



FINAL INVESTIGATIVE REPORT

Ombudsman Complaint A2009-1571, J2010-0144

February 9, 2012

This report has been edited and redacted to remove information made confidential by Alaska Statute and to protect the privacy interests of those citizens involved.

SUMMARY OF THE COMPLAINT

On December 2, 2009, the complainant filed a complaint with the ombudsman against the Department of Transportation (DOT) and Department of Administration Division of Personnel and Labor Relations (Personnel) regarding their hiring practices. The complainant said she had applied by mail for a full-time permanent position with DOT as an Office Assistant in July 2009. According to the complainant, DOT offered her the position in August 2009, and she accepted the offer. However, DOT and Personnel required her to reapply for the position because, they said, she did not apply properly. In reliance on DOT's initial job offer, the complainant quit a part-time job.

The complainant reapplied on-line for the position in August 2009. DOT interviewed her again, but this time DOT selected another candidate for the position. DOT informed the complainant of its decision in an e-mail on October 1, 2009.

The complainant filed a complaint with Personnel on October 15, 2009. She requested Personnel and DOT provide information on the hiring process, as well as information on the candidate who was hired. She asserted that her skills and experience surpassed those of the other candidate. She alleged that both DOT and Personnel staff acted unreasonably and unprofessionally and blacklisted her from future employment with the State of Alaska.

The ombudsman opened a complaint with the following allegations, written to conform with AS 24.55.150, authorizing the ombudsman to investigate complaints about administrative acts of state agencies:

Allegation 1: The Department of Transportation unreasonably rescinded a job offer to the complainant, who quit another job in reliance on the offer.

Allegation 2: Unsupported by an adequate statement of reasons: DOT staff failed to provide the complainant with a clear explanation of the reasons DOT rescinded an employment offer, and failed to acknowledge DOT's errors in the hiring process.

During the investigation, the ombudsman, on her own motion under AS 24.55.120, added the following allegations against DOT and Personnel based on a review of the agency's files:

Allegation 3: Division of Personnel and Labor Relation's on-line application instructions are unreasonably confusing to prospective applicants and fail to achieve the purposes of the application process.

Allegation 4: Contrary to law: Department of Transportation staff failed to rank and score applicants for a position prior to extending a job offer as required by 2 AAC 07.106.

Allegation 5: Contrary to law: DOT staff failed to retain recruitment documentation as required by 2 AAC 07.113.

The ombudsman provided notice of investigation to the agencies on May 19, 2010.

Assistant Ombudsman Jennifer Christensen investigated the allegations and forwarded her report to the ombudsman. The ombudsman forwarded her preliminary findings and recommendations to both agencies on March 29, 2011. Central Regional Director Robert Campbell responded for DOT and Deputy Director Katherine Sheehan responded for Personnel. Both agency responses are incorporated in this Finding of Record.

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OMBUDSMAN'S FINDINGS AND RECOMMENDATIONS

Based on the evidence developed during this investigation and for reasons explained further in this report, the ombudsman found Allegations 1, 2, 4, and 5 filed against DOT, and Allegation 3 filed against Personnel, *justified.*

The ombudsman proposed four recommendations to the agencies:

Recommendation 1: DOT should provide the complainant with a written apology for DOT's mishandling of the complainant's employment application and subsequent job offer without Personnel approval. The letter should clearly acknowledge the errors committed by staff during the recruitment and hiring process.

Recommendation 2: DOT should consider paying the complainant a reasonable sum of money to compensate her for her financial loss.

Recommendation 3 was redacted in accordance with Alaska confidentiality statutes.

Recommendation 4: Personnel should review and revise all future recruitment notices to clarify the appropriate process a prospective applicant should follow when applying for a position by U.S. mail.

Department of Transportation's Central Regional Director Robert Campbell responded to the ombudsman's preliminary report in a letter dated May 9, 2011. Mr. Campbell did not dispute any of the findings of the ombudsman and accepted all recommendations. However, Mr.

Campbell provided additional information to the ombudsman for her consideration concerning her findings for Allegation 2. Mr. Campbell did not request modification of this finding.

Division of Personnel and Labor Relations Deputy Director Katherine Sheehan responded to the ombudsman's preliminary report in a letter dated May 4, 2011. Ms. Sheehan did not dispute the findings of Allegation 3 and accepted the ombudsman's Recommendation 4.

At the conclusion of an investigation, the ombudsman often requests a state agency report back to her on its progress in implementing any recommendations she has made and the agency has accepted. After multiple contacts by the ombudsman, DOT ultimately issued an apology letter to the complainant on October 11, 2011, five months after the agency had accepted the ombudsman's recommendation to do so. DOT ultimately disagreed with ombudsman Recommendation 2 after consultation with the Department of Law and determined it was inappropriate to spend public funds by making a payment to the complainant to compensate her for her financial loss.

BACKGROUND

AS 39.25.150(3), 2 AAC 07.040, and 2 AAC 07.050 give the Division of Personnel the authority to advertise recruitment openings and closures for the State of Alaska. The Director of the Division of Personnel establishes all policies and procedures required to carry out personnel administration for those State of Alaska Executive Branch employees covered by the State Personnel Act and/or collective bargaining agreements.

Within the Division of Personnel, a DOT Service Center managed by Personnel staff provides support to supervisors and employees of the Department of Transportation and Public Facilities in the areas of management services, personnel and employee relations, recruitment and personnel/payroll processing. The Juneau DOT Service Center Office serves DOT Headquarters, as well as the Southeast and Northern DOT regions. The Anchorage DOT Service Center Office serves the Central Region of the department.

Workplace Alaska is the on-line recruitment system utilized by State of Alaska departments for posting job vacancies and recruiting prospective employees. The on-line system is managed by the Division of Personnel. Personnel must approve all recruitment notices posted on Workplace Alaska.

All positions within the classified service with the State of Alaska are filled through Workplace Alaska with the following exceptions:

- Some non-permanent positions, positions in range 7 and below and Mail Clerk Carrier II are filled through the Alaska Employment Service within the Department of Labor and Workforce Development;
- Positions in the Labor, Trades and Crafts Unit are filled through the Public Employees Local 71 hiring hall;

- Partially and fully exempt positions within the Executive Branch, and positions within the Legislative Branch may be filled through Workplace Alaska.¹

People interested in obtaining a job with the State of Alaska can learn about vacancies by viewing recruitment notices on the Internet at <http://workplace.alaska.gov>. Recruitment listings are also available at Alaska Employment Services Offices and Legislative Information Offices; by calling the Workplace Alaska Job Line; and published in local newspapers state-wide.

In order to apply for a vacancy on-line through the Workplace Alaska system, an applicant is required to complete an Applicant Profile providing general information, as well as a Job Qualification Summary. The Job Qualification Summary requests information about an applicant's skills, education, and experience relevant to the vacancy. The Job Qualification Summary is specific to each vacancy and is found within the HOW TO APPLY area of each recruitment notice. It must be submitted on-line by 5 p.m. on the closing date of recruitment.

If an applicant successfully submits an application on-line, a confirmation page appears, documenting the date and time the application was submitted. A confirmation e-mail is sent to the applicant.

Applicants have the option of submitting a paper application for vacancies listed on Workplace Alaska. The Applicant Profile and Job Qualification Summary forms are available at local Alaska Employment Services offices or can be downloaded and printed from Workplace Alaska's Employment Services page.

Applicants submitting paper applications must submit a copy of their Applicant Profile for each position applied for, as well as a hard copy Job Qualification Summary. According to information posted on Workplace Alaska's website, both forms must be submitted to the Division of Personnel by 5 p.m. on the closing date of the recruitment. The applications can be mailed or faxed to the Division of Personnel.

According to Workplace Alaska's application instructions, applicants are discouraged from submitting paper applications directly to the hiring manager. According to the Frequently Asked Questions section located on Workplace Alaska's Website, applications must be received on-line through Workplace Alaska or in hard copy by the Division of Personnel by 5 p.m. on the closing date of recruitment. Hiring managers are not responsible for submitting paper applications to the Division of Personnel.² The Applicant Profile and Job Qualification Summary that make up the application package are sent on-line to the hiring manager. The hiring manager then reviews the applications of those persons meeting the minimum qualifications for the position and contacts prospective applicants for an interview.

Upon completion of the recruitment and selection process through Workplace Alaska, hiring managers are required to appropriately and accurately document the disposition of each applicant. All applicants must have an appropriate disposition regardless of the outcome of the recruitment process (i.e. hire made, no hire made, etc.). With few exceptions³, a new recruitment posting will not be processed by Personnel until the previous recruitment has been fully dispositioned.

¹ <http://notes4.state.ak.us/wa/mainentry.nsf/WebData/HTMLFrequently+Asked+Questions+from+Applicants> (September 8, 2010).

² <http://notes4.state.ak.us/wa/mainentry.nsf/WebData/HTMLHow%20to%20Apply/?Open>

³ For example, public safety positions governed by 13 AAC 85.

Applicants who are dissatisfied with a hiring decision can file a complaint with Personnel. Per 2 AAC 07.450, members of the general public have the right to resolution of complaints arising out of application for state employment, state employment examinations, and the selection process. Personnel responds to questions concerning the application, examination, or selection process. Personnel treats telephone inquiries as informal inquiries. A written inquiry, appeal, or other similar communication submitted to Personnel within 10 working days after the action complained of is treated as a complaint. Personnel's director is required to investigate the complaint, take appropriate action to resolve the complaint and issue a final written decision within 15 working days. The decision of the director is final.

INVESTIGATION

The Ombudsman investigator interviewed or contacted the following persons during investigation of this complaint:

- The complainant
- Sherilyn Knight, Personnel Human Resources Manager
- Katherine Sheehan, Deputy Director Personnel Labor Relations
- Troy Larue, DOT Maintenance and Operations Supervisor
- Norman Heyano, DOT Airport Foreman
- Wanda Faber, DOT Administrative Assistant
- Brad Thompson, former Director Division of Risk Management (DRM)

The investigator reviewed documentation from Personnel and DOT recruitment files, e-mail communications between Personnel and DOT personnel, records from the Department of Labor, and materials provided by the complainant. The investigator researched relevant statutes, administrative regulations, agency policies, and case law. Below is a summary of the results of the investigation.

