

MEMORANDUM

State of Alaska
Department of Law

TO: Personnel Board

DATE: April 26, 1996

FILE NO.: 663-97-0140

TELEPHONE NO.: 465-3600

SUBJECT: Ethics Complaint Against
Executive Assistant of
Board X

FROM: Robert B. Briggs
Assistant Attorney General
Oil, Gas, & Mining Section

INTRODUCTION

The Attorney General's Office received a complaint filed by a person ("complainant") regulated by Board X. Board X licenses certain professionals; it also reviews and approves pre-licensing and continuing professional education course work offered within the state for those seeking to be licensed by Board X. The complaint was directed against the executive assistant of Board X, whom we will call Assistant Y. The complaint alleged violations of the Alaska Executive Branch Ethics Act ("Ethics Act" or "Act") based on Assistant Y's conduct relating to the recertification of the complainant's licensing courses. During our investigation the complainant withdrew the complaint.

For reasons expressed below, I conclude that there is no probable cause to believe that Assistant Y committed Ethics Act violations. Accordingly, a formal investigation is not warranted. AS 39.52.350. As discussed below, some of the allegations raised by the complainant, even if true, do not state an Ethics Act violation. Other allegations are not supported by the facts discovered during the investigation. The complaint is therefore dismissed under AS 39.52.320.¹

¹ The withdrawal of a complaint does not by itself terminate an investigation of an alleged violation of the Ethics Act. AS 39.52.310(i).

SUMMARY OF INFORMAL INVESTIGATION

Materials submitted by the complainant and detailed records submitted by Assistant Y were reviewed. Assistant Y and two other witnesses were interviewed. An interview of the complainant was attempted.²

DISCUSSION

The complaint alleges that Assistant Y wrongfully took official action that benefited the business of a friend (whom we will call Z), and that injured the complainant's competing business. Although the complaint does not cite to specific sections of the Ethics Act, the complaint includes allegations that Y (i) acted beyond his or her authority in reviewing and certifying the complainant's continuing professional education courses; (ii) delayed approval of the complainant's courses; (iii) improperly removed the complainant's business from a list of approved schools; (iv) improperly removed complainant's business from a licensing exam pamphlet; (v) provided special approval for Z's courses; (vi) provided material from complainant's business to Z; (vii) withheld information from Board X concerning the complainant's business; (viii) wrongfully controlled the agendas of meetings of Board X; (ix) wrongfully denied certification to the complainant in order to retaliate against the complainant; and (x) is not qualified to administer Board X's education program.

In broad summary, complainant argues that Assistant Y has misused his or her official position in violation of AS 39.52.120. Subsection (a) of this statute states that "[a] public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person." This statute contains two proscriptions: the first pertains to the personal gain of the public officer; the second concerns treatment or benefits for any person. Subsection (b) of AS 39.52.120 enumerates five specific proscriptions on the actions of a public officer. Each of these proscriptions involves the personal gain of the public officer, whether it be in the form of employment, compensation, or a benefit to the public officer's personal or financial interest.

Thus, the first question is whether any evidence exists that Assistant Y stood to personally gain from any of the actions allegedly taken. If not, then the only

² Efforts to interview the complainant were delayed after contact with the complainant was lost due to the complainant's move out of Alaska. During the course of the interview, the complainant refused to provide additional information by any specific date because, it was said, materials necessary to support the claims were in storage and unavailable. When informed that a deadline would be set in order to resolve the complaint, the complainant verbally withdrew the complaint and ended the interview. The complainant subsequently sent a written withdrawal.

remaining allegation would concern whether Assistant Y intentionally secured or granted unwarranted treatment for the complainant or unwarranted benefits for Z.

After careful consideration of the evidence, I conclude that there is no probable cause to believe that Assistant Y could have personally gained from any of the actions the complainant alleges. At most, the complainant has alleged that Assistant Y took action that benefited Z's business or harmed the complainant's business. The complainant has alleged that Assistant Y has a financial interest in Z's business, but has presented no evidence to support this allegation. I have carefully questioned both Z and Assistant Y concerning a possible financial arrangement between them. Both deny that Assistant Y has or ever had any financial interest in Z's business.

