



INVESTIGATIVE REPORT

Ombudsman Complaint A2006-0054
Finding of Record and Closure

This public report has been edited to remove information made confidential by law and to remove information that would identify the complainant and his family.

March 29, 2007

An Alaska man complained to the Office of the Ombudsman that a state employee was using state equipment and facilities to advance his private business interests. Specifically, the man alleged that the administrator of the state Pioneer Home in Anchorage was using the office computer, telephone, and the office itself to conduct a family counseling business.

In accordance with ombudsman regulation at 21 AAC 20.020 regarding complaints of misconduct, the complainant put his allegations in writing and provided specific and credible evidence that the administrator had misused state resources. The complainant provided emails to and from the administrator's state email account that, if proven to be authentic, were clearly related to the administrator's private counseling business.

The ombudsman opened a complaint with the following allegations, stated in terms that conform with AS 24.55.150, which authorizes the ombudsman to investigate complaints about administrative acts of state agencies:

Allegation 1: Contrary to law, an administrator with the Division of Pioneer Homes used state resources to benefit his private counseling practice.

Allegation 2: Contrary to law, an administrator with the Division of Pioneer Homes did not consult his departmental ethics officer to determine whether his use of state time, equipment, and facilities was allowable under the Executive Branch Ethics Act.

Assistant Ombudsman Mark Kissel investigated the complaint. He provided notice of investigation to Virginia Smiley, director of the Division of Pioneer Homes, on April 4, 2006. With the permission of the complainant, Mr. Kissel also provided the identity of the complainant to Ms. Smiley and to the subject of the complaint.

On that same date, the ombudsman subpoenaed the administrator's state computer records and emails from his state email account. Those records, along with a sworn statement from the administrator, substantiate the allegations. Consequently, the ombudsman finds the allegation *justified* for the reasons cited in this report.

BACKGROUND

The Executive Branch Ethics Act

The Executive Branch Ethics Act¹ (Ethics Act) establishes standards of conduct for government employees. The Ethics Act forbids public employees from improperly benefiting—financially or personally—from their actions as public officials.

The Ethics Act prohibits state employees from misusing their official position (AS 39.52.120), receiving improper gifts (AS 39.52.130), making improper disclosure of information (AS 39.52.140), exerting improper influence in state grants, contracts, leases, or loans (AS 39.52.150), making improper representation (AS 39.52.160), and working at another job that conflicts with official duties (AS 39.52.170). The act also contains provisions that restrict employment after leaving state service if the employment deals with issues that the former state employee had acted on as a state employee. The section that applies to the allegation in this investigation is Misuse of Official Position, AS 39.52.120. It will be discussed in greater detail below.

The Ethics Act provides that, when a public employee is involved in a situation that is questionable under its provisions, the employee must immediately disclose the matter in writing to his ethics supervisor and the Attorney General (AS 39.52.210). The commissioner of each department is the ethics supervisor for that department, but the commissioner may appoint another staff member to act as the ethics supervisor instead. Forms for this disclosure are available from the designated ethics supervisor and the Department of Law.

In response to a disclosure, the designated ethics supervisor will provide a written determination to the public employee and the Attorney General of whether the disclosed situation is a violation. If it is, the supervisor may reassign duties to avoid the violation (if feasible), or direct the public employee to remove the conflicting interest, or propose another solution (AS 39.52.210).

Ethics supervisors may request an advisory opinion from the Attorney General to help them make the determination and propose a solution.

The Ethics Act prohibits “substantial and material” conflicts of interest, while recognizing that “minor and inconsequential” conflicts are unavoidable in a free society.²

At AS 39.52.110(b), the Ethics Act explains the difference between allowable and prohibited conflicts:

¹ AS 39.52

² AS 39.52.110(a)(3)

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

- (1) personal or financial interest in the matter is insignificant or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or
- (2) action or influence would have insignificant or conjectural effect on the matter.