Chronology of Events

On July 10, 2009, Personnel posted an Office Assistant II recruitment notice on Workplace Alaska at the request of DOT Administrative Assistant Wanda Faber.

According to the July 10, 2009 recruitment notice posted on Workplace Alaska, applicants for the position could submit their resumé, in addition to an applicant profile, letters of reference, writing sample, and a sample business letter directly to Wanda Faber, the primary hiring manager for the position. The recruitment notice listed DOT's Southwest District mailing address, P.O. Box 196900, Anchorage, AK 99519. Ms. Faber told the investigator that she drafted the recruitment notice. She said that she sent the recruitment notice to Shannon Conger at Personnel for approval and posting on Workplace Alaska.

On July 14, 2009, the complainant posted an application packet to Ms. Faber via United States Postal Service priority mail. On July 18, 2009, the complainant e-mailed Ms. Faber to confirm whether her application had arrived. Ms. Faber's e-mail address was listed on the July 2009 Workplace Alaska recruitment notice under the contact person information. Ms. Faber responded by e-mail on July 20, 2009. She advised the complainant that her application packet had not arrived and told her that it needed to be sent to Post Office Box 196900, Anchorage 99519, Attn: Wanda Faber or to 4111 Aviation Ave., Anchorage, AK 99502. Ms. Faber requested the complainant resend it. The complainant confirmed that she had sent her application packet to this

address and offered to fax it to Ms. Faber or re-mail it. Ms. Faber does not recall having any discussion with the complainant concerning the need to forward her application packet to Personnel for processing.

When the ombudsman investigator asked Ms. Faber to explain the process for gathering the complainant's and the other applicants' paperwork and forwarding it to Personnel for processing, Ms. Faber responded that this information does not normally go to Juneau. Instead, she stated that the paperwork she received is forwarded to the people conducting the interviews. She said that the resumes, letters of reference and writing samples was extra information and does not get forwarded to Personnel. She further testified that the only information Personnel receives is the information on Workplace Alaska. The information provided to the interviewers includes the resume and references, provided solely to the interviewers. She stated this information was, "totally separate." The investigator asked Ms. Faber whether she discussed with the complainant that this information was separate from the information she needed to provide to Personnel. Ms. Faber responded, "No, there were many applicants. It's the way the system is, the way it's set up. So . . . apply on-line."

On July 22, 2009, Ms. Faber e-mailed the complainant confirming receipt of her application and stated she would schedule interviews the following week. Ms. Faber stated in her July 22 e-mail, "I did just get your mail application." The application packet was not date-stamped, however, so there is no way to know with certainty when the application was received; it is possible it had been accepted by the DOT mail room before July 22 and forwarded to Ms. Faber days later. According to the recruitment notice, the position closed at 5 p.m. on July 20, 2009, a Monday. Applications received by the Division of Personnel after this time frame, whether submitted on-line or by hard-copy application, should not have been further considered according to Personnel policies and procedures. According to the investigator's review, if DOT truly received the complainant's hard-copy application on July 22, it was received after the closing of the recruitment period and it should have been rejected.

Ms. Faber testified that after receiving the complainant's application, she went onto Workplace Alaska and printed out information on the other applicants to provide to the interviewers. "Somehow her packet got in with that." She further told the investigator that the reason the complainant's application got "thrown out" was because it had not been entered on-line. "Applicants had to do it on-line and the extra information that was to come, [was] directed to the interviewers only," according to Ms. Faber. When the investigator further questioned Ms. Faber if she had included the complainant's packet with the other Workplace Alaska applicants information, she testified "somehow it did get in there, yes." She said she forwarded the information to Airport Foreman Norman Heyano and Office Assistant III Karleen Laufenburger.

Ms. Faber told the investigator that she did not review any of the applications or applicant information prior to forwarding the information.

On August 17, 2009, the complainant e-mailed Ms. Faber for a status update on the interview schedule and requested an interview the week of August 17. Ms. Faber replied the same day that she had forwarded the complainant's message to the interviewers. The complainant said that DOT Airport Foreman Norman Heyano called her at home on the evening of August 17, 2009 and scheduled an interview with her for August 19. Mr. Heyano said he could not recall this conversation nor does he remember whether he called the complainant to schedule an interview. When asked who would be the person that scheduled the interview if not Mr. Heyano, he could

not remember who might have done so. In contrast, Ms. Faber told the investigator that Mr. Heyano was the person responsible for deciding which applicant would be interviewed for the position. Ms. Faber also confirmed that Mr. Heyano or another staff member would have been responsible for contacting the applicants for an interview, but she does not know who it was.

On August 19, 2009, DOT staff Norman Heyano, and Karleen Laufenburger interviewed the complainant in person. According to the investigator's review of the Workplace Alaska disposition comments, 13 applicants applied on-line for this position, including the candidate later hired on October 1, 2009 by DOT. DOT interviewed four additional candidates for the position. Ms. Faber told the investigator she had no knowledge concerning the applicants that had been selected for an interview by Mr. Heyano.

Mr. Heyano told the investigator on September 27, 2010 he has very little recollection of the interviews. While he acknowledged interviewing both the complainant and another candidate, Mr. Heyano told the ombudsman investigator that he does not recall the following:

- the substance of the interviews;
- the interview questions; how either candidate performed;
- how many other applicants for the position he interviewed;
- how he scored or ranked the applicants following the interviews.

When questioned further by the investigator about the complainant's performance and whether he considered her the best-qualified candidate for the position, Mr. Heyano responded, "I don't remember."

- He said he does not recall having a conversation with Ms. Laufenburger about the results.
- He said he does not recall either calling or e-mailing Wanda Faber to discuss the results of the interviews.
- He said he does not recall stating to Ms. Faber that the complainant was the person he felt was best qualified for the position, or that he would like to hire her.

Ms. Faber told the investigator that following the interviews, Mr. Heyano and Ms. Laufenburger sent to her the paperwork generated from the interviews. When asked by the investigator if she had any telephone conversations or exchanged any e-mail communications with either Mr. Heyano or Ms. Laufenburger about the results of the interviews, Ms. Faber responded, "Possibly. I have no idea. I must have talked to them or something." However, she said she did not remember the substance of any communication with Mr. Heyano or Ms. Laufenburger.

Ms. Faber does not know whether the scoring or ranking of the applicants' information was included with the interview paperwork forwarded to her. Ms. Faber stated, "it would have been verbal I'm sure, if anything." When the investigator asked her to clarify this statement, Ms. Faber replied, "Over the phone." Again, when asked to clarify what information on ranking of the applicants was conveyed to her verbally by either Mr. Heyano or Ms. Laufenburger, she told the investigator that "well, I don't know. I don't remember." She said she does not remember whether this conversation was with Mr. Heyano or Ms. Laufenburger. "It could've been either one."

According to the complainant, on August 20, 2009, Ms. Faber called her at her home and told her "you got the job." The complainant said she accepted the offer.

In contrast, Ms. Faber denied she offered the complainant the position during this telephone conversation. She denied telling the complainant she had the job. She told the investigator:

No, I'm not in any position to do that. I'm purely the in-between person. In between the interviewer and send the paperwork to Juneau. (sic)"

Instead, Ms. Faber said that as she recalled, she sent the complainant some paperwork to fill out and told the complainant she must wait for Human Resources' approval before any hiring decision was made. Ms. Faber does not recall anything that the complainant said to her during this conversation. However, what she does recall is stating to the complainant that although Personnel generally hires the people DOT requests, she still had to wait for hiring approval from Personnel.

When asked to clarify the paperwork she sent to the complainant to fill out, Ms. Faber responded it was "the applicant information that has to be submitted . . . you have to have social security cards . . . you have to have the information that's required for all applicants . . . **if you have an applicant that you want to submit . . .**" (Emphasis added).

When the investigator asked Ms. Faber to clarify this last statement, she responded "well you can't say that you're hiring them because you're not hiring them, Juneau is . . . does the hiring. It's the information for Juneau. It's done all over the state. We all have to do it." She continued that Personnel reviewed applications and if Personnel agreed, the applicant can be hired. She said that Personnel reviews the background information for anything that might disqualify the applicant. Ms. Faber further told the investigator that it was her understanding that the first hiring committee, Mr. Heyano and Ms. Laufenburger, were interested in offering the position to the complainant.

Curiously, although Ms. Faber denies offering the complainant the position, on August 20, 2009 at 3:39 p.m., Ms. Faber sent an e-mail to the complainant with hiring paperwork attached.

The attachments to this e-mail included the following forms: Applicant Certification, Notice of Drug Free Workplace Act of 1988, Employment Eligibility Verification Form I-9, State of Alaska Prior Service, Statewide Policy Acknowledgement, and Employee Affidavit. At the bottom of several of these forms, the PCN number was hand-written in. PCN stands for Position Control Number. Each position with the State is designated and tracked by a unique position control number (PCN). A comparison of Ms. Faber's handwriting on the responses to the applicant's interview questions, compared with the handwriting on these forms is markedly similar in form.

Ms. Faber stated in this e-mail, "Thank you and I will look for the forms tomorrow. Wanda"

The complainant responded on August 21, 2009:

Hi Wanda. Thank you for sending these forms, I have completed them faxed them to you as you instructed. I appreciate speaking with you today and assuring me that I've got the job, and that I can give notice at my place of work. I feel good knowing that you're working on getting me hired and I look forward to working with you in my new role as Office Assistant II at D.O.T. Thanks again and have a nice weekend, [The complainant] PCN 25-1156.

Ms. Faber did not recall receiving this e-mail communication but did recall telling the complainant that the position was "not hers to give and that it had to go through HR. Now she

knew that because we'd been over it before." Ms. Faber denied assuring the complainant she had the job and could give notice to her employer. "No, I don't think those were my words at all. I did say this and I do remember telling her that it had been previous experience that once an . . . the applicants we chose come through. But as far as her giving notice, that's her thing, not mine." The ombudsman believes this to mean that generally, the people DOT selects for hire are ultimately approved for hire by Personnel. When questioned further whether she and the complainant had discussed the complainant giving notice during this conversation, Ms. Faber told the investigator,

I don't think so . . . but I can't say for certain or not. I'm not lying here. I don't know for certain but I do know this, I cautioned her because I was not the one making the decision.