Similarly, the evidence does not support a conclusion that Assistant Y had a personal interest in Z's business. Personal interest is defined under the Act to include an interest held by the public officer or the public officer's immediate family. It can include membership in an organization. AS 39.52.960(18). It does not include, however, an interest of a friend or acquaintance. Here, at most the complainant has alleged that Assistant Y used his or her official position to benefit the interests of a friend, not the interests of Assistant Y, Y's family, or an organization to which Y belongs. Accordingly, I conclude that Assistant Y's personal interests are not implicated by this ethics complaint. Thus, at the outset, any conclusion that Assistant Y took official action to benefit his or her personal or financial interest can be eliminated.

The complaint does raise, however, a prima facie case that Assistant Y may have granted or secured unwarranted benefits or treatment for either the complainant or Z. A misuse of official position may be established if a public officer varies from normal procedures with an improper motivation. 9 AAC 52.040 (a)(1). An improper motivation may include being motivated by personal animus or friendship instead of taking action because it is in the best interest of the state. 9 AAC 52.990(b)(4); 1993 Inf. Op. Att'y Gen. (663-93-0292; Feb. 26).

Improper motivation is difficult to prove. Public officers are entitled to a presumption that they took action for a proper motivation. 1993 Inf. Op. Att'y Gen. (663-93-0292; Feb. 26). Improper motivation may be proved, however by circumstantial evidence. *Id.* For example, if a public officer varied from normal procedure and as a result a friend benefited or an adversary suffered, it might raise an inference of improper motivation. In such a case, the public officer must provide a credible reason for the variation from normal procedures that is consistent with acting in the best interest of the state.

The complainant attributes to Z three statements which allegedly support the claim of improper motivation. The complainant states that Z said during a telephone conversation with the complainant: 1) that "Assistant Y asked me [Z]" to start a particular

type of licensing course; 2) that “I [Z] have known Assistant Y since we both were skinny;” and 3) “Assistant Y is a close friend of mine.” From these statements, the complainant infers that Assistant Y’s conduct was intended to aid Z’s business at the expense of the complainant’s.

Both Assistant Y and Z, however, describe their relationship as professional, having met at various professional meetings. Both deny ever engaging in social interaction other than at these professional meetings. They see each other on average once per year, and have telephonic contact on average twice per month.

Based on my review of the evidence, I conclude that the evidence that Assistant Y and Z were close personal friends is weak. More important, it takes more than evidence of friendship to establish that a public officer has provided unwarranted benefits.

In my investigation I inquired into facts that might support an inference that Assistant Y took official action affecting complainant or Z based on an improper motivation. Below, I address each allegation raised by the complainant. As I explain, for each allegation I conclude that either the allegation does not give rise to an ethics act violation or that the evidence does not support an inference that Assistant Y misused his or her official position.

Allegation 1: Acting Beyond Authority

The allegation is that Assistant Y exceeded his or her authority as executive assistant of Board X by reviewing and certifying professional education courses (both for pre-license training and continuing professional education). The complainant does not describe how this allegation, if true, would be a violation of the Ethics Act. There is no evidence that Assistant Y performed the function of reviewing and certifying professional education courses for an improper motivation. Because Assistant Y did not vary from otherwise normal procedure, the allegation does not raise an Ethics Act violation.

Board X approves the courses and instructors for pre-licensing and continuing professional education of its licensees. During the time period relevant to this complaint, the Board delegated to Assistant Y the task of reviewing, certifying and approving course outlines and instructors. In performing this task, Assistant Y operated within apparent authority under a regulation adopted by the Board.³

After receiving an opinion of the Attorney General holding that the executive assistant does not have authority to approve professional education that the

³ A statute requires the assistant to perform duties as assigned by the Board.

