After a year, R.F. became eligible for vocational support because of a disability. He continued to work at XYZ, but as a contract employee of REACH, a non-profit agency that provides employment opportunities and experience for persons with disabilities. With the vocational support, XYZ paid REACH \$3 per hour for R.F.'s salary. This money came from the X project.

B.B., an XYZ section chief, asked Ms. Olson whether it was permissible for R.F. to work in the office with his mother. Ms. Olson said she approved the situation with the understanding that R.F. would not be under his mother's direct supervision and that she not be in a position to influence his employment or the REACH contract.

Under its agreement with XYZ, REACH was to provide for R.F. a job coach who would be present during his working hours. The coach was not always present, however, and T.F. often took direct supervision of her son.

### ***Ethics Concerns***

Near the end of May 1996, D.N. reported to B.B. that a potential ethics problem existed because T.F. directly supervised her son. D.N. explained to the Ombudsman investigator that she objected to the noisy

and disruptive work relationship the two had. She also felt that it was improper for T.F. to be involved in a contract that employed her son and improper that T.F. “solicited” work for her son from other staff members. D.N. also said that T.F. was treated differently at the office because she is a close friend of B.B.’s wife.

According to the department’s investigation report, B.B. notified REACH that R.F.’s work station needed to be moved to another location. REACH relocated R.F. and he has continued to work for XYZ under a vocational support contract.

On June 14, 1996, D.N. reported her ethics concerns to Brent Allison of the department’s Human Resources Section. Although Ms. Olson is the ethics supervisor, Mr. Allison worked for her and was assigned to complete the ethics investigation. Ms. Olson wrote in a January 24, 1997, e-mail that she was so busy “I had Brent assist me on the [D.N.] one.” In consultation with Ms. Olson, Mr. Allison investigated the complaints and sent his investigative report to B.B. and D.N. on July 11, 1996. According to the Allison report, D.N.’s complaint involved a “potential ethics violation.” Specifically, Mr. Allison examined potential violations of two sections of the Executive Branch Ethics Act: AS 39.52.120 (Misuse of Official Position) and AS 39.52.150 (Improper Influence in State Grants, Contracts, Leases or Loans).

*The Allison Investigation*

Mr. Allison concluded that no violations of the ethics act occurred:

At some time prior to the receipt of this complaint.. the [XYZ] Section had recognized a potential problem emerging. They took appropriate action by physically removing this REACH client from their facility...

He recommended four actions, however: (1) that assignment of work from XYZ to REACH should be handled by someone other than T.F.; (2) that R.F. continue to work at a location outside the XYZ office where his mother works, and his mother should be asked not to visit R.F. at his worksite; (3) that future contracts should be let with Ready Mail, a REACH subsidiary; and (4) that some portion of the work assigned to Ready Mail should be generated from persons within XYZ other than T.F.

D.N. was displeased with the report and contacted the Office of the Ombudsman the following day, July 12. D.N. complained to the Ombudsman investigator that the department had done an inadequate investigation of her ethics complaint. She said that the ethics report failed to deal with the central issues in her complaint, namely, that T.F. oversees a program budget from which her son is paid and that T.F.

solicited work from other program managers to keep her son busy. She alleged that T.F. increased the number of mailings done under the X project agreement in order to provide work for her son. She said that T.F. sent out six mailings in Fiscal Year 1996 rather than the four called for in the X project reimbursable services agreement (RSA). She said the number of mailings was increased to 12 in later RSAs.

*The X Project Reimbursable Services Agreement*

The Ombudsman investigator looked at the X Project RSAs for Fiscal Years 1996 and 1998. Each agreement called for XYZ to provide educational materials, such as monthly information bulletins and quarterly packets, for clients and their families. B.B. expanded on this part of XYZ's responsibilities in a memo to Ms. Olson on April 13, 1998:

Regarding the...RSA, [T.F.] is a lead staff person...but negotiation of the terms for the [X Project] RSA are my responsibility...and ultimately must be approved by... [the] director of the division..... Furthermore, the purpose of the mailings, for which the REACH contract provides sorting and envelope stuffing, is to provide...information to [X Project] providers. Therefore, as section chief, I am pleased to see more mailings, because it results in the distribution of more information to...providers throughout the state. Our records show that there were five mailings in SFY96 and four in SFY97.