The complainant told the investigator that during her August 20, 2009 telephone conversation with Ms. Faber, she asked about her start date. According to the complainant, Ms. Faber responded she did not know and the complainant would have to ask Norman Heyano about it. The complainant stated that she called Mr. Heyano sometime after her conversation with Ms. Faber on August 20, 2009.

According to the complainant, during the telephone conversation with Mr. Heyano, he informed her that there was a problem with her hire and that she needed to talk to Ms. Faber. Mr. Heyano told the investigator he does not recall having a conversation with the complainant on August 20, 2009, or at anytime thereafter. He said he does not remember discussing with her a start date or any problems with her application.

When questioned about any prior contact with the complainant before interviewing her in August 2009, Mr. Heyano acknowledged that he knew both the complainant and her husband, as they were long-time residents of the area. When questioned further about any prior relationship he may have with the complainant or her spouse, Mr. Heyano stated that the complainant was an acquaintance, and that he was friends with her husband. He did not elaborate on his friendship with the complainant's husband, or the frequency of his contact. He also said he does not recall having any conversations with either the complainant or her husband about her complaint against DOT or about the Office Assistant position, other than what was discussed during the complainant's interview for this position.

The complainant told the investigator that on August 21, 2009 she contacted Ms. Faber who told her that because she had not applied on-line for the job, she would have to reapply. According to the complainant, Ms. Faber told her that Personnel decided to repost the position. The complainant said that Ms. Faber told her during this conversation that she would talk to Shannon Conger of Personnel to see "what we can work out" and that they (Ms. Faber and Ms. Conger) would "push the paperwork through." Ms. Faber denies making either statement to the complainant. Ms. Faber recalls one thing from this conversation: stating to the complainant that she was sorry they had to start over.

The complainant told the investigator that based on Ms. Faber's assurances, she gave notice to her employer. According to the investigator's review, Ms. Faber told the complainant about the problems with her application on August 21, 2009, the day after Ms. Faber had e-mailed her hiring paperwork.

When asked to clarify the exact date she notified her employer that she was leaving, the complainant told the investigator that she e-mailed her supervisor on August 20, 2009 that she

had accepted a job with DOT and told her other co-workers on the same date. However, she said that her supervisor was out of the office on August 20 on a hunting trip, so she was not able to “officially” give him notice until his return to the office. She did not say when this was. She said that once her supervisor had returned to the office, she notified him in person of her decision to take the job with DOT. She said that her supervisor offered the position to another person who accepted the job, but was unable to start work until mid-October. Her replacement started working on October 12, 2009. The complainant was able to continue working for her employer until October 15, 2009.

The investigator further questioned the complainant about what she told her employer once Wanda Faber informed her on August 21, 2009 that she would have to reapply for the position. She responded that, “I told them that they (DOT-Anch & Juneau) are telling me that I ‘didn’t apply properly’ and that I have to reapply as well as go to job service and complete a series of tests. Staff at [her prior employer] were dismayed to hear this. However my replacement was already hired and set to arrive to fill the job I was vacating.”

According to a February 8, 2010 e-mail from Shannon Conger to Human Resource Specialist Shelly Saviers, Ms. Faber contacted Ms. Conger on or around July 28, 2009 to see what she could do “as [the complainant] was not in WPA [Workplace Alaska] and she was the one they wanted to hire.”

In contrast, Ms. Faber denies making this statement to Ms. Conger. Ms. Faber told the investigator that she was not aware that the complainant was not in Workplace Alaska until after she was notified by Ms. Conger. Ms. Conger further states in the February 8 e-mail,

. . . after discovering what had happened, we had them shut the first recruitment down to a no hire made and were told to contact all the applicants that had applied the first time and let them know if they wanted to be considered in this second go around they would have to re-apply.

On August 21, 2009, Ms. Faber sent a hiring manager request to Personnel to repost the position on Workplace Alaska. According to the Personnel Employee Services comments dated August 21, 2009, Sandra Conger entered the following comments: “closed to a NHM, (No Hire Made) will repost, per Wanda Faber.//sc.”

On August 21, 2009, Ms. Conger re-posted the Office Assistant 2 position on Workplace Alaska with no changes from the prior posting, according to the Personnel Employee Services comments.

Both the July 10, 2009 recruitment notice and the August 21, 2009 re-posting stated at the bottom of the notice:

AT THE TIME OF APPLICATION, please provide:

- A current resume, in addition to your applicant profile,
- Letters of reference from past work experience,
- A writing sample, and
- A sample business letter.

These items may be submitted to the contact person below.

The contact person listed on both Workplace Alaska postings was Wanda Faber, providing her e-mail address, mailing address at the DOT Southwest District office, and fax number.

The second recruitment open period was August 21, 2009-August 31, 2009.

According to Personnel's records, the complainant spoke to Personnel Human Resource Technician Sandy Tagaban on August 21, 2009. In an e-mail communication dated September 1, 2009 by Ms. Tagaban to other Personnel staff, Ms. Tagaban said she spoke to the complainant once. She told the complainant she had not correctly applied for the position and would need to submit a complete application to Personnel in Juneau. Personnel's e-mail records confirm that Ms. Tagaban sent an e-mail to the complainant on August 21, 2009 verifying her registration with Workplace Alaska and log-on username.

On August 24, 2009 at 7:24 a.m., the complainant responded to Sandy Tagaban's August 21 e-mail:

Hi Sandy,

It was nice speaking with you. I will fax you the Printed Job Qualifications Summary and my coversheet today. This should take care of everything correct? On 8/21/09, I faxed 53 pages to 907.269.0750, then faxed 14 pages to 907.465.2576, per Wanda's instructions. I have given notice at my place of work with Wanda's assurance that was OK to do. I am hoping this takes care of everything? I think I have completed all the forms that need to be completed and you all have routed them to the appropriate department(s) for processing my hire. If something is still missing let me know ASAP, otherwise I will consider this resolved. I am excited about my new job!

The investigator questioned Ms. Faber about the 53 pages the complainant stated she faxed to Anchorage in her August 24 e-mail. Ms. Faber said she does not recall receiving a 53-page fax from the complainant and commented it had probably been thrown away. "At that time it was all on Workplace Alaska and I didn't have time to go through all of it so I'm sure it was tossed because we didn't need it until the second round of interviews." When asked to clarify this statement, Ms. Faber responded, "Well I don't have it. I don't even know what it is. 53 pages? Of what? It wasn't requested I know that." When the investigator asked Ms. Faber if she threw anything away that the complainant had provided to her, Ms. Faber replied, "I don't know."

On August 24, 2009 at 7:57 a.m., Ms. Tagaban sent an e-mail to Personnel staff members Tara Stephens and Shannon Conger, forwarding a copy of the complainant's earlier e-mail to her that same day:

The note below is from the woman who did not apply for the Off Asst. position correctly, was interviewed and offered the position anyway. I hope the fact that she has given notice at her current position does not cause a problem . . . [The Ombudsman redacted this note in accordance with Alaska confidentiality provisions.]

At 11:43 a.m. on August 24, 2009, Division of Personnel Human Resources Technician II Sandy Tagaban sent the complainant an e-mail confirmation page indicating she had completed entering the complainant's hard copy application into Workplace Alaska.

On August 31, 2009, the complainant e-mailed Sandy Tagaban stating that Mr. Heyano had called her to come in and be fingerprinted on September 1, 2009, "for my new job."

Mr. Heyano says he does not recall this conversation or contacting the complainant on either August 31, 2009 or September 1, 2009. Likewise, Ms. Faber denied any knowledge whether Mr. Heyano contacted the complainant to be fingerprinted.

The recruitment period for the second recruitment notice closed on August 31, 2009.

On September 1, 2009 at 8:01 a.m., Ms. Tagaban e-mailed Personnel co-worker Tara Stephens that DOT had hired a person who had applied incorrectly and without Personnel hiring approval. She forwarded a copy of the complainant's August 31 e-mail. According to Ms. Tagaban's e-mail, DOT called the complainant to be fingerprinted before the closing of the recruitment period. Ms. Tagaban's e-mail characterized these events as ". . . the recruitment that went crazy last week." She questioned, "I wonder if they interviewed any of the new applicants."

On September 1, 2009 at 8:57 a.m. and 9:20 a.m., the complainant e-mailed both Sandy Tagaban and Shannon Conger, "What's the good word? I'm awaiting official notice please?" At 9:43 a.m., Ms. Conger e-mailed Wanda Faber and Troy Larue forwarding a copy of the complainant's e-mail. Ms. Conger wrote:

This woman has also left a voice message on my phone~Please, please, please~get in touch with her!!!

When Ms. Faber was questioned about this e-mail, she said she could not remember receiving it, or having made any effort to contact the complainant in direct response to Ms. Conger's request.

On September 1 at 10:16 a.m. DOTPF Human Resources Manager I Sherilyn Knight responded to the complainant's September 1, 2009 e-mail to Sandy Tagaban and Shannon Conger:

Your message was forwarded to me for a response. Ms. Tagaban is an employee of the Division of Personnel & Labor Relations . . . [s]he is not the hiring manager for the position in which you applied.

It is my understanding that the hiring managers will be conducting the recruitment and interview process for the posting for PCN 251156, Office Assistant II, for the recruitment period August 21, 2009 through August 31, 2009. . .

Ms. Knight forwarded her e-mail response to the complainant to DOT Maintenance and Operations Supervisor Troy Larue, Wanda Faber and Shannon Conger. Ms. Faber replied to Ms. Knight:

Thank you. We will be interviewing all the qualified applicants for this position soon. Hopefully we will be making our decision to give to Juneau for approval before long. I do not know why this lady is sending inquiries to you. Thank you for your help on this.
Wanda

Ms. Conger responded at 10:26 a.m. to Ms. Knight's forwarded e-mail response to the complainant. She stated that Mr. Larue told Norman Heyano not to fingerprint the complainant. According to Ms. Conger's e-mail, Mr. Heyano told the complainant to "stand down," and that they [DOT] would be in touch again about an appointment to interview. Mr. Heyano said he does not recall this. He also does not recall Mr. Larue telling him not to fingerprint the complainant. He does not remember having any conversation with Mr. Larue concerning this.

