

March 10, 1999

Mr. Gary Bader  
c/o Mike McMullen, Acting Director  
Division of Personnel  
Department of Administration  
Mail Stop 0201

Re: In re: SD  
A.G. file no.: 223-98-0210

Dear Mr. Bader:

This office received an ethics complaint on November 24, 1997, from FS, a former state employee with the Division of Family and Youth Services (DFYS), alleging that his former supervisor, SD, had violated the Ethics Act. After investigation, I concluded that SD did violate the Act. I further concluded, however, that the matter could be resolved with corrective action pursuant to AS 39.52.330. After consultation with SD's designated ethics supervisor, I proposed a resolution to SD, which she accepted. Accordingly, the matter is dismissed. This letter summarizes the facts, the allegations in the complaint, the investigation, the analysis of the evidence, and the resolution of the matter. A copy of the stipulation signed by SD and myself is attached.

**A. Facts**

SD is a supervisory employee of DFYS in the Department of Health and Social Services. From April 27, 1987, to September 11, 1997, SD worked in the Barrow office of DFYS. She transferred to the Bethel office on September 11, 1997.

In July 1997, J\_\_, who worked in the Barrow office under SD, traveled to California and Minnesota, first to attend a conference, and then to attend classes related to J\_\_'s graduate studies for two weeks. J\_\_ was not required to submit leave slips for the time J\_\_ spent in travel status, but was allowed to take "administrative leave." SD submitted J\_\_'s request for administrative leave to the regional supervisor of DFYS, RH, and the Director of DFYS, DW, who approved the request.

Prior to leaving the Barrow office in September 1997, SD received a gift from an employee. The employee handed the gift to SD with no explanation other than that the gift was a going-away present. The gift had no tag identifying who had contributed to its purchase. The gift was a baleen basket with an estimated value of approximately \$250-350.

The employee who presented the gift to SD, X\_\_, was supervised by SD. Although X\_\_ solicited donations for the gift from other employees in the office, she did not pursue donations very aggressively. The only donation she received was \$100 from LS, a supervisory employee who was temporarily in the Barrow office to replace SD. X\_\_ paid for the rest of the basket herself. At the time the gift was presented, X\_\_ had already received her final evaluation from SD. X\_\_ did not concur with the evaluation. It is not clear whether SD had performed the final steps in processing of X\_\_'s evaluation at the time SD received the gift, but, even if she had, she could have taken action to amend the evaluation. SD did not change the evaluation after receiving the gift.

SD reported her receipt of the gift first to her fellow employee, LS. SD told LS that, in her view, she probably could not accept the gift. LS assured SD that this was not the case. LS, who believed that X\_\_ had received donations from several people for the gift, said that she and others had contributed to the gift and therefore the gift was acceptable under the ethics rules. SD then reported the gift to her supervisor, RH. RH confirmed that, under these facts, the gift was acceptable. SD did not report the gift to her designated ethics supervisor, Jo Olsen. SD was aware, however, of the need to report gifts to the designated ethics supervisor because of a previous incident in the Barrow office regarding gifts that had been investigated by Ms. Olsen.

## **B. Allegations**

The complaint contained the following four allegations:

1. SD provided an unwarranted benefit to a subordinate employee by providing him with a gift of airlines miles.
2. SD provided an unwarranted benefit to a subordinate employee by approving the employee's request to remain on pay status while traveling to the Lower forty-eight for a three-week period in order to attend a conference and training.
3. SD disseminated information that is confidential under law by discussing personnel information about the complainant, FS, with third parties.

4. SD accepted a gift under circumstances in which it could be inferred that the gift was intended to influence her official action, and she failed to report the gift.

### **C. Investigation**

SD answered the ethics complaint on December 26, 1997. In that answer, she provided additional information that was not included in the complaint. For example, she informed this office of her initial view that the gift was not acceptable. She also disclosed that X\_\_'s evaluation was still pending at the time of the gift, and that X\_\_ was upset at the evaluation. In responding to the allegation regarding disclosure of information about FS, SD denied using information about FS to harm him personally or professionally, and stated that she tried to avoid joining in conversations regarding FS. She stated that when approached by community members with work-related inquiries about FS, she would respond to those inquiries in her official capacity as his supervisor, regardless of whether the inquiry occurred at the workplace.

As provided by AS 39.52.310(e), on January 14, 1998, the attorney general requested that the designated supervisor for DHSS conduct the factual investigation of this matter. An investigator for DHSS interviewed SD on February 24, 1998. A report was delivered to the attorney general on July 8, 1998. After receiving the report, the attorney general interviewed several other witnesses, including LS, RH, FS, and other witnesses whose names were provided by the complainant as having knowledge of the gift or the alleged disclosures of confidential information. The investigation was delayed because some key witnesses were traveling.