Where there exists a potential violation of the Ethics Act, AS 39.52.210 requires:

(a) A public employee who is involved in a matter that may result in a violation of AS 39.52.110 - 39.52.190 shall

- (1) refrain from taking any official action relating to the matter until a determination is made under this section; and
- (2) immediately disclose the matter in writing to the designated supervisor and the attorney general.

Misuse of Official Position

AS 39.52.120(a) states that "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." AS 39.52.120(b)(3) states that "A public officer may not use state time, property, equipment, or other facilities to benefit personal or financial interests."

AS 39.52.120(d) states that

In this section, when determining whether a public officer is considered to be performing a task on government time, the attorney general and personnel board shall consider the public officer's work schedule as set by the public officer's immediate supervisor, if any.

The Ethics Act does not require that a violation involve actual receipt of money. Solicitation of compensation, including prospective or contingent economic benefits, is enough to trigger a violation.³

Anchorage Pioneer Home

The Anchorage Pioneer Home (APH) is a five-story assisted living home along the municipality's Park Strip near downtown. It houses approximately 160 elderly Alaskans and employs about 200 staff.

³ Skvorc v. State Personnel Bd., 996 P.2d 1192 (Alaska 2000)

The subject of this complaint has been administrator of the APH since October, 2003. Before that he was employed as chaplain at the Alaska Psychiatric Institute. According to the administrator, he has been employed by the State of Alaska for about 12 years.

His supervisor is Pioneer Homes Director Virginia Smiley. Ms. Smiley said that the administrator has been an exemplary employee. She said he has made significant improvements in the operation of the APH in the past three years. She said that the administrator is commonly at APH seven days a week, including holidays, and works 60 or more hours each week. The usual work week for a full-time state employee is 37.5 hours per week.

The administrator has at the same time conducted a counseling practice, known on his Alaska business license as “[Name Removed by Ombudsman] Counseling Services.” The administrator reported this outside employment to Deputy Commissioner Janet Clarke, the designated ethics supervisor for the Department of Health & Social Services. AS 39.52.170 requires state employees to submit such reports if they have outside businesses or employment.

The administrator said he pared his counseling practice down to two clients when he became administrator of the APH, because he no longer had time for a private practice. He said he kept two particular clients because he had a well-developed therapeutic relationship with them.

One of his clients was a young girl who was in counseling for issues related to her parent’s divorce. As the girl’s counselor, the administrator testified in court at custody and visitation hearings. After the administrator testified at a hearing in January 2006, the relationship between him and the girl’s father became strained. The girl’s father eventually complained to the ombudsman that the administrator was using state time and resources for his private counseling practice.

INVESTIGATION

Telephone calls

The father and his partner presented telephone billing statements that showed five calls being made from the partner’s work phone to the administrator’s APH office phone during the month of December 2005. The calls averaged about two minutes in duration. Four of the calls were made during normal business hours.⁴ Another telephone billing statement for the father’s home phone showed one call made to the administrator’s APH phone in December. The call was made during normal business hours and was billed at 16 minutes.

The administrator kept a log at his office at APH. The chronological log contained notes about his Pioneer Home work, meetings, and conversations as well as brief notes about

⁴ Normal work hours for State of Alaska employees are from 8 a.m. until noon, and then from 1 p.m. until 4:30 p.m., Monday through Friday.

his counseling business, and personal matters. The administrator said APH purchased the logbook for his use at work. The log contains seven entries indicating that he made telephone calls or sent faxes related to his private counseling practice, but none of the entries included the time they were written or when these calls were made.

Emails

The father and his partner also presented copies of 13 emails sent between them and the administrator at his APH computer address. The ombudsman investigator subpoenaed the administrator's APH computer files—those on his APH office machine and those stored on the state server. The investigator confirmed that the emails presented by the complainant were genuine and also discovered dozens of additional emails related to the administrator's private practice.

The subpoenaed computer files covered the period from 2003, when the administrator assumed the position of APH administrator, through February 2006. The ombudsman investigator went through the emails and counted those that pertained to the administrator's private counseling practice. During those two-and-a-half years, he received 31 emails during normal business hours and another 18 during off-hours. During that time, he sent from his state email account 26 messages during normal business hours and another five during off hours. In total, the investigator counted 80 emails on the administrator's state email account that were clearly related to his private practice.