At 11:03 a.m. the same day, Shannon Conger e-mailed Norman Heyano, Troy Larue and Wanda Faber that four interviews would need to be offered, including the complainant. Mr. Heyano e-mailed Ms. Conger back at 12:01 p.m. requesting clarification.

Ms. Conger responded to Mr. Heyano at 1 p.m.:

The instructions given to Wanda Faber were to contact the five applicants that applied correctly to the first recruitment, along with [the complainant], and inform them that if they were still available and interested that they would have to reapply to the newly opened recruitment in order to be considered. At the time these instructions were given it was thought that the interview panel would be the same, along with the same exact questions. If this were the case those applicants that applied to the first recruitment and then reapplied to the second recruitment would not have to be re-interviewed, as the panel and questions would be the same. . .

Mr. Heyano responded to Ms. Conger at 1:11 p.m.:

Karleen or I did not tell or know we had to tell anyone to re-apply, Norman

Ms. Conger sent a second e-mail to Mr. Heyano at 1:15 p.m.:

As per our telephone conversation there are basically two options as to these recruitments for 25-1156.

We can keep the first recruitment as a No Hire Made and you will need to contact the applicants and let them know they were not chosen.

OR

We can extend the recruitment that just closed yesterday and contact the five applicants from the first recruitment and let them know if they are still interested and available that they will need to submit a new application package to the open recruitment, AND will need to be reinterviewed also.

...

On September 1, 2009 at 1:54 p.m., Ms. Conger extended the recruitment period for the second notice an additional three days, until September 4, 2009. According to the comments under the Employee Services Selection, Personnel received seven applications during the extended recruitment period.

On September 9, 2009, Ms. Conger sent an e-mail to Wanda Faber, Troy Larue and Norman Heyano listing eight people who warranted an interview. This list included both the complainant and the applicant ultimately selected by DOT for the Office Assistant position. According to a review of Personnel's records, the other applicant did not submit her application to the second recruitment notice until September 3, 2009, after Ms. Conger extended the recruitment period an additional three days.

On September 9, 2009, Wanda Faber e-mailed another applicant for the position stating that new interviews for the position were being set up and requested that the other applicant go to the local Job Center to take a computer/general test prior to an interview. Ms. Faber indicated in this e-mail that the interviews were scheduled for the week of September 21, 2009. Ms. Faber forwarded a copy of this e-mail to DOT Office Assistant Frances Nelsen on September 11, 2009. Ms. Nelsen, in turn, forwarded the e-mail string to the complainant.

On September 16, 2009, the complainant responded by e-mail to Ms. Nelsen that she had completed a general test at Job Service and that the results had been sent to Ms. Faber. Ms. Nelsen responded the same day, "Sounds good. Wanda will be back on Monday so I'm sure she will call you. Fran"

On September 22, 2009, the complainant sent an e-mail to Ms. Nelsen, "Hi Fran I returned your call and spoke with Wanda. I'm set up for an interview tomorrow via phone at 1:00 p.m." Ms. Nelsen responded to her on the same day, "OK. Good. She told me."

The second hiring team was comprised of Troy Larue, Wanda Faber and Frances Nelsen. Norman Heyano was not on the second hiring team. According to an October 26, 2009 e-mail from Troy Larue to Sherilyn Knight, Mr. Heyano was not available and Mr. Larue wanted to lead a new hiring team. Ms. Faber told the investigator that at Mr. Larue's direction a new hiring committee was formed without Mr. Heyano's and Ms. Laufenburger's participation. As she recalled, the reason for forming a new committee was due to the unavailability of other staff. However, according to Mr. Heyano, it was decided by the Anchorage office that they would handle the interviews. When asked whether Mr. Larue had made this decision, Mr. Heyano said he did not know. He said he did not recall being unavailable for the interviews. He also does not recall having any conversation with Mr. Larue on the subject.

On September 22, 2009, the successful applicant (Applicant B) was re-interviewed. On September 23, 2009, the complainant was re-interviewed.

On September 29, 2009, Ms. Faber contacted Personnel for hiring approval of Applicant B.

On October 1, 2009, DOT/PF recruitment sent Ms. Faber Hiring Approval for Applicant B.

On October 1, 2009 at 4:20 p.m., Wanda Faber e-mailed the complainant notifying her that she had not been selected for the position. At the top of this e-mail, it is dated September 30, 2009.

The complainant e-mailed Ms. Faber on October 9, 2009, "Can you please tell me what happened Wanda?" Ms. Faber forwarded the complainant's e-mail to Troy Larue on October 9, 2009, requesting his assistance with a response, "Troy, can you help me with a response to her? **She is the one who made the mess...**" (Emphasis added). Ms. Faber replied to the complainant on October 12, 2009, "Please call Troy LaRue on Monday, October 12, and he will be glad to explain any of your questions. Thank you. Wanda His phone # is 269-0751."

When Ms. Faber was asked by the investigator to explain the statement in her October 9 e-mail to Mr. Larue "She is the one who made the mess . . .", she responded "I think I was referring to all the letters she sent to all the other departments that were bad-mouthing us because we hadn't gotten the recruitment finished and everybody was coming back to me."

On October 14, 2009, the complainant e-mailed Mr. Larue:

At the conclusion of my interview on 8/19/09, Wanda called me at home on 8/20/09 and told me I got the job. I accepted. She said that her and Shannon would process my hire paperwork; she sent me employment forms . . . I subsequently resigned from my job; ready to go to work at D.O.T.

Now I'm told someone else has been selected—I'm not sure what happened Troy—can you tell me what happened? Please explain in writing. Thank you.

Mr. Larue responded in an e-mail on October 15, 2009:

I don't know the particulars about the conversation that you and Wanda had however; each hiring process must be conducted per our Department P&P. After the first round of interviews our Human Resources Department found some flaws in the process. Once this happened we had no choice but to re-post the position and ask each person to re-apply if they were still interested in the position.

I lead the second round of interviews myself with a new interview team. Once the interviews were conducted and we considered each person's strengths the team made a selection. I'm sorry that you did not receive the position and for the confusion.

On October 15, 2009, the complainant e-mailed Troy Larue and Shannon Conger requesting additional information and documentation from the hiring selection process, specifically requesting her scoring sheets, screening documents, identification of the selection committee, and relationship between the committee members and advanced candidates.

Sherilyn Knight responded in a letter dated October 21, 2009 to the complainant's October 15, 2009 e-mail request. Ms. Conger also e-mailed Personnel's letter to the complainant on October 21, 2009 at 8:24 a.m. indicating a hard copy would follow by mail. Ms. Knight denied the complainant's request for a copy of her scoring sheet or screening documents "as written examination used for evaluation of applicants is not open for inspection by an applicant until after the examination is no longer used for competitive testing." Ms. Knight identified Troy Larue, Wanda Faber and Frances Nelsen as the selection committee members and confirmed that "all State of Alaska rules and regulations pertaining to Nepotism have been followed and complied with" in response to the complainant's question on the relationship between the members and the advanced candidates.

In her October 21 letter, Ms. Knight stated in the fifth paragraph:

When the hiring manager requested hire approval for the above referenced position, it was determined that your original application, dated August 21, 2009, was not submitted in the appropriate manner in order to be considered.

Ms. Knight's letter stated that "this decision constitutes a final administrative determination. With this letter, I have completed the final step in the appeals process and I am closing the file."

The complainant sent several additional e-mails to Sherilyn Knight between October 25, 2009 and November 4, 2009, requesting further clarification on statements Ms. Knight made in her October 21, 2009 letter, as well as additional information on the hiring selection process. In an October 25, 2009 e-mail the complainant wrote in part:

- 1) Why did the selection committee exclude Mr. Heyano?
- 2) Please explain the determination that my original application was not submitted in the appropriate manner.
- 3) Please clarify how to properly apply.
- 4) Who is the hiring manager you're referring to?
- 5) Please expound on the approval for hire the hiring manager requested.
- 6) How did my second application differ from my first?
- 7) When will competitive testing conclude?

- 8) What is the procedure to inform a candidate when they aren't selected?
- 9) What is the confidentiality policy a hiring manager will observe regarding applicant privacy?

Ms. Knight responded to these questions on October 26, 2009 in an e-mail as follows:

- 1) It is my understanding that Mr. Heyano was not available to work the recruitment.
- 2) Your original application was not submitted via Workplace Alaska online nor was a hard copy provided to the DOPLR.
- 3) Applications for most vacancies in the State are received via Workplace Alaska or it's hard copy alternative.
- 4) Troy Larue, Central Region M&O Superintendent
- 5) Division of Personnel is responsible for reviewing recruitments and providing all hiring managers with approval to hire.
- 6) It was submitted through Workplace Alaska
- 7) When the questions are no longer in use
- 8) The State requires notice either verbally, via email or letter
- 9) Alaska Statute 39.35.080

Apparently dissatisfied by Ms. Knight's response to question number five, the complainant e-mailed her again on October 30, 2009 for further clarification on this response:

- 5) Please expound on the approval for hire the hiring manager requested.

You replied, "Division of Personnel is responsible for reviewing recruitments and providing all hiring managers with approval to hire."

That does not answer my question. You stated in your letter (fifth paragraph) "the hiring manager requested hire approval". I want you to tell me more about that.

Ms. Knight responded by e-mail on November 2, 2009:

Before a job offer is made to an applicant, a hiring manager receives hiring approval from Division of Personnel & Labor Relations. The Division of Personnel & Labor Relations reviews the recruitment and the information submitted by the hiring manager to ensure personnel rules and bargaining unit contract requirements have been met and gives the hiring manager approval to make a job offer. This is the process followed for all recruitments in the classified service.

In October 2009, the complainant filed for unemployment benefits. While her initial filing was denied by Unemployment Insurance on November 3, 2009, on December 31, 2009, Hearing Officer Dan Kassner reversed the denial in the complainant's favor:

The claimant quit her employment to accept better work that had been offered to her. By the time she learned that she would not be hired into the new job, there was no work remaining for her []. The claimant was unemployed through no fault of her own. It is the conclusion of the Appeal Tribunal that the claimant voluntarily left suitable work with

good cause. The notice of determination issued in the matter on November 3, 2009, is REVERSED. The claimant is allowed benefits starting the week of October 17, 2009.