*D.N. Resigns*

D.N. told B.B. in a June 15 e-mail that she did not want to supervise T.F.:

My position on the "office situation" ...has raised the conflict between [T.F.] and me to such a point that there is no communication between us. The last communication we had (on June 6th) was one in which she verbally attacked my personality over the issue of her son no longer being able to work in this room.

The Supervisor II Instructor also encouraged me to check out the ethics concern I have with [her] son being paid out of a project she oversees and her personal agenda of wanting to keep her son employed. Although you told me that you have checked it out, and there is no issue, the instructor encouraged me to check it out for myself. The instructor says that even though I may not appear to have supervisory authority over someone, what is on paper is what counts. I want you to be aware that I have asked Personnel for input on this.

On July 2, 1996, D.N. and B.B. had a heated discussion about compensatory time that soon led to an equally heated discussion of

D.N.'s ethics complaint. B.B. told D.N. that she had undermined him by going to Mr. Allison and Ms. Olson with her concerns. D.N. submitted her resignation the following day. D.N. reported to Mr. Allison on July 8 by e-mail:

Work shouldn't be a place where one dreads the repercussions of an angry supervisor. I resigned last week, and my last day will be July 18th.

When Mr. Allison reported this to Ms. Olson, she expressed concern: I would suggest you approach the supervisor to get his side of the story. This almost sounds like a "whistleblower" situation. My concern is that they (sic) employee will come back and claim "constructive discharge" - made complaint and had repercussions.

In mid July, D.N. met with the division director and Deputy Commissioner Russell Webb. They assured D.N. that she would not be subject to retaliation for her allegations and offered her an opportunity to rescind her resignation. D.N. did rescind her resignation, but did not return to work at XYZ after July 18. Instead she took sick leave and family medical leave entitlements until she ultimately resigned in November, 1996.

D.N. said she was never asked to put her allegations in writing when she went to Mr. Allison to complain. T.F. wrote to department Commissioner Karen Perdue that she had never received written notice of the investigation concerning her. She formally requested that all charges be presented in writing and that the findings of the investigation also be presented in writing.

#### *A Second Investigation*

During the summer of 1996, D.N. filed a grievance against the department over her work and leave situation. During this period also, Ombudsman investigators spoke to department staff regarding her ethics complaint. By October, the department had decided to reopen the investigation into D.N.'s ethics complaint. The second report included a review of B.B.'s conduct toward D.N. following her initial complaint to Mr. Allison.

The second investigation concluded on November 13, 1996. The final report, however, was not issued until January 29, 1997. The department wrote T.F., B.B., and D.N. of the findings.

In the second report, Ms. Olson found that a "conflict of interest" occurred when the mother acted as the son's supervisor, but that relationship was ended when it was brought to B.B.'s attention. Olson essentially agreed with the earlier Allison report on the ethics issues:

[T.F.] does not currently, nor has ever, had the authority

to affect the continuance of or manner in which these funds are distributed. This authority rests with her supervisor, [B.B.], and with the [director]. It is her function as program administrator to see that the funds are allocated according to the wishes of those in authority...Without [T.F.]’s ability to authorize funds, it is determined that this is not an ethics violation involving personal gain.

The report also addressed whether the department, and specifically B.B., had violated the Protection for Whistleblowers Act (AS 39.90.100-.150). That act prohibits a public employer from taking adverse action against anyone for reporting violations of law or for complaining to the Ombudsman, among other things. Ms. Olson found that although B.B. and D.N. had a volatile meeting on July 2, there were no “specific examples of any action he had taken which indicated that he had or would retaliate against her for making the allegations.”

The report was forwarded to Law and reviewed by Assistant Attorney General Patrick Gullufsen.