In his deposition to the ombudsman, the administrator said his use of emails for private business purposes was minimal.

I freely admit, and I've told [the ombudsman], that I've received emails over the years and responded to them real quickly. And I admit it. If it was wrong, I plead guilty. To me it was 30 seconds, quick reply. And you know, I probably should have said, "Stop emailing me at my work." But I want to make a point... there was no exchange of funds because of responding to an email.

I mean someone sends me an email saying, "Can we change the visitation schedule here?" because the judge ordered [the parents] do the mediation of visitation when there was a problem—instead of going to court every time—to do it through me. If you read those emails, many of them were, as I recall, many of them were, "Can we take a day here and switch it with a day there?" and "Is it okay if I take my visitation weekend next weekend?" Many times it was just forwarding requests to the other parent and me just being the in-between person, so we're talking 5 seconds, a minute of my time. I know there were times that I did it, but generally my recollection is that when I'd see something like that, I'd wait till I wasn't working or eating my lunch at my desk and do that kind of stuff.

Office visits

The father claimed that he had met with the administrator at the administrator's offices in the APH. He also said that his daughter had met with the administrator in his offices for counseling sessions.

In his deposition, the administrator agreed that he had met with the father at APH, but he denied ever meeting the child there.

Administrator: I met with him and his girlfriend on a holiday here. And looking back, perhaps that was the wrong thing to do. I met with them here because they live . . . [information redacted] and I live [information redacted], and I thought it would be easier for them to meet here. At no time did they pay me for that. I have not received any payment. I've never received any payment from the father—ever. His daughter is a client of mine. I was hired by his ex-wife.

I think I met with him twice, very far distances apart. It was months between the times, and once it was a holiday when it was this crisis he called about and wanted to meet with me and just had to meet me here. And the other time he met with me one evening here, but it was after hours.

Investigator: And you say he didn't pay you, but did you bill him for that?

Administrator: Oh, I always submit a statement, yes. I did submit a statement, knowing I wouldn't get paid. He's never paid a penny; he's never paid for his daughter's counseling. But that's not my concern. My concern is the daughter, and the mother hired me and it's up to her if she wants to get money from him. And yes, I do give a statement. To me that's them understanding that I'm not here at their beck and call.

The mother of the child, the father's ex-wife, said that the administrator never met with her or her daughter at APH.

Court Appearances

The father also alleged that the administrator testified in court during times that he should have been working. The administrator acknowledged that he made two court appearances to testify about his client, but said that he used his lunch time to be at court. One of the court appearances was in early January 2006. The administrator's timesheet for the period from January 1 through January 15, 2006 was not on file with the Division of Personnel or the Division of Pioneer Homes. The copy used in this investigation was found on the administrator's APH computer. That timesheet indicated he came in at 8 a.m. and left at 6:30 p.m.

In his deposition, the administrator stated:

Administrator: I was subpoenaed to appear in court and testify on behalf of the child. I remember January 10th [2006], I think that is accurate. I don't remember the date of the previous one. The reason I know it was January 10th is that it was after that hearing that he began making threats and he sent me letters threatening to do things to me, to ruin me somehow. And then this...

Investigator: The court usually meets during regular business hours, so how did you do that in conjunction with your job at the Pioneer Home?

Administrator: I took my lunch hour.

Investigator: They were both during your lunch hour?

Administrator: I just took my lunch hour during that time. I work long hours and I'm salaried, so I just said, "I'm taking early lunch today. I've been subpoenaed to appear in court." I guess looking back, I don't know how I should have handled it. Maybe you could advise me. I mean maybe I should have filled out a leave slip or something, but when you work 60-80 hours a week, taking an hour off to take care of something, to me it's the same as taking some time off to run and get a haircut, because I'm working such long hours I don't have time.

Investigator: So you don't fill out leave slips when you leave?