According to Mr. Kassner's decision, the complainant began working for her prior employer on July 13, 2009. At that time, she normally worked 20 hours per week and earned \$19.63 per hour, or gross wages of approximately \$392.60 per week. She last worked at her prior employer on October 15, 2009 according to the UI Hearing Officer's decision and confirmed by the complainant.

The Complainant's Applicant Profile and Application

The complainant signed her hard copy applicant profile on July 13, 2009. At the bottom of her profile, directly below the applicant's signature line, it states that hard copy profiles are to be submitted to the Department of Administration, Division of Personnel at P.O Box 110201, Juneau, Alaska.

The July 10, 2009 recruitment notice posted on the Workplace Alaska Website for the Office Assistant position lists Wanda Faber's name, e-mail and mailing address under the "Contact Person" information. This notice also states directly above the "Contact Person" information:

AT THE TIME OF APPLICATION, please provide:

- A current resumé, in addition to your applicant profile,
- Letters of reference from past work experience,
- A writing sample, and
- A sample business letter.

These items may be submitted to the contact person listed below. [Emphasis in original].

The second recruitment notice dated August 21, 2009⁴ was identical in this instruction. The investigator asked Ms. Faber who was responsible for drafting the recruitment notices. As Ms. Faber initially explained, "it was done by HR." However when further questioned by the investigator, Ms. Faber acknowledged that she helped to draft the recruitment notices and forwarded them to Personnel for approval. She could not recall if she put her contact information in the recruitment notice, or if this information was inserted by Personnel.

The complainant did not send her hard-copy profile and application packet to the Personnel Juneau office, but instead to Wanda Faber at the address listed on the recruitment notice. When the investigator questioned the complainant why she did not send her application to Personnel as noted on the application, but instead to Wanda Faber, she acknowledged the error but stated it was confusing to her since the on-line recruitment notice had Wanda's mailing address on it as the contact person. In addition, when she contacted Ms. Faber on July 18, 2009 prior to the closing of the application deadline, Ms. Faber told her that she needed to send it to Ms. Faber's mailing address, which she had already done, per the recruitment notice's instructions. According to the complainant, Ms. Faber did not inform her that she needed to send her application directly to Personnel. This is confirmed by the investigator's review. When the complainant contacted Ms. Faber on July 18, 2009 by e-mail, Ms. Faber directed her to send the

⁴ The recruitment period for the second notice indicated that it was open for the period August 21, 2009-August 31, 2009. According to the Employee Services Section notes on the second recruitment notice, the recruitment was extended by Shannon Conger for 3 additional days starting on September 1, 2009 through September 4, 2009.

application packet to Ms. Faber's attention in Anchorage, not to Personnel. Ms. Faber denied telling the complainant to send her application packet directly to Personnel in Juneau.

On August 21, 2009, the complainant faxed her hard copy applicant profile to Personnel. According to Personnel's disposition comments for the second recruitment posting, Personnel employee Sandy Tagaban entered the complainant's application information onto Workplace Alaska on August 24, 2009. On September 1, 2009, Personnel employee Shannon Conger reviewed the complainant's second application and determined that it met minimum qualifications, requiring DOT to offer the complainant an interview.

Review of Recruitment Files and Applicant Ranking

The ombudsman investigator asked Personnel to provide copies of the recruitment files for the Office Assistant position, including all documentation showing the scoring or ranking of the candidates from both sets of interviews conducted in August 2009 and September 2009. On December 30, 2009, Sherilyn Knight provided the investigator with a chronology of events, copies of e-mail communications between Personnel and DOT staff and the complainant, the two recruitment notices for July 2009 and August 2009, Job Response/Disposition comments, and the complainant's applicant profile entered into Workplace Alaska by Sandy Tagaban on August 24, 2009.

On March 2, 2010, Ms. Knight provided the investigator with copies of additional documents, which included the interview questions from the first round of interviews conducted by DOT staff in August 2009, and the interview committee members' handwritten notes to each candidate's responses. Also included were the applicant's responses to interview exercises conducted during the August 2009 interviews, application materials from both recruitments, including the complainant's hard copy applicant profile dated July 13, 2009 and Applicant B's application Job Qualification Summary submitted to Personnel on July 17, 2009.

On April 20, 2010, Personnel Deputy Director Katherine Sheehan provided the investigator with the interview questions and responses for the second round interviews, as well as each candidate's ranking following the second round. In response to an additional request by the investigator for the scoring or ranking documentation from the first round interviews, Ms. Sheehan responded in her April 20 e-mail that she had "been informed that there are no test scores for the first round of interviews since that recruitment was thrown out." When the investigator asked Ms. Sheehan to further explain this statement, Ms. Sheehan clarified in a May 6 e-mail:

Nothing has been thrown away, rather the information gathered up to that point was not being considered any longer. The interview process was not completed as it was found that they were handling that recruitment incorrectly and the process was then stopped in order to start over. You stated that you have the interview questions for the first round candidates. This is the documentation as to the first round of interviews . . .

Because the scoring information was unavailable, the ombudsman investigator was unable to determine or compare how the complainant and Applicant B were scored during their first interview round, as opposed to the second. However, it is clear that following the complainant's first interview round, the first DOT hiring committee (Norman Heyano, Karleen Laufenburger) concluded that the complainant was the best qualified person for this position, despite Mr. Heyano's later testimony to the investigator that he does not recall the results of the interviews.

According to Ms. Faber, Mr. Heyano or Ms. Laufenburger told her the complainant was the person they wanted to hire. Thus, Ms. Faber forwarded her hiring paperwork for the position on or about August 20, 2009. Because Ms. Faber did not offer Applicant B the position in August 2009, they presumably did not score as high as the complainant following the first interview.

The second DOT hiring committee consisted of Wanda Faber, Troy Larue, and Frances Nelsen. On September 23, 2009, the second hiring committee interviewed seven candidates, including the complainant and Applicant B. Applicant B received the highest score of all candidates following the second interview.

Ms. Faber requested Personnel approval to hire Applicant B on September 29, 2009. Personnel approved Applicant B's hire on October 1, 2009.

The Complainant's Prior Position

Ms. Faber's offer of employment to the complainant on August 20, 2009 was contingent on approval by Personnel, which Ms. Faber failed to obtain prior to extending an offer to the complainant for the Office Assistant position. Based on the job offer, the complainant asserts she gave notice to her then current employer. However, according to the Unemployment Insurance hearing officer's decision discussed below, the complainant continued to work at her prior position until October 15, 2009.

When questioned about her ability to continue working at her prior employer after already having notified her employer of her acceptance of DOT's job offer, the complainant responded that her replacement could not start the position until mid-October and so her employer allowed her to continue working at the position until that time.

According to the UI hearing officer's December 31, 2009 decision on the complainant's UI appeal, the complainant began working for her prior employer on July 13, 2009. At that time, she normally worked 20 hours per week and earned \$19.63 per hour, or gross wages of approximately \$392.60 per week. She last worked at her prior employer on October 15, 2009 according to the UI Hearing Officer's decision.

During the investigator's contacts with the complainant, she stated that her position with her prior employer was a permanent, part-time position. However, upon further questioning the complainant admitted that she was in a temporary hire status at the time.

STANDARDS: ALASKA ADMINISTRATIVE CODE, WORKPLACE ALASKA POLICY

2 AAC 07.113. Records; maintenance of documents

The applications, examination papers, and records of ratings of applicants are official records and must be maintained by the appointing authority for not less than two years after an appointment has been made.

Hiring Manager Training

The investigator reviewed information posted on the Personnel's website for the Workplace Alaska for Hiring Managers - WPAK on-line course. According to the website information, the on-line course takes approximately 180 minutes to complete on-line and is a self-learning course as described below:

A Self-Learning Course

You will receive a Self-Learning Guide to learn the basic knowledge and essential information needed to comply with legally defensible hiring practices. The Self-Learning Guide also contains a Job Aid to guide you in learning to use the Workplace Alaska on-line recruitment system.

Note: This course is no longer offered for classroom delivery.

Upon successful completion of this self-learning course you will have authorization to request a Workplace Alaska Hiring Manager User ID and Password.

On May 6, 2010, the investigator requested Ms. Sheehan provide either direct on-line access to the training currently being offered to hiring managers or a hard-copy print out version for the investigator's review. On June 22, 2010, Ms. Sheehan provided the investigator with a hard-copy print of the Workplace Alaska training course for hiring managers.

The stated objectives include:

- Knowledge of statewide policies and procedures associated with the use of the Workplace Alaska on-line system
- Knowledge of basic legally defensible hiring principles and practices
- Knowledge of the roles and responsibilities of the hiring manager, the Division of Personnel & Labor Relations and the applicant in the recruitment and hiring process
- Learn to use the Workplace Alaska Hiring Manager Job Aid to guide you through the on-line recruitment and hiring process.⁵
-

ANALYSIS AND PROPOSED FINDINGS

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable; unfair; oppressive; arbitrary; capricious; an abuse of discretion; or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact, based on improper or irrelevant grounds, unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. "The ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is justified and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

⁵ http://doa.alaska.gov/dop/fileadmin/Statewide_Planning_Research/pdf/FY06Issue1Attachment1.pdf

The standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

* * *

Allegation 1: The Department of Transportation unreasonably allowed a hiring manager to extend an offer of employment to the complainant, and later rescinded the offer after the complainant left another job in reliance on the offer.

The complainant alleges that DOT acted unreasonably when it allowed Wanda Faber to offer her a position, but later rescinded the offer after she notified her former employer she had accepted DOT's job offer. The Office of the Ombudsman Policies and Procedures manual defines "Unreasonable" at 4040(2).