Board itself, by statute, is required to review and approve, Assistant Y promptly stopped approving or disapproving professional education courses. Since then, Assistant Y has reviewed and made recommendations to the Board on all certifications of professional education. The Board has made the final decisions on these matters.

I conclude that there are no facts constituting probable cause that Assistant Y violated the Ethics Act, AS 39.52.010 to 39.52.960 (1995), in reviewing, approving or disapproving course outlines and instructors, and in certifying professional education courses during the relevant time period.

Allegation 2: Deliberate Delay of Approval of Pre-licensing Course

This claim is that Assistant Y deliberately, and for improper reasons, delayed approval of the complainant's pre-licensing course. The complainant submitted an outline of the course for re-certification. The course was neither approved nor disapproved by Y. The course was not approved by Board X until after 11 months. By comparison, Z submitted a pre-licensing course for review and certification which was approved by the Assistant Y in less than a month. The complainant alleges that the delay had the purpose either to injure the complainant's business or to assist Z's competing business, or both. Implicit in this allegation is that Assistant Y caused the 11-month delay.

I conclude that Assistant Y was not responsible for the entire 11 months of delay in the recertification of the complainant's course. [A detailed examination of the facts, omitted here to protect privacy, reveals that the eleven-month delay involved legal review by the attorney general's office and multiple Board reviews. Three months of the delay cannot be attributed to Assistant Y.]

The investigation reveals that Assistant Y did not improperly vary from normal procedures. There is no evidence that Assistant Y deliberately delayed the approval of the complainant's courses or that an eight month delay is unusual for review of deficient courses. Assistant Y's initial review revealed that the complainant's proposed course was deficient, a finding later upheld by the Board. Assistant Y investigated the possibility of hiring outside counsel in order to expedite review. This would have been an extraordinary measure, but the decisions to seek -- and later not to hire -- outside counsel cannot be attributed to an improper motivation. Reviewing the treatment of all of the complainant's submissions, the totality of the circumstances indicates no bias on the part of Assistant Y. (See discussion of Allegation 9, below.) Similarly, there is no evidence that Assistant Y's review of Z's proposed courses was unusually expedited. (See discussion of Allegation 5, below.) I conclude that the delay in approval of the complainant's course does not provide probable cause to conclude that Assistant Y violated AS 39.52.120(a).

Allegation 3: Improper Removal of the Complainant's School from List of Approved Licensing Schools

The complainant's school was listed as an approved school on a published Board list. The complainant's school was dropped briefly from the Board's list of approved schools on a revision published later in the same year. The complainant's school was then added back to the "approved" list later in the same year. The complainant's school was dropped from the "approved" list for a total of approximately two (2) months. Action by Assistant Y to remove the complainant's school from an approved list of pre-licensing schools could be a violation of AS 39.52.120(a), if based on improper motive.

The changes in the list of approved schools correspond with the Board's action denying re-certification of the complainant's pre-licensing course, and subsequently re-certifying the course after the complainant had made changes to respond to defects in the course outlines. The changes in the "approved" list reflect the actions of the Board, not Assistant Y.

For these reasons, I conclude that the removal of the complainant's school from the published list of approved schools was the result of the Board's independent action. There are no facts constituting probable cause that Assistant Y improperly caused the complainant's school to be removed from this list in violation of AS 39.52.120(a).

Allegation 4: Undermined the marketing of the complainant's course by removing the complainant's school from the licensing candidate pamphlet printed by the testing service, Company W

During the time in question, a booklet was distributed by the Board, which we will call the Licensing Candidate Pamphlet ("pamphlet"). This pamphlet is distributed on an annual basis. The pamphlet contains general information regarding application for a license, including discussion of prerequisites. Pre-licensing education is a prerequisite to applying for a license and taking the licensing examination. Although the pamphlet does not state that the education must be obtained from an "approved" school, it is necessary to enter a four-digit "school code" in completing the form application. The "school codes" are listed on the back of the pamphlet. In the relevant edition of the pamphlet, 13 schools are listed, including Z's school, but *not* the complainant's.