Administrator: No. For small things like that I don't generally. Again I work—I've gone recently a period where I've gone six months without a single day off. And again, I'm not being a martyr. That comes with the job. I mean when you have 200 employees and 160 residents, you know, you just need to be there. My style of leadership is leading from the front, so the staff can get hold of me 24 hours a day and I'll be right there. I'm sure Virginia, my supervisor, will attest to the fact that [I am] always at work... I believe in working hard. I want the state to get all the bang for their buck.

Computer Storage

The subpoena of the administrator's computer also turned up other documents related to his private practice. One of his many folders on the state computer server contained files relating to his private practice. This folder held 215 files totaling 11.7 megabytes of data. Most of these files were billing statements to various clients of his counseling practice. Some of the files dated back to 2000, before the administrator began working at APH. Others are narratives of client progress and letters to clients and to the courts on behalf of clients.

Of the 215 files, 56 had creation dates during the administrator's tenure as administrator of APH. Thirty of these were, according to the creation and modification dates of the files, created or modified during normal business hours. In his deposition, the

administrator said that these documents were on the state computer system as a back-up to his home computer.

Investigator: There were quite a number of invoices and a number of reports or letters or narratives related to individual clients...

Administrator: Right.

Investigator: . . . that were on the server. Did you write those while you were at the Pioneer Home?

Administrator: No. I wrote them on my computer at home and I backed them up here. I explained to [the ombudsman] that my home computer was getting old and wasn't working well and was crashing often. So I backed them up here. Since this whole thing I went and bought a new computer because I didn't want to have an issue anymore. As far as I recall—I'm not saying I never did it, because I don't really recall, Mark. There might have been times where I was here in the evenings or at lunch, and I quick wrote a narrative or wrote something in because I wanted to remember to do it. I'm not saying I never did it, but the huge majority of those things were generated not on this computer here.

Investigator: How did you get these files from your home computer to your work computer?

Administrator: Just burned them on a disk and transferred them. I don't recall if it was a floppy or a CD more recently. I think it was a floppy disk no—it was a CD actually. Yeah. I'm not positive.

Investigator: Why, if you had them on a CD, would you want to put them on another computer? Wouldn't a CD back-up be enough?

Administrator: I suppose it would be. Yeah.

Investigator: I guess I don't understand...

Administrator: Yeah, I'm not a real computer geek. I guess I just didn't think about it. I thought I'd better put it on another computer. It's my failing.

Of the billing statements stored on the state computer, 24 requested payments be sent to the administrator at APH's mailing address. In his deposition, the administrator explained why he used the APH mailing address on those statements:

Why, it was just a convenience thing, because I have my paychecks sent here, and it was easier for me to do my banking from here than... Again, I'm not making excuses, but I work long hours and it's rare that I would ever even be going home before the banks are closed. So it was just easier for me with that, since it was a regular monthly thing. In the child's case,

they [the mother] paid weekly when I went there. This [other] is a case where I saw this woman, and she herself couldn't do the payments, so I sent a bill to her payee and just—I guess that's another one of those poor judgment things—there wasn't malicious intent. It was just easier to send the check here because many times I run to the bank here on my lunch hour or something because by the time I get home it's just way too late. It was just a convenience thing.

Department of Law Ethics Video

The administrator's computer carried a copy of a 20-minute video⁵ produced by the Alaska Department of Law explaining the Ethics Act. One of the administrator's emails recommended this video to his colleagues in the Division of Pioneer Homes. The investigator found that the administrator sent the email on October 26, 2005 and advised staff "please review this video."

The video presents various scenarios that could occur in state employment and discusses whether they represent a violation of the Ethics Act. One scenario, under the heading of *Misuse of State Equipment*, presents the situation of a fictional state worker named "Larry." Larry keeps tax software on his office computer, and throughout the year he adds data needed for his personal tax return. According to the video, Larry has violated the Ethics Act. The narrator intones:

Using state time, property, equipment, or other facilities to benefit personal or financial interests is prohibited. A designated ethics supervisor, however, may determine that a personal use of state equipment is so insignificant that it does not violate the Ethics Act. Using state equipment for a private business is not an insignificant use.