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## **ANALYSIS AND FINDINGS**

Two unrelated complaints against the Department of Health and Social Services within two months drew attention to the department’s responsibilities under the Executive Branch Ethics Act. Two Ombudsman investigators tried to understand the department’s actions in these cases before finally issuing a formal notice of investigation on March 7, 1997. Initially, the Ombudsman was concerned mainly with the apparent inconsistency in the two cases: D.N. was notified of the disposition of her complaint while H.G. was not. As the investigation progressed, other concerns emerged: the lack of a written policy at the department for handling ethics complaints, the inadequacy under the ethics act of the department’s unwritten policies, the lack of training for designated ethics supervisors, and Law’s change in interpretation of the ethics act regarding notification to persons who report potential ethics violations. The issues of training and interpretation involve the Department of Law, not the Department of Health and Social Services. The issue of training will be addressed in the section on Proposed Recommendations; the issue of interpretation will be addressed in the appendix.

### **Adequacy of Investigation**

Also, both complainants raised concerns that the department did not investigate their concerns adequately. Since the department never gave

H.G. notice of the disposition of her complaint, she assumed that the matter had been covered up. She said she suspected a cover up because her former director was a close friend of Commissioner Karen Perdue. The Ombudsman investigator found nothing to indicate a cover up, however. Mr. Bacolas conducted the investigation, which included a taped interview with H.G.. The department audited the director's travel documents and corrected the several mistakes discovered there. The department concluded that the discrepancies, which totaled \$107.20, were the result of mistakes and not an attempt to defraud the state. The department investigation of H.G.'s complaint seems adequate in that the department looked at and analyzed the information provided by H.G., sought confirmation of that information, and drew reasonable conclusions. An assistant attorney general reviewed the information and decided no further action was required.

When D.N. saw the investigative report completed by Mr. Allison, she complained that Mr. Allison did not address several important issues. Since Mr. Allison did not take a written statement from D.N., and since D.N. did not offer one, it is impossible to say exactly what allegations she relayed in her initial conversation with Mr. Allison. This is where the requirement in the ethics act for written complaints and reports becomes practical.

D.N.'s concern about T.F.'s administration of the X Project budget was addressed by Ms. Olson in the second investigative report. Ms. Olson concluded that T.F. does not have authority over the program budget from which her son is paid, and this was confirmed later by B.B. Also, D.N. alleged that T.F. increased the number of mailings under the X Project RSA in order to provide work for her son. B.B., however, said that his records do not indicate an increase from FY96 to FY97. Furthermore, he said he would be glad to see more mailings, "because it results in the distribution of more information to...providers throughout the state." In conducting two investigations into D.N.'s allegations, and in its follow-up to further inquiries from the Office of the Ombudsman, it appears that the department's investigation of her complaint was adequate. Again, a copy of the investigative report was sent to an assistant attorney general, who concluded no further action was required.

### **Department Ethics Policies**

The Department of Health and Social Services does not have written procedures for handling and investigating reports and complaints under the ethics act. Ms. Olson said she refers for guidance to ethics opinions from Law and to the department's labor relations manual, but neither provides procedural advice. No other state department has developed

written procedures for handling ethics reports, either. Designated ethics supervisors said they use the ethics act itself or the Burns memo for guidance as necessary. The Burns memo is easier to understand than the act and would make a good guide for agencies. However, Law's ethics attorney disagrees with one of the steps outlined by Mr. Burns: the Burns memo supports notifying persons who report potential violations of the disposition of their complaint, while Assistant Attorney General Slotnick does not.

### ***Inconsistent Treatment?***

Although the department has no written policies or procedures regarding the ethics act, it is still required to treat persons consistently and in conformity with it. The first question, then, is why were the two employees who reported ethics concerns treated differently? Why was D.N. allowed to see a copy of the Allison report and later notified of the findings of the second investigation while H.G. was never allowed to see the Olson report on her complaint? The evidence shows that the department recognized D.N.'s complaint as a complaint under the ethics act, but treated H.G.'s complaint as a personnel matter. Indeed, Assistant Attorney General Strasbaugh, who initially reviewed H.G.'s complaints for Law, said she would not expect the department to recognize H.G.'s complaints as a complaint under the ethics act.

Much of the material H.G. supplied pertains to personnel issues such as overtime, a job upgrade, office management, training opportunities, workload, and a better computer. When the Ombudsman investigator began asking the department why H.G. could not be told the disposition of her complaint, the department referred the question to Assistant Attorney General Patrick Gullufsen. He advised the department not to release the information. It is difficult, then, to fault the agency for taking the advice of its legal counsel.