Action by Assistant Y to remove the complainant's school from the list of schools published in the pamphlet could be a violation of AS 39.52.120(a) (intent to secure unwarranted treatment), if based on improper motive.

The complainant alleges that Assistant Y caused the complainant's school to be removed from this list, thereby damaging its business due to the fact that potential candidates could not see the complainant's school listed and therefore would not contact it to fulfill the pre-licensing education requirements.

The pamphlet was prepared and published by Company W, which is in the business of preparing standardized examinations throughout the country for licensing examinations of the type administered by Board X. In preparing the pamphlet, Company W depends upon information supplied by the Board. An employee of Company W (who will be referred to as "Q") was responsible for preparation of the pamphlet. During the time in question, Q faxed a message to Assistant Y along with a list dated several months earlier of the approved pre-licensing schools. The complainant's school is listed on this list. Q essentially sought verification of the list of approved schools.

Assistant Y wrote a notation on the message from Q, and faxed a reply back to Q, stating: "I was out of the office last week. I am faxing you a new list with the changes & one new school noted. I will fill these orders for [pamphlets] today."⁴

The list attached to Assistant Y's message is dated as revised less than two weeks before the date that Assistant Y faxed a reply to Q. In short, Assistant Y provided Q with a current list, which contained the complainant's school, with its school code. The notations on the list include noting a new school, and noting changes in the addresses and/or contact persons at three other schools. There is no notation or other remark next to the complainant's school.

With regard to the pamphlet, there are no facts provided by the complainant, nor have any been revealed in informal investigation, which would establish probable cause that Assistant Y caused the complainant's business to be dropped from the list of schools contained in the pamphlet. The only facts adduced thus far establish that Assistant Y provided Company W with a list dated less than two weeks earlier that listed the complainant's business, with instructions that the business should be listed in the pamphlet. There have been no facts adduced which suggest that Assistant Y caused the failure to list the complainant's business in the pamphlet.

There is no probable cause to conclude that Assistant Y was motivated to, or did in fact, cause the complainant's business to be removed from the list of pre-licensing schools published in the pamphlet published by Company W. I therefore conclude there is no probable cause of a violation of AS 39.52.120(a).

⁴ The handwritten notation is unsigned, but Assistant Y admitted in interview that the notation was hers, responding to Q's inquiry. Q confirmed this fact during a separate interview.

Allegation 5: Showing Special Favored Treatment to Z

The substance of this allegation appears to focus not on whether Assistant Y intended to harm the complainant's business, but whether Y intended to improperly assist Z's business.

Regarding the approval of Z's pre-licensing course, which was approved in one month, it should be noted that Z has taught the pre-licensing course under sponsorship of different companies since 1978. Z sought certification of her or his pre-licensing course under the sponsorship of Company V in February 199_, which was approved in early April 199_. Thereafter, Z changed her or his sponsor to another company. Thus the approval of Z's course in a shorter time frame than the complainant's does not, by itself, constitute evidence of preferential treatment. Z merely received approval for a course which had previously been submitted and approved.

The complainant's course, on the other hand, had significant defects, upon which the Board based its denial of recertification.

I conclude that there is no probable cause to conclude that Assistant Y violated AS 39.52.120(a) in approving Z's pre-licensing course.

Allegation 6: Provided the Complainant's Approved Outline Materials to Z to Use As a Model

If Assistant Y, for improper motive, provided the complainant's outline materials to a competitor, this allegation could be a violation of AS 39.52.120(a). This allegation was denied by both Z and Assistant Y. The complainant has provided no evidence to establish this allegation. Assistant Y stated that Y has never released course outlines of any entity to any other person. There is no probable cause to support this allegation of a violation of AS 39.52.120(a).