According to the video, Larry violated the Ethics Act because he used the equipment for "personal gain, did not check with his designated supervisor, and his use is not insignificant."

The ombudsman investigator asked the administrator if, after viewing the video, he had any concerns about whether his conduct was within the boundaries of the Ethics Act. He responded:

As I recall, no I didn't. The only thing—and even now, I just didn't think about the fact that I had some files backed up on my computer. I quite honestly didn't think of that. To me it was: it didn't apply, actually. I didn't think about that.

The administrator told the investigator that he did not report any potential violations of the Ethics Act to his department ethics supervisor, apart from the annual report of outside

⁵ The video, *The Ethics Law, A Guide to Ethical Behavior in State Government*, is available on the Department of Law website at <<http://www.law.state.ak.us/doclibrary/ethics.html>>.

employment. The investigator confirmed this by checking the ethics disclosures on file with the department ethics supervisor.

ANALYSIS & PROPOSED FINDING

The allegation is that the administrator acted contrary to law. The Office of the Ombudsman's Policies and Procedures Manual at 4040(1) defines *contrary to law*. The portion that pertains to this situation is:

(E) individual misconduct in which a state employee:

(a) performs for an illegal or improper purpose.

In this case, the law that the administrator allegedly violated is the Executive Branch Ethics Act, specifically AS 39.52.120(b)(3), which states that "A public officer may not use state time, property, equipment, or other facilities to benefit personal or financial interests."

Also pertinent to this investigation is AS 39.52.210(a), which requires a declaration of potential violations by public employees. It states that

A public employee who is involved in a matter that may result in a violation of AS 39.52.110 - 39.52.190 shall

(2) immediately disclose the matter in writing to the designated supervisor and the attorney general.

By the evidence and by his own admission, the administrator used state time, property, and equipment as part of his private counseling practice. The administrator emphasized that he never received money for the particular phone calls, emails, or documents made on state equipment. These products were ancillary, but they were certainly associated with his counseling practice. He admitted that he billed the father for a meeting at the APH office, although he said the father never paid him. Clearly, the "Counseling Services" was a for-profit business, and the administrator was compensated for his services as his numerous billing statements prove. In any event, the courts have ruled the receipt of money is not essential in a violation of the Ethics Act.⁶

The evidence shows that the administrator used both the state telephone and computer system to conduct his private practice. The investigation documented a handful of private practice telephone calls, the longest lasting 16 minutes, to the administrator's APH phone. The investigation also documented 80 emails back and forth between the administrator and persons involved in his private practice over two-and-a-half years. The administrator admitted that he used the phone and email for business purposes, but said his use was minimal. Whether it was minimal is arguable, because the administrator never disclosed this use to his designated ethics supervisor for a determination. Thus he was in violation of the Ethics Act.

⁶ Skvorc at 1192.

The administrator admitted meeting twice with the father at his APH office, but said the meetings did not occur during normal business hours. He said he met with the father at APH for convenience. The administrator said he attended court hearings twice to testify concerning one of his clients. He said he used his lunch hour to account for the time. The hearings were not held during his regular lunch hour, but the administrator said he took an early lunch hour to make the times coincide. Again, this is impossible to verify because the administrator did not use leave slips, and his timesheets report only the time he walked in the door in the morning and the time he walked out at night and nothing, not even lunch hours, in between. The evidence is clear that the administrator worked long hours, many more than the 37.5 hours per week that is usual for state employees. However, the absence of detailed time accounting is not appropriate for someone who occasionally spends time on private business during the workday.

For instance, on January 10, 2006, the administrator attended a court hearing related to his private practice. He said he took an early lunch to coincide with the hearing. However, his timesheet shows only that he came in at 8 a.m. that day and left at 6:30 p.m.

