

March 12, 1991

Mr. Martin J. Nusbaum
Administrative Officer
Alaska Marine Highway System
P.O. Box R
Juneau, Alaska 99811-2505

Ref: AMHS Vessel Employees Cost-of-Living
Differential
AG #663-92-0169

Dear Mr. Nusbaum:

This letter is in response to your request to Mr. Jeffrey Cole for suggestions concerning vessel employee certification forms used by the AMHS to determine payment of the cost-of-living differential. From discussions with Assistant Ombudsman David Haas, I understand that the state may be losing as much as \$300,000 annually in cost-of-living differentials paid out based on false claims of residency. Accordingly, you and Mr. Haas would like to know how to "tighten" the cost-of-living-differential forms so that false claims of residency could be criminally prosecuted.

I reviewed the materials you sent to Mr. Cole setting forth the history of the cost of living differential and the forms used to apply for it. I also reviewed Alaskan statutes implicated by these forms and by the misconduct you wish to address. Lastly, I reviewed hunting and fishing license/permit application forms used by the Fish and Wildlife Protection Division of the Department of Public Safety upon which prosecutions for false claims of residency have been based. I further discussed such prosecutions with Alaska State Trooper Joe Campbell -- an experienced Fish and Wildlife Protection officer. I hope a discussion of the law followed by specific recommendations for the cost of living differential application forms will assist you.

I am unaware of any statutes specific to the AMHS which might address false residency claims in an application. The

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Department of Fish and Game does have such statutes. AS
16.05.420(b) provides:

A person who knowingly makes a false statement, or knowingly omits a material fact, in an application for a license, tag, or permit issued under AS 16.05.330 - 16.05.430 is guilty of unsworn falsification under AS 11.56.210.

The history of the amendment that made a false statement the crime of unsworn falsification in the above statute is worth noting for purposes of our discussion. The previous AS 16.05.420 made no mention of the crime of unsworn falsification. Instead, when read with AS 16.05.360, it set out a separate misdemeanor offense. But AS 16.05.360 required that the false statement must have been given under oath.

The first time Fish and Game attempted to prosecute an individual for lying about her residency in an application for a sport fishing permit, the case was dismissed by the judge because the application form did not state that the applicant swore or that the person issuing the license was certified as an officer authorized to administer oaths. It was decided that simply revising the form to provide for this was impractical -- license vendors do not normally give oaths. So the statute was amended to make a false statement on a license or permit application the crime of unsworn falsification under AS 11.56.210, which has no oath requirement, but instead provides:

AS 11.56.210. Unsworn Falsification.

(a) A person commits the crime of unsworn falsification if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement which the person does not believe to be true

(1) in an application for a benefit; or

(2) on a form bearing notice, authorized by law, that false statements made in it are punishable.

(b) Unsworn falsification is a class A misdemeanor.

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A number of issues need to be addressed for this statute to apply to AMHS cost-of-living-differential application forms. First, to successfully prosecute an individual for this offense, the state must prove beyond a reasonable doubt that the person engaged in the conduct, with the intent to mislead a public servant in the performance of a duty. "Public servant" is defined in AS 11.81.900(b)(48) as:

Definition.

. . .

(b) In this title, unless otherwise specified or unless the context requires otherwise,

. . .

(48) "public servant" means each of the following, whether compensated or not, but does not include jurors or witnesses:

(A) an officer or employee of the state, a municipality or other political subdivision of the state, or a governmental instrumentality of the state, including legislators, members of the judiciary, and peace officers;

(B) a person acting as an advisor, consultant, or assistant at the request of, the direction of, or under contract with the state, a municipality or other political subdivision of the state, or another governmental instrumentality; in this subparagraph "person" includes an employee of the person;

(C) a person who serves as a member of the board or commission created by statute or by legislative, judicial, or administrative action by the state, a municipality or other political subdivision of the state, or a governmental instrumentality;

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(D) a person nominated, elected, appointed, employed, or designated to act in a capacity defined in (A) - (C) of this paragraph, but who does not occupy the position;

The question that arose with respect to this requirement for Fish and Game prosecutions was whether the license vendors could be considered public servants. I have an inquiry into my Central Office in Juneau as to whether this has been litigated in a Fish and Game unsworn falsification prosecution. For your purposes, a "public servant" would have to be identified in the application process. My guess is that the completed forms are processed by a "public servant", but I did not want to simply assume this. The state would have to identify a "public servant" that the employee specifically intended to mislead and the duty that public servant was performing.