Allegation 7: Deliberately Withheld Information from the Members of the Board in Order to Control Their Actions

This is a general allegation by the complainant, without stating what specific information allegedly was withheld, nor what decision was allegedly improperly influenced. If based on improper motive, this could be a violation of AS 39.52.120(a).

The minutes and transcripts of several meetings of Board X suggest that Assistant Y was open and informative with the Board, and that the Board independently decided its action regarding re-certification of the complainant's course, as well as other actions. The evidence suggests the Board insisted on being informed by Assistant Y, and

acted independently of Y. There is no probable cause that Assistant Y improperly manipulated the Board. There is no probable cause to support this allegation of a violation of AS 39.52.120(a).

Allegation 8: Assistant Y Controlled Agendas of Meetings of Board X

This is another general allegation by the complainant, without stating which provision of the Ethics Act was violated, or how Assistant Y improperly controlled the Board agendas. If done for an improper motivation, however, this could be a violation of AS 39.52.120(a).

As the executive assistant to the Board, functioning essentially like an executive director, it might be expected that Assistant Y would play an important role in establishing the Board's agenda, because Y would be required to make sure the Board accomplishes its statutory tasks, including re-certification of courses. The complainant has provided no evidence to establish any undue effort by Assistant Y to control the agenda of the Board. The evidence suggests that the Board independently reviewed the agenda at the beginning of each meeting, modified it when the members thought modification was necessary, and gave direction as to the agenda for future board meetings.

There is no probable cause to support this allegation of a violation of AS 39.52.120(a).

Allegation 9: Retaliation Against Complainant by Continuing to Deny Courses Subjectively

This is another general allegation by the complainant, without stating which provision of the Ethics Act was violated, when the retaliation allegedly occurred, nor which courses were improperly denied certification or re-certification. If true, however, Assistant Y's actions could be a violation of AS 39.52.120(a).

The complainant has submitted no evidence to support this allegation. The only evidence regarding evaluations of course work is the evidence of the length of time taken to approve Z's pre-licensing course (approximately one month) versus the time taken to review the complainant's course (approximately 11 months). Delay, by itself, is not evidence of subjectively different treatment, since the evidence establishes that some of the delay was the result of the complainant, as discussed above.

Moreover, a recommendation to deny certification of a course, or recommend modification of the course outline, may equally be based on a good faith evaluation of the course. The complainant has not submitted the course outlines

themselves to support the argument that the critique of the outlines by Assistant Y was “subjective” and unjustified.

That Assistant Y’s critique of the complainant’s course materials was bona fide is supported by the Board’s independent consideration of the complainant’s courses. The Board decided independently to deny re-certification. When the complainant formally appealed some of the actions of the Board regarding four courses, the Board actions were almost entirely upheld by an administrative hearing officer after a formal adjudicative hearing.

There is evidence that other courses offered by the complainant were re-certified without incident both before and after the events relating to the pre-licensing course. Prior to the dates relevant to the allegations of the complaint, courses on Subjects A, B and C were conditionally approved in approximately one month. Prior to the complaint, courses on Subjects D and E were submitted in November, and approved the following March. A course on Subject F was submitted at the same time as the pre-licensing course at issue here, and was approved the five months later. Two additional courses, submitted for certification after the pre-licensing course had been submitted, were approved within a month.

The entirety of the evidence suggests, contrary to the complainant’s allegations, that Assistant Y’s evaluation of the complainant’s course materials was not biased but based upon good faith critique, which the Board independently reviewed.

There is no probable cause to support this allegation of a violation of AS 39.52.120(a).

**Allegation 10: Insufficient Credentials, Particularly in Education,
to Administer the Board’s Education Program**

This allegation, if true, would not support a claim of an ethics violation. There is no probable cause to support a formal investigation of this allegation.

CONCLUSION

For the reasons discussed above, the complaint against Assistant Y is dismissed under AS 39.52.310(g) and AS 39.52.350.

RBB:rar