"Unreasonable" means:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program,
- (B) the agency adopted and followed a procedure that defeated the complainant's valid application for a right or program benefit, or
- (C) the agency's act was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

Offer of Employment by DOT

According to the complainant, on August 20, 2009 following her interview with the first DOT hiring committee, Ms. Faber called her at her home and told her "she got the job." The complainant said she accepted the offer during this conversation with Ms. Faber. In contrast, Ms. Faber told the investigator she did not offer the complainant the job and actually cautioned her that Personnel had to approve any hire; she did not have the authority to offer her a position. On August 20, 2009 at 3:39 pm, Ms. Faber sent an e-mail to the complainant with hiring paperwork attached including Applicant Certification, Notice of Drug Free Workplace Act of 1988, Employment Eligibility Verification Form I-9, State of Alaska Prior Service, Statewide Policy Acknowledgement, and Employee Affidavit.

Ms. Faber stated in this e-mail, "Thank you and I will look for the forms tomorrow. Wanda"

The complainant responded on August 21, 2009:

Hi Wanda. Thank you for sending these forms, I have completed them faxed them to you as you instructed. I appreciate speaking with you today and assuring me that I've got the job, and that I can give notice at my place of work. I feel good knowing that you're working on getting me hired and I look forward to working with you in my new role as Office Assistant II at D.O.T. Thanks again and have a nice weekend, [signed by the complainant] PCN 25-1156.

The complainant told the investigator that during her August 20, 2009 telephone conversation with Ms. Faber, she asked about her start date. According to the complainant, Ms. Faber responded she did not know and would have to ask Foreman Norman Heyano about it. The complainant stated that she called Mr. Heyano sometime after her conversation with Wanda on August 20, 2009. According to the complainant, during the telephone conversation with Mr.

Heyano, he informed her that there was a problem with her hire and that she needed to talk to Ms. Faber. She did so, and was informed by Ms. Faber that she had not applied properly and that Personnel was requiring that the job be re-posted and that she reapply. Mr. Heyano does not recall having any conversation with the complainant on this date or discussing this with her at anytime.

The ombudsman was extremely troubled by both Ms. Faber's and Mr. Heyano's complete lack of memory concerning the events that took place and found their responses to most of the questions posed by the ombudsman to be disingenuous at best.

Finding for Allegation 1

It was unreasonable for Ms. Faber to offer the complainant a position when she had not received approval by Personnel to do so. Because of Ms. Faber's actions, the complainant notified her employer she would be leaving the position in order to take a job with DOT. Ms. Faber's actions were inconsistent with hiring policy and thereby failed to achieve the purposes of the program. Consequently, the ombudsman found the allegation *justified*.

Agency Response to Allegation 1 Finding

DOT Response: DOT conceded that Ms. Faber did send the complainant hire paperwork and did not follow the recruitment rules. "There is a definite perception or expectation of hire when an applicant is requested to fill out hiring forms." *DOT May 9, 2011 Response to Preliminary Report.*

DOP Response: DOP did not respond to the findings of allegation 1 as they were directed to DOT.

DOT did not dispute the ombudsman's proposed finding in Allegation 1; therefore this allegation will be closed as *justified*.

* * *

Allegation 2: Unsupported by an adequate statement of reasons: DOT staff failed to provide the complainant with a clear explanation on the reasons DOT rescinded an employment offer, and failed to acknowledge DOT's errors in the hiring process.

The complainant alleges that Wanda Faber and Troy Larue failed to adequately explain to her why she was not hired for the position following the second round of interviews.

The Office of the Ombudsman Policies and Procedures manual defines "Unsupported by an Adequate Statement of Reasons" at 4040(13).

"Unsupported by an adequate statement of reasons" means:

- (A) the agency did not address or explain the complainant's concerns directly and completely in the decision;
- (B) the agency did not plainly state the rule of law on which its decision was based;
- (C) the agency's factual assertions and legal conclusions lacked sufficient support;

- (D) the agency provided reasons for its decision that were not comprehensible; or
- (E) the agency did not provide documentation appropriate to the decision.

On October 1, 2009, Ms. Faber e-mailed the complainant notifying her that she had not been selected for the position.

The complainant e-mailed Ms. Faber on October 9, 2009, "Can you please tell me what happened Wanda?" Ms. Faber forwarded the complainant's e-mail to Troy Larue on October 9, 2009, requesting his assistance with a response, "Troy, can you help me with a response to her? **She is the one who made the mess...**" (Emphasis added). Ms. Faber replied to the complainant on October 12, 2009, "Please call Troy LaRue on Monday, October 12, and he will be glad to explain any of your questions. Thank you. Wanda His phone # is 269-0751."

On October 14, 2009, the complainant e-mailed Mr. Larue:

At the conclusion of my interview on 8/19/09, Wanda called me at home on 8/20/09 and told me I got the job. I accepted. She said that her and Shannon would process my hire paperwork; she sent me employment forms . . . I subsequently resigned from my job; ready to go to work at D.O.T.

Now I'm told someone else has been selected—I'm not sure what happened Troy—can you tell me what happened? Please explain in writing. Thank you.

Mr. Larue responded in an e-mail on October 15, 2009:

I don't know the particulars about the conversation that you and Wanda had however; each hiring process must be conducted per our Department P&P. After the first round of interviews our Human Resources Department found some flaws in the process. Once this happened we had no choice but to re-post the position and ask each person to re-apply if they were still interested in the position.

I lead [sic] the second round of interviews myself with a new interview team. Once the interviews were conducted and we considered each person's strengths the team made a selection. I'm sorry that you did not receive the position and for the confusion.

Ms. Faber's October 9 e-mail to Mr. Larue clearly implies that the complainant alone was to blame for not getting hired for the position and asks for Mr. Larue's assistance in responding to her request for an explanation why she was not hired after the second interviews. This statement by Ms. Faber conveniently overlooks her own procedural errors in her mishandling of the complainant's application from the outset and subsequent unauthorized offer of employment to the complainant before receiving Personnel approval. Further, Mr. Larue's e-mail explanation to the complainant fails to acknowledge the errors Wanda Faber made in the hiring process. While Mr. Larue apologized to the complainant that she was not ultimately hired and "for the confusion," his apology falls far short of owning Ms. Faber's mishandling of this situation.

Finding for Allegation 2

Both Ms. Faber and Mr. Larue failed to provide the complainant with a clear explanation why she was not selected for the position following the second interview round and failed to acknowledge Ms. Faber's errors in offering the complainant a job at DOT without Personnel approval. While Mr. Larue apologized to the complainant for not being hired after the second interviews, his apology failed to address or explain the complainant's concerns directly and

completely in response to her question “what happened.” Consequently, the ombudsman found the allegation justified.

Agency Response to Allegation 2 Finding

DOT Response: Although DOT did not dispute the findings of allegation 2, Mr. Campbell responded that “Mr. Larue did state that the hiring process was not conducted according to the Department’s Policies and Procedures. He did not point a finger at a single employee, but accepted the responsibility on the behalf of the Department. At the time, the only information that he was working from was Ms. Faber’s claim that she had not offered [the complainant] a job and the knowledge that hiring procedures were not met. Mr. Larue also informed [the complainant] that, during the second process, she was not hired based on an assessment of strengths by the hiring committee.”

DOP Response: DOP did not respond to the findings of allegation 2 as they were directed to DOT.

Ombudsman Response and Finding

Mr. Larue was assigned to respond to the complainant’s questions about what happened. His answer was insufficient. DOT stated that he did not point a finger but accepted responsibility on behalf of the department. The complainant was entitled to a clear answer to her question. Mr. Larue did not give her one. The ombudsman is not persuaded to alter this finding and this allegation will be closed as justified.

* * *

Allegation 3: The Division of Personnel’s on-line application instructions are unreasonably confusing to prospective applicants, and fail to achieve the purposes of the application process.

The Office of the Ombudsman Policies and Procedures manual defines “Unreasonable” at 4040(2). An agency’s actions can be unreasonable where:

(B) the agency adopted and followed a procedure that defeated the complainant’s valid application for a right or program benefit. . .

Both the July 10, 2009 recruitment notice and the August 21, 2009 re-posting stated at the bottom of the notice:

AT THE TIME OF APPLICATION, please provide:

- A current resumé, in addition to your applicant profile,
- Letters of reference from past work experience,
- A writing sample, and
- A sample business letter.

These items may be submitted to the contact person below.

The contact person listed on both postings was Wanda Faber. The postings provided her e-mail address, mailing address at the DOT Southwest District office, and fax number. Personnel approved the recruitment notices posted on Workplace Alaska.

Applicants also have the option of submitting a hard copy application for vacancies listed on Workplace Alaska. Applicants submitting hard copy applications must submit a copy of their Applicant Profile for each position applied for, as well as a hard copy Job Qualification Summary. According to information posted on Workplace Alaska's website, both forms must be submitted to the Division of Personnel by 5 p.m. on the closing date of recruitment. The applications can be mailed to the Division of Personnel or faxed.

According to Workplace Alaska's application instructions, applicants are discouraged from submitting hard copy applications directly to the hiring manager. According to the Frequently Asked Questions section located on Workplace Alaska's Website, applications must be received on-line through Workplace Alaska or in hard copy by the Division of Personnel by 5 p.m. on the closing date of recruitment. Hiring managers are not responsible for submitting hard copy applications to the Division of Personnel.⁶ The Applicant Profile and Job Qualification Summary that make up the application package are sent to the Hiring Manager on-line. The Hiring Manager then reviews the applications of those persons meeting the minimum qualifications for the position and contacts prospective applicants for an interview.

However, while the hard-copy applicant profile the complainant sent to Ms. Faber in July 2009 clearly stated directly below her signature to send it to Personnel in Juneau, both the July and August 2009 recruitment notices provided contradictory instructions in part, by stating the application materials may be submitted to the contact person listed on the recruitment. Neither recruitment notice provided clear instructions to hard-copy applicants. The complainant said she was confused by the instructions on the recruitment notices. She said she contacted Ms. Faber on July 18, 2009 prior to closure of the first recruitment, and Ms. Faber instructed her to send the materials to her directly, not Personnel. Ms. Faber did not instruct her to send her hard-copy application packet to Personnel in Juneau.

As a result, the complainant was required to reapply for the position because, according to Personnel's procedures, she applied incorrectly. Had the instructions on the recruitment notices stated clearly that hard copy applications must be submitted to Personnel for consideration and not to the contact person, the complainant would likely have followed these instructions and sent her materials directly to Personnel. The complainant met the minimum qualifications for the position and DOT would have been required to offer her an interview for the position. Had her hard-copy application been properly submitted to Personnel for consideration in July 2009, the complainant's selection by the DOT hiring team would have been approved by Personnel.