### **D. Analysis**

**1. The alleged gift of airline miles.** No investigation was conducted regarding this allegation. A personal gift of miles to a fellow employee, even if true, would not constitute a violation of the Ethics Act by the giver of the miles. No official action is involved. Unless the gift creates a conflict of interest, the Ethics Act does not cover gifts given by a public officer in the officer's personal capacity; AS 39.52.130 applies only to gifts received by a public officer. This allegation is dismissed.

**2. The alleged approval of J\_\_'s education on state time.** The complaint alleges that SD approved administrative leave for educational purposes for J\_\_ because J\_\_ was a friend of SD. This asserts a potential violation of AS 39.52.120, in that SD allegedly provided an unwarranted benefit to J\_\_. Alaska Statute 39.52.120(a) provides, "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."

Providing a benefit to a subordinate employee only violates the Act if the benefit is unwarranted. AS 39.52.120(a). Thus, if J\_\_ did not deserve the benefit of education on state time, it would be evidence that would indicate a possible ethics violation. If SD varied from normal procedures, that, too, would be evidence that the benefit was not warranted. 9 AAC 52.040(a); 1996 Inf. Op. Att'y Gen. at 3 (663-97-0140; April 26). For example, if SD took special action only for J\_\_, and not for other similarly situated employees, that would be evidence that the benefit may have been unwarranted.

The evidence, however, does not indicate special treatment by SD for J\_\_. SD informed us that she would routinely forward to her supervisor requests by subordinates for state travel and administrative leave. RH confirmed that she received many such requests from SD. In this instance, the decision to allow J\_\_ to take administrative leave was approved by both RH and the Director, DW.

The only evidence of a possible unwarranted benefit to J\_\_ is an assertion by the complainant, FS, that his requests for travel were not approved. This evidence, if true, might provide some support for an inference of differential treatment. The mere fact that one employee's travel was disapproved, however, would not prove that J\_\_ received an unwarranted benefit, or that FS received unwarranted treatment. J\_\_'s travel may have had more merit than FS's, or J\_\_'s travel request may have come at a time when there was more travel money in the budget. Moreover, the evidence does not confirm differential treatment by SD. SD recalls that she forwarded FS's request for state-paid travel to her supervisor, just as she did for J\_\_, and that FS's travel was disapproved by someone at a higher level. RH stated that she did not have a specific memory of reviewing FS's travel request, but she does recall that she received many travel requests from SD for employees under SD's supervision, and that some were granted, some were denied. This evidence tends to indicate that SD did not provide differential treatment for either J\_\_ or FS regarding state travel. In sum, there is no probable cause to conclude that SD provided differential treatment for J\_\_.

Furthermore, even if there were evidence of differential treatment, the Ethics Act requires that the provision of an unwarranted benefit be intentional in order to constitute a violation. AS 39.52.120(a). The regulations interpret the intent requirement to mean that the provision of the benefit must be done with a "wrongful motivation." 9 AAC 52.040(a). See 1996 Inf. Op. Att'y Gen. at 3 (663-97-0140; April 26).

In this case, the only evidence of "wrongful motivation" was a statement by the complainant that J\_\_ and SD were friends and that, at one time, J\_\_ rented a room from SD. Standing alone, this evidence does not provide probable cause to conclude that SD had a wrongful motivation when she forwarded J\_\_'s travel request to supervisory officials. A public officer is entitled to a presumption of regularity in performing official business. 1993 Inf. Op. Att'y Gen. at 3 (663-93-0292; Feb. 26). Thus, unless evidence indicates otherwise, we will presume that a public officer had the best interests of the state in mind when taking official action. Although friendship between supervisors and subordinates may, under some circumstances, raise certain personnel questions, supervisors frequently are friendly with subordinate employees. Additional evidence, such as a statement of intent or differential action for friends, would be necessary to infer wrongful motivation.

In sum, this case does not present sufficient proof of either element of unwarranted benefit. Although SD did provide a benefit to J\_\_ in forwarding his travel request, SD did not vary from normal procedures in providing this benefit. Nor is there any evidence that SD had a wrongful motivation in providing the benefit. Accordingly, we find no probable cause to conclude that a violation occurred, and this allegation is dismissed.

**3. The alleged disclosure of confidential information.** The complainant, FS, alleged that SD would frequently discuss information regarding FS with others, including other state employees and an employee of the North Slope Borough. Although the complainant never identified the information as "personnel records," his allegations appear to raise an inference that SD discussed personnel matters regarding FS with individuals who were not in FS's chain of command. State personnel records are confidential by law under AS 39.25.080.