Second, it seems clear that a cost-of-living differential meets the definition of "benefit" as defined in AS 11.81.900(b)(2):

Definition.

. . .

(b) In this title, unless otherwise specified or unless the context requires otherwise,

. . .

(2) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary;

This alone would provide the basis for a prosecution of Unsworn falsification. But an alternative theory of prosecution would also lie if the form bore notice, authorized by law, that a false statement made in it was punishable. "Law" is defined in AS 11.81.900(b)(28) to include statutes and regulations. It is unclear what the phrase "authorized by law" would require the state to prove at a criminal trial. Whether it would require

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proof that the form was authorized by statute or regulation, that the notice of punishment was authorized by statute or regulation, i.e., that the issuing entity had this authority, or both is unsettled.

The Legislative Commentary to this statute from Senate Journal Supp. No. 47, at 73 (June 12, 1978) notes:

The purpose of AS 11.56.210 is to eliminate the need for numerous statutes outside Title 11 covering unsworn falsifications and to replace them with one provision applicable to all unsworn falsifications. As its title indicates, the crime does not require that the false statement be made under oath.

The statute offers a major advantage over existing law: it fills loopholes that result when the Legislature authorizes a form of economic grant or special license, but fails to enact a companion provision punishing falsification of the written or recorded application for such benefits.

The legislature has authorized this economic grant of the AMHS' cost of living differential under AS 23.40.210. Given the above legislative commentary, I believe that if AMHS' application contained notice that a false statement on it was punishable, it would fall within the provision of AS 11.56.210(a)(2). In any event, AS 11.56.210(a)(1) provides the basis for prosecution even without such notice. Having the form contain such notice, however, provides the advantage of two alternative theories of prosecution at trial.

Another basis for criminal prosecution of false statements on the AMHS cost of living differential application form is perjury.

AS 11.56.200. Perjury.

(a) A person commits the crime of perjury if the person makes a false sworn statement which the person does not believe to be true.

(b) In a prosecution under this section, it is not a defense that

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(1) the statement was inadmissible under the rules of evidence; or

(2) the oath or affirmation was taken or administered in an irregular manner.

(c) Perjury is a class B felony.

"Sworn statement" is defined in **AS 11.56.240. Definitions.**, as:

(A) a statement knowingly given under oath or affirmation attesting to the truth of what is stated, including a notarized statement; or

(B) a statement knowingly given under penalty of perjury under AS 09.63.020.

(A) above would require that the form provide for notarization. Problems may arise when the notary does not actually administer the oath -- a not uncommon occurrence. The state successfully litigated this, however, in the recent case of Gargan v. State, MO&J #2138, (Jan. 3, 1991). In that case, the defendant argued that to prove perjury the state had to prove the sworn statement in an affidavit was accompanied by the administration of a verbal oath by the notary. The court of appeals rejected this argument and held that a notarized statement is a "sworn statement" even without proof of the administration of a verbal oath. Slip opinion at 13-16. But, because this opinion is an MO&J (Memorandum of Judgment) it cannot be cited as precedent. See, Alaska R. App. P. 214. The cases the opinion cites and the opinion's reasoning may, however, be argued and the MO&J is certainly an indication of how the court of appeals would resolve this issue should it arise again.

(B) above applies when a person certifies the document is true pursuant to AS 09.63.020 which provides:

Certification Of Documents. (a) A matter required or authorized to be supported, evidenced, established, or proven by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making it (other than a deposition, an acknowledgment, an oath of office, or an oath required to be taken

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before a specified official other than a notary public) may be supported, evidenced, established or proven by the person certifying in writing "under penalty of perjury" that the matter is true. The certification shall state the date and place of execution, the fact that a notary public or other official empowered to administer oaths is unavailable, and the following:

"I certify under penalty of perjury that the foregoing is true."

(b) A person who makes a false sworn certification which the person does not believe to be true under penalty of perjury is guilty of perjury.

Given that under AS 09.63.010, oaths may be administered by a judge, justice, magistrate, clerk or deputy clerk of court, notary public, U.S. Postmaster, or commissioned officer, it seems this situation would seldom arise. Still, I have provided for it below.