Finding for Allegation 3

The complainant followed the instructions posted on the July 2009 recruitment notice, which clearly stated that the application materials may be submitted to the contact person listed in the notice, Wanda Faber. Because she followed these instructions and did not send her application packet directly to Personnel, Personnel rejected her original application. The ombudsman agrees with the complainant that the instructions on the recruitment notices and hard-copy applicant

⁶ <http://notes4.state.ak.us/wa/mainentry.nsf/WebData/HTMLHow%20to%20Apply/?Open>

profile are contradictory and confusing to prospective applicants. Personnel approved the recruitment notice before posting it on Workplace Alaska, and therefore approved use of these conflicting instructions for people submitting hard-copy applications. Accordingly, Personnel unreasonably adopted and followed a procedure that defeated the complainant's valid application for employment. Therefore, the ombudsman found the allegation justified.

Agency Response to Allegation 3 Findings

DOT Response: DOT did not dispute this finding and responded that "DOA is responsible for parameters that are required in the use of Workplace Alaska. DOT will work with DOA personnel to better ensure that submittals to them for placement on Workplace Alaska are not unreasonably confusing."

DOP Response: Ms. Sheehan responded to the findings of Allegation 3 as follows,

Allegation number 3 was found to be justified and the recommendation was that 'Personnel should review and revise all future recruitment notices to clarify the appropriate process a prospective applicant should follow when applying for a position by U.S. mail.' I believe part of the issue with the recruitment posting that [the complainant] responded to was that it stated that at the time of application, certain documents needed to be provided including a current resume in addition to the applicant profile.

Hiring managers are strongly encouraged not to ask for additional information at the time of application. It is only necessary if the applicant is granted an interview. If you examine current job postings on the Workplace Alaska website, you will see that under "Additional Information Required," most postings state that the information to be provided to the contact person is not required until the time of the interview. This should alleviate any potential confusion. You will also observe that there is a separate section titled "To Apply by Hardcopy," which is in bold print. Although I believe the process is clear if the applicant reads the entire document, we certainly don't want to create any confusion and strive to make the application process as smooth and efficient as possible. Therefore, we will be adding an additional sentence near the contact person's information that clearly explains that if the applicant is applying by hard copy, they must follow the directions below which will point them to the directions for sending the application to the Division of Personnel and Labor Relations.

Ombudsman comments: DOT recently recruited for the Office Assistant 2 position between May 3, 2011-May 15, 2011 this time changing the language of the recruitment notice to clarify that additional required information (i.e. resume, writing sample, a sample business letter, references, and transcripts) be provided by a candidate "If selected for an interview," as opposed to "at the time of application." Also, it is noted the recent recruitment notice for this position provides precise instructions on how to apply by hard copy. Likewise, several other recent

recruitment notices reviewed by the investigator have clarifying instructions for hard copy applicants.

The finding will stand as justified.

* * *

Allegation 4: Contrary to law: DOT staff failed to rank and score applicants for a position prior to extending a job offer as required by 2 AAC 07.106.

The Office of the Ombudsman Policies and Procedures manual defines “Contrary to Law” at 4040(1). An agency’s actions can be contrary to law where the agency fails to comply with statutory or regulatory requirements, or misinterprets or misapplies a statute, regulation, or comparable requirement.

2 AAC 07.106 requires that:

(a) The appointing authority shall use reasonable techniques and procedures as circumstances permit to determine the relative ranking of qualified applicants. An applicant may be required to pass each part of the assessment in order to be considered for appointment. Any preference for certain veterans, disabled veterans, former prisoners of war, or active members of the Alaska National Guard, as provided in AS 39.25.159 , must be included in the selection process.

Mr. Heyano told the investigator that he does not remember if he scored or ranked the applicants after the first interviews. Likewise, Ms. Faber said she does not recall seeing any scoring or ranking information in the interview materials Mr. Heyano forwarded to her. The ombudsman investigator also did not find any scoring or ranking information in any of the materials provided to her by DOT and Personnel.

The ombudsman investigator concluded based on this information that either DOT failed to score the applicants prior to offering the complainant the position in August 2009 as required by 2 AAC 07.106, or DOT did not comply with the requirements of 2 AAC 07.113 requiring retention of scoring/ranking documentation from the first recruitment.

Proposed Finding for Allegation 4

Following the first round of interviews, the evidence suggests Ms. Faber offered the complainant the position. Presumably, Ms. Faber’s offer, irrespective of the fact that it lacked Personnel approval, was based on some ranking of the complainant above the other candidates. If not, then Ms. Faber, Mr. Heyano, and Ms. Laufenburger failed to comply with the requirements of 2 AAC 07.106 by extending a job offer without first scoring or ranking the applicants. Alternatively, if DOT staff complied with the scoring/ranking requirements, this documentation has apparently disappeared which is a separate violation of the law under 2 AAC 07.113 as further discussed under allegation 5. Accordingly, the ombudsman finds the allegation justified against DOT because they are unable to produce any evidence that they ranked or scored the applicants as required by law.

Agency Response to Allegation 4 Findings

DOT Response: Mr. Campbell responded as follows,

It is hard to make a determination on this allegation without the supporting documentation of the initial hiring process. Steps have been put in place to ensure that this will not happen again.

DOP Response: DOP did not respond to the findings of allegation 4 as they were directed to DOT.

Because DOT did not dispute the findings, this allegation will be closed as justified.

* * *

Allegation 5: Contrary to law: DOT staff failed to retain recruitment documentation as required by 2 AAC 07.113.

2 AAC 07.113 requires that recruitment documentation must be maintained for not less than two years. The regulation reads as follows:

The applications, examination papers, and records of ratings of applicants are official records and must be maintained by the appointing authority for not less than two years after an appointment has been made.

Hiring managers are required to have written documentation of the entire recruitment and selection process in their recruitment file, which includes ranking and scoring, reference questions and other tools used during the recruitment and selection process.⁷

On April 20, 2010, Personnel Deputy Director Katherine Sheehan provided the investigator with the interview questions and responses for the second round interviews, as well as each candidate's ranking following the second round. In response to an additional request by the investigator for the scoring or ranking documentation from the first round interviews, Ms. Sheehan responded in her April 20 e-mail that she had "been informed that there are no test scores for the first round of interviews since that recruitment was thrown out." When the investigator asked Ms. Sheehan to further explain this statement, Ms. Sheehan clarified in a May 6 e-mail:

Nothing has been thrown away, rather the information gathered up to that point was not being considered any longer. The interview process was not completed as it was found that they were handling that recruitment incorrectly and the process was then stopped in order to start over. You stated that you have the interview questions for the first round candidates. This is the documentation as to the first round of interviews . . .

Ms. Faber said that she did not participate in the first interview. She told the investigator that Norman Heyano and Karleen Laufenburger conducted the first interviews. She said she does not know what happened to the documentation from the first interview, although she acknowledges that Norman sent her "something." She does not remember what she did with this information but thinks it went to Personnel in Juneau.

When the investigator questioned Mr. Heyano about this issue, he responded as follows: "I don't remember." He does not remember where the documentation would have gone, but when probed

⁷ See also, Workplace Alaska Guidelines, Updated: 3/19/2010.

further by the investigator, responded it probably went to Ms. Faber in Anchorage. He does not remember what was sent to Ms. Faber and does not recall scoring or ranking the applicants.

Finding for Allegation 5

If DOT staff complied with the scoring/ranking requirements prior to offering the complainant the position, this documentation has apparently disappeared. However, it is unclear what precisely happened to this information, as no one from DOT seems to recall. The ombudsman finds this mass amnesia to be simply unbelievable and profoundly disturbing. The only documentation retained from the first interviews failed to include any scoring/ranking information and was limited to the candidate's responses to the interview questions and results from test exercises. Accordingly, the ombudsman finds the allegation that DOT failed to retain the scoring or ranking of candidates as required by law justified.

Agency Response to Allegation 5 Findings

DOT Response: Mr. Campbell responded as follows,

Allegations 4 and 5 are the most disappointing parts of this report. There is no justification for a hiring committee to lose documentation. This too has now been addressed by training.

DOP Response: DOP did not respond to the findings of allegation 5 as they were directed to DOT.

Ombudsman response

The ombudsman appreciates Mr. Campbell's acknowledgement that "there is no justification for a hiring committee to lose documentation." We agree. There isn't. Because DOT did not dispute the findings, this allegation will be closed as justified.

RECOMMENDATIONS

When the ombudsman finds actions by a state agency to be unfair or otherwise unreasonable, it is appropriate for the ombudsman to make recommendations or suggestions on ways to help correct them or prevent reoccurrences in the future. As a result of this investigation, the ombudsman proposed four recommendations to the agencies:

Recommendation 1: Agency Comment and Ombudsman Response

Recommendation 1: DOT should provide the complainant with a written apology for DOT's mishandling of the complainant's employment application and subsequent job offer without Personnel approval. The letter should clearly acknowledge the errors committed by staff during the recruitment and hiring process.

The ombudsman recommends that DOT write an apology letter to the complainant apologizing for staff's failure to follow the correct hiring policies and procedures prior to extending an offer of employment to the complainant. The ombudsman often encourages state agencies to apologize for their actions.

While Mr. Larue wrote in an e-mail communication to the complainant, "sorry for the confusion" this apology falls far short of addressing the harm suffered by the complainant. Nor does it acknowledge staff's mishandling of her employment application and offer of employment prior to obtaining Personnel's approval.

There are several resources available both on-line and in print on how to write an effective apology letter. The ombudsman recommends that DOT utilize these sources as reference tools in writing a letter to the complainant.

One excellent resource, the book, "*On Apology*" by Aaron Lazare, Oxford University Press 2004, suggests that effective apologies usually contain four elements. An apology:

- Should be sincere in accepting responsibility for the act and the distress it caused the offended party;
- Should show sincere regret and discuss what will change to prevent a recurrence;
- Should explain why the event happened;
- Should make reparations or at least acknowledge that nothing can "unring the bell."