It is a violation of the Ethics Act to disclose information that is confidential by law. AS 39.52.140(b). If it is true that SD disseminated information that constitutes a personnel record, this could be a violation of the Ethics Act. Yet, if the information disseminated by SD does not amount to a "personnel record," or other matter confidential by law, then her alleged conduct, even if true, would not constitute a violation of the Ethics Act.

The investigation into this allegation focussed on answering two questions: (1) did SD discuss FS's work or conduct at work with people not in his chain of command; and (2) if so, did SD disseminate personnel records or other information confidential by law in these conversations.

The complainant provided a list of witnesses with whom SD allegedly discussed confidential matters. For some witnesses, the complainant was able to provide the circumstances in which the conversations took place, such as while playing cards, or during a call for a reference regarding a job application.

Each witness was interviewed by an attorney from the Department of Law. The witnesses were asked a series of questions, beginning with a broad inquiry about any information regarding FS that SD may have divulged, and then following up this question with more narrow questions about whether the witness may have heard SD discuss discipline or evaluation of FS.<sup>1</sup> Where appropriate, the questions were put in context, such as whether SD ever talked about FS during card games. Finally, each witness was asked a broad catch-all questions, such as "Did SD ever discuss anything regarding FS that in your mind might constitute a confidential personnel matter?"

Each witness was aware that the relationship between SD and FS was rancorous. Two of the witnesses - one of whom was not employed by DFYS - recalled hearing SD express a feeling of "frustration" caused in part by dealing with FS. One witness stated that SD was very discrete and that SD would not participate in "table talk" regarding FS that occurred during card games. One social worker IV from the office specifically recalled that SD did mention dissatisfaction with FS; yet, this witness also described this as "more like a frustration statement." None of the witnesses could recall SD mentioning any discipline, evaluation, or other personnel action regarding FS.

The question here is whether any disclosure by SD could constitute a disclosure of a personnel record that would be protected under AS 39.25.080. The Alaska Supreme Court has explained that a protected personnel record includes "documents [that] contain details about the employee's or applicant's personal life." *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997). In contrast, documents that "simply [describe] employment status," such as time sheets, are not protected under the statute. *Id.*

Here, SD has not disclosed any documents or any information that could reveal the contents of any documents. Certainly a supervisor may discuss job performance criteria with members of her staff. The evidence indicates that, at most, SD has expressed personal frustration with her work, including frustration with the tension

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<sup>1</sup> This is not to imply that FS has ever been disciplined or subject to adverse evaluations. In preparing this report and in interviewing witnesses, the Department of Law did not review FS's personnel file.

between herself and FS. This does not amount to a disclosure of protected personnel documents. Accordingly, the evidence does not provide probable cause to conclude that SD has disclosed information that is confidential under law. Thus, given no probable cause to conclude that SD violated AS 39.52.140(b), this allegation is dismissed.<sup>2</sup>

**4. The going-away gift.** The complaint alleged that SD received a going-away gift of a baleen basket from a subordinate employee. The basket was worth approximately \$250-350.

A public officer may not accept a gift "under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment." AS 39.52.130. The ethics regulations provide that "[u]nless rebutted by other evidence, an occasional gift worth \$50 or less is presumed not to be given under circumstances in which it could be reasonably inferred that the gift is intended to influence an officer's performance of official duties, actions, or judgment." 9 AAC 52.060(a). The Ethics Act further provides that a public officer must report receipt of a gift worth more than \$50 within thirty days to the officer's designated supervisor if "the public officer may take or withhold official action that affects the giver." AS 39.52.130(b).

Thus, the first question is whether SD could take or withhold official action that affects the giver. The answer is yes. The giver, X\_\_, was a subordinate employee who was evaluated by SD. In preparing to leave the Barrow office for a transfer to Bethel, SD had prepared an evaluation of X\_\_. In her answer to the complaint, concerning the allegation about the gift, SD informed this office that "I remember it well, because I had given [X\_\_ the] evaluation just a couple of days before to review before we discussed it and [X\_\_] was upset at its content." Thus, SD had pending the action of final review of the evaluation with X, and could have taken official action regarding the evaluation.

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<sup>2</sup> These facts do not implicate a potential violation of AS 39.52.140(b) related to FS's constitutional right to privacy under Article I, section 22 of the Alaska Constitution. First, it is far from clear to what extent this right would be implicated for purposes of AS 39.52.140(b) by disclosure of information not protected by AS 39.25.080. More important, however, is that fact that the relationship between FS and SD was common knowledge in Barrow, and that FS spoke freely of it to both state government employees and other members of the community. In these circumstances, expression of frustration with the complainant by SD cannot constitute disclosure of information that is confidential by law.