D.N.'s complaint, on the other hand, was from the start a complaint under the ethics act, and the agency recognized it as such. The Allison report used AS 39.52.120 (Misuse of Official Position) and AS 39.52.150 (Improper Influence in State Grants, Contracts, Leases, or Loans) as its standards for evaluating T.F.'s conduct. Ms. Olson decided to report back to D.N. the disposition of the matter she brought to the department's attention. As an experienced human resources manager, she would not have done this had she believed it to be a matter falling under the state's personnel rules. The Ombudsman agrees with Ms. Olson that it makes sense to report back on ethics issues even though, had she asked Law's ethics attorney, he would have advised against it. (The Ombudsman addresses this issue more fully in the appendix.)

D.N. and H.G. were treated differently because of the different nature of

their complaints. D.N.'s complaint was clearly an ethics complaint. H.G.'s complaint contained a combination of personnel and ethics issues. Since Ms. Olson has a responsibility to maintain confidentiality regarding personnel matters, her reluctance to issue any kind of notice to H.G. becomes understandable. When pressed on this by the Ombudsman investigator, Ms. Olson sought advice from the department's attorney, who affirmed her decision.

Ironically, although an Ombudsman investigator referred H.G.'s complaint to Ms. Olson as the department ethics supervisor, Ms. Olson is not the designated ethics supervisor for the LMN Agency. The ethics act provides that the ethics supervisor for the staff of a board or commission is the executive director of the board or commission. Apparently, Ms. Olson herself was unaware of this.

### ***Consistency with the Law***

The second question is whether the department's procedures in the ethics case were consistent with the ethics act. In handling D.N.'s complaint, the department strayed from the procedures set forth in AS 39.52 in two particulars.

When D.N. came forward with her ethics concerns, neither Mr. Allison nor Ms. Olson asked her to put her allegations in a sworn, written statement as required by the ethics act. Although Mr. Allison was not the designated ethics supervisor, he was Ms. Olson's subordinate and clearly acting on her behalf. In an interview with the Ombudsman investigator, Ms. Olson said she was unaware that a sworn, written statement was required under the ethics act.

Neither Ms. Olson nor Mr. Allison notified the subject of the complaint, T.F., of the allegations. This violated not only the ethics act, but apparently T.F.'s sense of fairness as well. She wrote a memo to the commissioner in, 1996, complaining that she had never received written notice of the investigation.

The Ombudsman mailed preliminary findings to the department on June 1, 1998. In its response of June 15, the department did not object to the proposed findings, and they stand as the final findings in this investigation. The allegation under investigation by the Ombudsman was:

***The Department of Health and Social Services  
unreasonably lacks a consistent process for handling  
reported violations of the Executive Branch Ethics Act.***

The allegation was separated into three elements:

(1) The adequacy of the department's investigations: ***The Ombudsman***

*finds that the investigations conducted by the department were adequate.*

(2) Inconsistent treatment of the complainants: *The Ombudsman finds that the department was reasonable in treating the two complaints differently because the nature of the complaints was different. One was clearly a complaint under the ethics act; the other was essentially a personnel matter.*

(3) Department procedures inconsistent with the ethics act: *The Ombudsman finds that the procedures followed by the department in the D.N. investigation were not consistent with the ethics act.*

The ethics act established designated ethics supervisors in each agency to handle reports of ethics violations within that agency in accordance with the Alaska Executive Branch Ethics Act. The Ombudsman finds that the department acted unreasonably by following procedures inconsistent with the ethics act.

Under section 4060.3 of the Office of the Ombudsman Policies and Procedures manual, a complaint is considered “partially justified” if, in a complaint having several elements, at least one element is found to be justified. The Ombudsman, then, finds the complaint against the department partially justified.