Applying the above considerations to your most recent COST OF LIVING DIFFERENTIAL form enumerated and dated "25M026 3/10/89", I suggest the following:¹

1. The definition of "eligible resident" should be set forth in the form and not just referred to by statute citation. Earlier versions of the form contained the definition. The state has to prove a criminal state of mind, not just negligence. This change will help avoid jury sympathy for a defendant who claims he is not a lawyer and that the form was so vague or complicated you had to be a lawyer to understand it. With this in mind, the simpler the applicable definition, the better. In the most recent version of the form (3/10/89), the criteria of "eligible resident" is used as that term is defined in AS 01.10.055. Subsection of (a)

¹ I am unable to address the ramifications of any of my suggestions to AMHS' collective bargaining agreement with employees. You would need to consult with the assistant attorney(s) general who represents the Department of Transportation for that.

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AS 01.10.055 appears to depend on the defendant's reported state of mind. Subsection (b)(2) uses the indefinite term "may" repeatedly and subsection (c) discusses the indefinite notion of "other acts" or circumstances inconsistent with the intent required under (a). All of this leads to a lot of indeterminateness with respect to what the state would have to prove, as well as confusion the defendant may argue as a defense to the charge he lied knowing he was lying or intending to mislead.

Previously, in 1985, it appears AMHS used an Affidavit of Residency form which used a person's domicile as the eligibility criteria and defined domicile in the form. This definition seemed simpler and appears to provide a broader range of evidence the state could present to prove the applicant was not a resident. You may want to consider the definition of "resident" Fish and Game uses on their license/permit application forms as set forth in AS 16.05.940(19). It offers a simpler, more determinate definition.

I do not know what went into the choice of AS 01.10.055 as the definition to be used in determining cost-of-living differential eligibility but you may also wish to look into promulgating your own definition for this purpose. That would be a matter to discuss with the assistant attorneys general who represent the Department of Transportation. The main thing is that the definition should be on the form and not just cited and available upon request.

2. As for the signature portion of the form, for unsworn falsification prosecutions I recommend:

CERTIFICATION OF EMPLOYEE:

I have read and understand this application for a cost of living differential (salary)(pay)² benefit. I certify that all of the information I have provided is true -- including, but not limited to, the fact that (my residence is currently within the state of Alaska)(I am currently a resident of the state of Alaska) and

² Parentheses set out language about which I was uncertain as to your preference.

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that I (established such residency)(became a resident) on _____. I understand that providing false information on this application may subject me to prosecution for a crime under AS 11.56.210 which carries a maximum penalty of a \$5,000 fine and one year in jail.

I further understand that it is my responsibility to notify the Personnel Section in writing of any changes in the information provided in this application (and that failure to do so may make me ineligible for the cost-of-living differential and subject me to the repayment of any differential to which I was not entitled).³

For perjury prosecutions I recommend:

CERTIFICATION OF EMPLOYEE:

You must complete Part "A" or "B" below:

Part A:

I have read and understand this form. I have provided the information in it and affirm this information is true. I also understand that it is my responsibility to notify the Personnel Section in writing when any of this information changes (and that failure to do so may make me ineligible for the cost of living differential and subject me to the repayment of any differential to which I was not entitled).

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 199__, at Anchorage, Alaska.

³ I have suggested a parenthetical sanction here for failure to correct information when it no longer holds true. I do not know what your collective bargaining agreement would permit as a sanction. I do not believe that failure to notify the Personnel Section of changes can itself be prosecuted as Unsworn Falsification or Perjury.

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Notary Public
My comm'n expires: _____

Part B:⁴

A notary public or other official empowered to administer oaths is not available to me. Accordingly, I certify under penalty of perjury that the foregoing information provided in this form is true.

_____	_____
Date	Location

Employee signature	

Employee Social Security No.	

I recommend that my letter be discussed with the assistant attorney(s) general who represent the Department of Transportation. I would be glad to discuss this matter further with such attorney(s), yourself, and/or Mr. Haas.

Thank you for this opportunity to assist you. I apologize for your long wait and appreciate your patience. Mr. Haas should be commended for his gentle persistence on your behalf.

Yours truly,

CHARLES E. COLE
ATTORNEY GENERAL

By: _____
Valerie VanBrocklin
Assistant Attorney General

VV:sa

cc: David W. Haas
Assistant Ombudsman

⁴My authority for Part B is AS 09.63.020