The administrator also stored numerous private practice documents on state computers. Evidence shows that the administrator stored on the state computer system more than 200 files totaling approximately 11 megabytes of data. These were stored in a folder dedicated to documents related to his private practice. Evidence supports the administrator's contention that most of these documents were brought from another location and stored on the state computer. However, at least 30 of the files were created during normal working hours and were likely written on the administrator's APH computer. The administrator said it was possible that he created some of the documents at APH, but it would have been a rare occurrence.

The stored documents included billing statements for his private practice, 24 of which instructed the client to mail payment to him at the APH address. Again, the administrator failed to disclose to his ethics supervisor the potential violations of the Ethics Act inherent in these actions.

Taken individually, the administrator's violations are not egregious, but together they demonstrate ethical improvidence unbecoming of a public servant. The ombudsman believes the evidence shows that the administrator violated the Ethics Act in seven ways:

- 1) by using the state telephone and email for his private practice,
- 2) by meeting with persons concerning his private practice at APH offices,
- 3) by using the state computer to create documents related to his private practice,
- 4) by conducting private business during normal working hours without proper accounting of his time,

5) by using the address of a state office to receive payments to his private business,

6) by storing numerous documents related to his private practice on the state computer system, and

7) by failing to disclose these potential violations of the Ethics Act to his ethics supervisor and the attorney general.

Consequently, the ombudsman finds both allegations that the administrator acted contrary to law to be *justified*.

FINDING OF RECORD AND CLOSURE

The ombudsman sent a preliminary report of this investigation to Director Smiley and the administrator in accordance with AS 24.55.180 and 21 AAC 20.210. They were given an opportunity to comment on the proposed findings and recommendations. Neither chose to comment on the findings and the findings will, therefore, remain *justified* as proposed.

In cases of individual misconduct, ombudsman policy is to defer decisions to the subject's supervisors regarding what personnel actions, if any, are appropriate. Ms. Smiley responded to the recommendations in a letter.

The ombudsman made the following recommendations.

Recommendation 1: The Director of Pioneer Homes and the department designated ethics supervisor should review this investigative report to determine what personnel action, if any, is appropriate in this case.

Part of the Ombudsman Act, AS 24.55.220, provides: "If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency." The ombudsman has therefore referred this matter to the director of the Division of Pioneer Homes as the employee's supervisor, and to the department's designated ethics supervisor as "another appropriate official" pursuant to AS 24.55.220.

Director Smiley's response to the preliminary report indicated that the director undertook appropriate review of the report. Personnel records are confidential pursuant to AS 39.25.080. Review of a potential violation of the Executive Branch Ethics Act is confidential pursuant to AS 39.52 unless a formal accusation is filed by the Attorney General. Therefore, the ombudsman's public report does not include any actions taken in response to this recommendation.

Recommendation 2: The administrator should cease using state time, property, equipment, or other facilities for purposes related to his private

business until he submits a disclosure to the department ethics supervisor and the attorney general in accord with AS 39.52.210 and until he receives a written reply to his disclosure from the ethics supervisor.

Director Smiley responded that the administrator has “removed all outside business documents from his computer and ceased using state email for response to his clients.”

Recommendation 3: The Director of Pioneer Homes should direct the administrator to use leave slips or keep accurate timesheets, especially noting times in and out of the office.

Director Smiley rejected this recommendation. In her response to the ombudsman, Ms. Smiley wrote:

Per the division of personnel, supervisory bargaining unit employees are not required to keep time sheets. The administrators of the Pioneer Homes voluntarily submit time sheets for ease of processing payroll for our 670 employees every two weeks. They began doing so years ago. The administrator is using his facility’s sign in/out board when he enters/leaves the premises. I find these actions appropriate, given the nature of [his] work.

As the ombudsman stated before, an employee who takes time during normal business hours for outside business activities ought to keep track of that time in a permanent record. This protects the agency and the employee from allegations related to the employees use of state time and is simply a good administrative practice. The easiest permanent record would be an accurate timesheet. The solution proposed by Ms. Smiley, using a sign in/out board, does not provide a permanent record, and the ombudsman does not consider it consonant with the third recommendation.

Based on the agency response the ombudsman finds the allegations in this case ***justified*** and ***partially rectified***.

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