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## **RECOMMENDATIONS**

The Executive Branch Ethics Act is long on substance but short on sustenance. The Department of Law, which has primary responsibility under the act, administers it with an attorney who carries a full caseload besides his ethics duties. The ethics act creates designated ethics supervisors at the agency level who fulfill their responsibilities under the ethics act in addition to their regular work. Ms. Olson, for example, is not only a designated ethics supervisor; she is the human resources manager for a department with approximately 1,900 employees, the department’s Equal Employment Opportunity officer, and the department’s coordinator for the Americans with Disabilities Act. Ms. Olson has never received training as a designated ethics supervisor, nor does the Department of Law offer such training.

Ms. Olson does not handle ethics issues every day and cannot be expected to remember all the policies and procedures in the law and regulations. Under these circumstances, written procedures and training become imperative.

The Ombudsman proposes the following recommendations:

**(1) The Department of Health and Social Services should adopt written procedures for carrying out its responsibilities under the Alaska Executive Branch Ethics Act.** Writing the procedures need not be burdensome; the Burns memo would make an excellent first draft, and the scripts developed by Law provide the information complainants need to know before signing their complaint or report of potential violation. Information for complainants should include an explanation of what the complainants can and cannot expect to learn about the disposition of their complaint or report.

The department, in its June 15 response to the preliminary investigative report, agreed to this recommendation. Ms. Olson wrote that her department would create written procedures as soon as Law clarifies the issue of notice to persons who report potential violations of the ethics act.

**(2) The Department of Health and Social Services should secure training for its designated ethics supervisor.** This may be somewhat difficult since the Department of Law does not offer ethics supervisor training. However, Assistant Attorney General Slotnick said Law could provide such training under a reimbursable service agreement with one or more state agencies. The Department of Health and Social Services should consider joining with several other agencies and sharing the cost of a training session. The training should be repeated every two or three years.

In responding to this recommendation, Ms. Olson indicated the department's preference that Law take the lead in securing training:

I would suggest that the State's Alaska Professional Development Institute under the Division of Personnel, Department of Administration be contacted by the Department of Law for establishing such a training class. Our department certainly would pay to attend and I believe other departments would welcome this opportunity to be trained in this area.

Ms. Olson is formally correct that responsibility for administration of the ethics act falls to the Department of Law. The Ombudsman had hoped that the department, as a result of this recommendation, would initiate a discussion with Law to develop training for designated ethics supervisors. However, the department's commitment to attend such training, should it be offered, is in substantial accord with this recommendation. The Ombudsman, therefore, closes this investigation as partially justified and rectified.

## Appendix

Assistant Attorney General Slotnick told the Ombudsman investigator that the Department of Law does not support telling persons who report potential violations of the ethics law what happened regarding their report. However, material he later sent the investigator, specifically the Burns memo and the model letters and scripts, show that Law once supported such notice. Law has never sent out a correction to the Burns memo. In fact, Mr. Slotnick was unaware that the Burns memo provided for notice for those who report potential violations.

Mr. Slotnick's position is based on this: the ethics act provides for notice to persons making complaints of actual violations but does not make the same requirement for those reporting potential violations. It is simply not in the law.

"It might be something worth reviewing further," Mr. Slotnick said. "I agree it makes sense. It's a common sense kind of thing to follow up. Possibly we could consider adopting a regulation to that effect."

The Ombudsman agrees but believes it goes deeper than common sense. A person making a report of a potential violation is filing a written, sworn statement that will be sent to the subject of the complaint. Making such a report is uncomfortable and potentially risky. The person filing the report achieves a special status above the general public by bringing forth information that allows designated ethics supervisors and ethics attorneys to do their work. Within the bounds of confidentiality requirements, designated supervisors ought to provide information to persons reporting potential violations sufficient to allow reasonable persons to understand how the ethics act works and to satisfy themselves that the designated supervisor and ethics attorney have adequately reviewed their report and applied appropriate standards. As Law itself expressed in one of its informational scripts about the ethics act:

The Legislature...stated, in enacting this legislation, that it believed a Code of Ethics would "promote and strengthen the faith and confidence of the people of this state in their public officers" (AS 39.52.010). This will occur only if citizens believe their concerns are being fairly addressed and given proper consideration, and only if they come forward when they sincerely question the conduct of public officers.

The Ombudsman suggests that Law review its position concerning notice to persons reporting potential violations. If Law stands against notice, it should issue another memo to designated ethics supervisors

updating the 1987 Burns memo.

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