Interestingly, X\_\_ did not recall the facts in quite the same way. X\_\_ recalled that she did not completely agree with the evaluation, but that she had signed it anyway before giving the gift. Even if X\_\_'s version of the facts is correct, however, SD could still have taken official action that affected the giver, because, as a supervisor, SD could have changed the evaluation even if it was signed and final. Under SD's admission, however, the potential for official action is less remote, because the evaluation was not final at the time of the gift.

The next question is whether these circumstances could reasonably support an inference that the gift was intended to influence official action. This inquiry does not hinge on any showing of actual intent; indeed, here, we are satisfied that X\_\_ did not intend to influence SD's official action on X\_\_'s evaluation. Thus, if an inference of intent would be objectively reasonable under the circumstances, then the gift is prohibited under the Act. *See, e.g.,* 1996 Inf. Op. Att'y Gen. at 2 (663-96-0360; March 21) (tips received by state employee would support inference of intent to influence even though no wrongdoing by employee occurred).

In general, gifts given in circumstances where gift-giving is customary are less likely to support an inference that the gift was intended to influence official actions. For example, this office has advised that wedding or Christmas gifts are less likely to give rise to an inference of intent to influence where the giver and the recipient customarily exchange gifts. *See* 1995 Confidential Memorandum from Ass't Att'y Gen. Jan Levy to Commissioner (Aug. 24) (wedding gifts of moderate value are intended in celebration of wedding of friends and do not support inference of intent to influence official action).

Going-away gifts will generally fall within this category. Going-away gifts are customary. Frequently, the gifts are moderate and costs are shared among several persons. Furthermore, going-away gifts often could not support an inference of intent to influence, because the person leaving usually can no longer take official action affecting the giver.

Here, however, the facts, viewed objectively, do support the inference of intent to influence official action. Here, the gift was from a subordinate employee, given when the employee's evaluation was pending, in circumstances where the employee was seeking changes to the evaluation. Moreover, the employee giving the gift had contributed at least \$150.00 toward its purchase. In these circumstances, the gift is not allowed under the Ethics Act.

Furthermore, given that SD could have taken official action that would affect the giver, she should have reported the receipt of the gift to her designated ethics supervisor. AS 39.52.130(b). True, she did report the gift to her direct supervisor, RH. This report, however, is not sufficient to comply with the Act. Thus, we have concluded that SD committed two ethics violations, a violation of AS 39.52.130(a) in accepting the gift, and a violation of AS 39.52.130(b) in failing to report the gift.

Having established that two violations occurred, the next step was to determine whether this matter could be resolved under AS 39.52.330. This necessarily required a determination of whether the violations required imposition of a fine. Although the Department of Law will usually seek a fine in resolving an ethics violation, several factors mitigate against the necessity of a fine in this case. Most important of these is the fact that SD immediately reported the gift to two supervisory personnel, and was informed of facts that, if true, would have allowed her to accept the gift and would have obviated the need to report. She was told that the gift was paid for by many contributors, not just X\_\_. Had that been true, no violation would have occurred, as X\_\_ would not have paid more than \$50 toward the gift. AS 39.52.130(c); 9 AAC 52.060(a). Additionally, SD was fully cooperative in this investigation. Indeed, without her own testimony that was adverse to her interests, it would not have been so apparent that the gift was a violation. True, SD should have known that she had to report the gift to her designated ethics supervisor, not her direct supervisor. Yet, had the facts been as she reasonably believed them to be, she would not have had to report the gift at all. Accordingly, no fine is necessary to enforce compliance with the Ethics Act.

Having determined that no fine is necessary, this office contacted SD and proposed a resolution of this complaint. The resolution required that SD return the gift. She also must read the Ethics Act, and certify that she understands it and will abide by it in the future. In addition, the matter is to be made public. This is important in that it assures the public that the Department of Law is not resolving ethics matters in secret in a manner adverse to the public interest, and it will allow the Department and the agencies to use these documents to educate public officers about the Ethics Act. SD readily agreed to the stipulation, and has complied with it.

Mr. Gary Bader  
Division of Personnel  
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A copy of the signed stipulation is enclosed. In addition, as required by the Ethics Act, copies of the stipulation and this letter are being sent to the complainant. A representative from the Department of Law will be available at your next general meeting to answer questions regarding this matter.

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:  
Stephen C. Slotnick  
Assistant Attorney General

SCS:bm