The New South Wales, Australia Ombudsman office also developed a guideline for apologies which includes a six point list of components that should be included in an apology:

Depending on the circumstances, the chances that an apology will be effective are greatly increased if they address the six Rs.

- **Recognition** — including a description and recognition of the wrong and an acknowledgement of the harm caused.
- **Responsibility** — an acceptance of responsibility.
- **Reasons** — an explanation of the cause.
- **Regret** — an expression of sincere sympathy, sorrow, regret, remorse and/or contrition.
- **Redress** — an indication of the action taken, proposed or offered to address the problem and a promise that it will not reoccur.
- **Release** — a request for forgiveness (optional, but important).⁸

Lazare's elements of a proper apology are expounded upon in an article posted on the Website perfectapology.com

By giving a **detailed account of the offence**, you are making sure that both you and the other person are talking about the same thing. It also legitimizes the feelings of the recipient by

⁸http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Apologies%20Guidelines%202nd%20edition%20March%202009_.pdf

having the person who caused the offence recount the situation. An apology should be as specific as possible and focused on the particular event(s).

Next, by **acknowledging** the hurt or damage done, you are validating their feelings and the recipient begins to sense that you understand the situation. This is important to rebuilding your relationship because it legitimizes their reaction, even if others in the same situation may have reacted differently.

Taking **responsibility** and recognizing your role in the situation without offering excuses is important to letting them know that you understand that the event and your actions did cause them harm.

Don't try to defend yourself or justify the situation or your actions. The apology is all about THEM and how they feel. It doesn't matter if the actions were intentional or not, the end result is the same and that is what needs to be focused on when learning how to say I'm sorry.

Including a **statement of regret** such as I "apologize" or "I'm sorry" along with a promise that it won't happen again are important to rebuilding the relationship and are key ingredients to any apology. After all, there is no value in apologizing for something that you will do again and again.⁹

DOT Response: The agency accepted this recommendation and indicated it would issue an apology letter to the complainant.

Ombudsman comments: At the conclusion of an investigation, the ombudsman often requests a state agency report back to her on its progress in implementing any recommendations she has made and the agency has accepted. After multiple contacts by the ombudsman, DOT ultimately issued an apology letter to the complainant on October 11, 2011, five months after the agency had accepted the ombudsman's recommendation to do so.

Recommendation 2: Agency Comment and Ombudsman Response

Recommendation 2: DOT should consider paying the complainant a reasonable sum of money to compensate her for her financial loss.

DOT's offer of employment to the complainant on August 20, 2009 was contingent on approval by Personnel, which staff failed to obtain prior to extending an offer to the complainant for the Office Assistant position. Based on the job offer, the complainant asserts she gave notice to her prior employer. However, according to the UI hearing officer's decision the complainant continued to work at her prior employer until October 15, 2009.

According to the UI hearing officer's December 31, 2009 decision on the complainant's UI appeal, the complainant began working for her prior employer on July 13, 2009. At that time, she normally worked 20 hours per week and earned \$19.63 per hour, or gross wages of approximately \$392.60 per week. She last worked at her prior employer on October 15, 2009 according to the Hearing Officer's decision.

⁹ www.perfectapology.com (May 6, 2010).

During the investigator's contacts with the complainant, she stated that her position with her prior employer was a permanent, part-time position. However, upon further questioning the complainant admitted that she was in a temporary hire status at the time.

In general, candidates who are on the receiving end of a rescinded offer do not have much in terms of legal recourse. Most employment is generally "at-will," meaning either the employer or the employee can terminate the employment relationship at any time and for any reason, as long as the reasons given do not violate another law. Consequently, candidates often have a difficult time enforcing a job offer or recovering damages for a rescinded offer when there is no duty on the part of the employer to keep the individual employed. Candidates are not employees until they go to work. Candidates generally do not have a right to a position that has been offered to them.

However, there *are* some circumstances where a candidate may have legal recourse if an employer rescinds a job offer. The candidate may be able to pursue a claim against the employer under one of the following legal theories:

- Promissory estoppel
- Fraudulent misrepresentation
- Breach of contract
- Discrimination

Under Alaska law "[a] person who is employed 'at the pleasure' of his employer has no 'property' interest in continued employment that is protected by due process." Canfield v. Sullivan, 774 F.2d 1466, 1467 (9th Cir. 1985), quoting Breeden v. City of Nome, 628 P.2d 924, 926 (Alaska 1981). Even though Alaska is an employment-at-will state, an employer still must act in good faith and fair dealing with a prospective employee. This means that an employer must make no misrepresentations, that the employment relationship is entered into in good faith and that the employer will treat the employee fairly.

The Alaska Supreme Court has not yet addressed a situation where a prospective employee has been offered a position, has accepted the position, but the employer rescinds the job offer prior to the first day of work. However, other courts have. In a New Jersey decision Peck v. Imedia, Inc., 679 A.2d 745 (App. Div.) cert. denied, 147 N.J. 262 (1996), a New Jersey court held that a prospective employee that accepted a job offer was entitled to pursue a claim for damages suffered in reliance on a job offer that was later rescinded by the employer. The court in this case applied the detrimental reliance theory: (1) a promise of employment was "clear and definite"; (2) it was made with the expectation that the promisee would rely on it; (3) the promisee relied on the promise of employment; and (4) the promisee is injured as a result.

According to the Peck decision, where an employer hires a prospective employee and then rescinds that offer after the prospective employee has taken steps in reliance upon that offer, the employer may be legally responsible to pay damages to the employee. As to the type of damages that are permitted, the Court explained that the prospective employee was entitled to recoup any "losses incident to the reliance upon the job offer itself, even though the employer can terminate the relationship at any time." The Court attempted to draw a distinction between the benefits that would have accrued from the new position as compared to the losses suffered in giving up a prior job and/or moving. Thus, the prospective employee was not entitled to seek damages for the

salary she would have received, but she was entitled to pursue a claim for other damages, such as giving up another position and incurred moving expenses.

The ombudsman investigation determined that DOT staff made an offer of employment to the complainant without Personnel approval and that in reliance on this job offer, the complainant quit her part-time employment. Because her replacement at her prior employer was unable to start the job until mid-October, the complainant was able to work until then but she still ended up on unemployment insurance benefits until April 2010. Because of this, the ombudsman recommends that DOT consider paying the complainant a reasonable sum to compensate her for the wages she lost by quitting her part-time position and suggests that DOT consult with the Attorney General's office and Risk Management for further guidance on this issue.

DOT Response: The agency accepted this recommendation, indicating that it would consider potential financial losses to the complainant and would utilize resources at its disposal to consider what/if compensation for financial loss might be due the complainant.

Ombudsman comments: After repeated requests by ombudsman staff for evidence the agency had implemented this recommendation as it had previously committed it would, DOT ultimately disagreed with ombudsman Recommendation 2 after consultation with the Department of Law and determined it was inappropriate to spend public funds by making a payment to the complainant to compensate her for her financial loss. In an email response from Troy Larue to the Ombudsman on October 12, 2011, Mr. Larue wrote:

After careful review and consultation with the Department of Law, DOT has decided that it would not be appropriate, under the circumstances, to spend public funds by making a payment to the complainant.

* * *

Recommendation 3: Agency Comment and Ombudsman Response

Recommendation 3 was redacted in accordance with Alaska confidentiality statutes.

DOT Response: DOT accepted this recommendation.

Recommendation 4: Agency Comment and Ombudsman Response

Recommendation 4: Personnel should review and revise all future recruitment notices to clarify the appropriate process a prospective applicant should follow when applying for a position by U.S. mail.

Both the July and August 2009 recruitment notices stated that:

AT THE TIME OF APPLICATION, please provide:

- A current resumé, in addition to your applicant profile,
- Letters of reference from past work experience,
- A writing sample, and
- A sample business letter.

These items may be submitted to the contact person below.

The contact person listed on both postings was Wanda Faber, providing her e-mail address, mailing address at the DOT Southwest District office, and fax number. Ms. Faber testified that she drafted the recruitment notice on Workplace Alaska, and sent it to Shannon Conger for approval. Ms. Faber also testified that the above-language was entered into the recruitment notice by Personnel staff to her knowledge, and that she was not responsible for including this language in the notices. Mr. Larue testified that because of Ms. Faber's workload demands, sometimes Ms. Conger will assist Ms. Faber with the language included in recruitment notices.

Personnel approved both notices by posting them on Workplace Alaska. While the hard-copy applicant profile the complainant sent to Ms. Faber in July 2009 clearly stated that it should be sent to the Personnel in Juneau, both the July and August 2009 recruitment notices provided contradictory instructions in part by stating the application materials may be submitted to the contact person listed on the recruitment. She sent her application packet to Ms. Faber in Anchorage based on the recruitment notice instructions. She was not instructed by Ms. Faber to send her application packet to Juneau for processing.

The ombudsman recommends that Personnel ensure that all future recruitment notices clarify the specific instructions for persons submitting applications by mail to prevent confusion due to contradictory instructions.

DOT Response: DOT accepted this recommendation and indicated that steps have been put in place to ensure that this will not happen again.

DOP Response: DOP accepted this recommendation indicating that future recruitment notices will contain an additional sentence near the contact person's information that clearly explains that if the applicant is applying by hard copy, they must follow the directions directing them to send the application to the Division of Personnel and Labor Relations.

CONCLUSION

Finding of Record on Allegations Against DOT

The ombudsman closed this investigation against DOT as a *justified* complaint. The agency accepted all ombudsman recommendations and has initiated corrective actions to prevent similar problems from recurring. Therefore, this complaint against DOT is deemed *partially rectified*.

Finding of Record on Allegation Against DOP

The ombudsman closed this investigation against DOP as a *justified* complaint. Because DOP recognized that the lack of clear instructions on recruitment notices for applicant's applying by hard-copy was of concern and has taken steps to prevent similar problems from recurring, the complaint against DOP is deemed *rectified*.

It is the ombudsman's practice to contact agencies several months after the agency commits to a course of action to determine how the ombudsman's recommendations have been enacted. The

ombudsman routinely reports to the Legislature on how agencies have implemented recommendations.

REDACTED PUBLIC REPORT