



THE STATE
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March 1, 2022

SENT VIA USPS

Legislative Budget & Audit Committee
Alaska State Capitol, Room 504
Juneau, AK 99801

Re: *Legislative Budget and Audit Committee Investigation*
AGO No. 2021200596

Honorable Members of the Legislative Budget & Audit Committee:

The Board of Trustees of the Alaska Permanent Fund Corporation (“APFC”) asked us to reach out to you regarding the Committee’s recent initiation of an investigation into the Board’s December personnel action dismissing the former executive director.

Although the Trustees acted in conformance with law and based on their best judgment when they made the decision to dismiss Angela Rodell, sometimes personnel decisions are not popular either with the employee or with others who are not responsible for managing an organization. This has been the case with the dismissal of Ms. Rodell.

The Board is mindful of the importance of the Permanent Fund to Alaskans and the interest in having different parts of our state government cooperate when possible. However, the Board believes that the Committee’s investigation exceeds its statutory and constitutional authority – and the manner in which the investigation has begun raises serious concerns about its fairness and impartiality. Given the circumstances, the Trustees want to provide a path forward that will permit APFC to continue operating without becoming embroiled in political and legal squabbles, while respecting the public interest in this employment decision. The Board proposes that an independent party, such as a retired judge, be retained to review the issues related to the Board’s decision, and to issue a report. We hope that the Committee will give this proposal serious consideration as the best approach in these circumstances.

An independent party would neutralize the most serious problems under Alaska law with the current investigation and address the Board’s legitimate concerns with the due process violations already apparent in the investigation. A fair and independent investigation, devoid of politics and without litigation, benefits all Alaskans.

By statute, the employment of an executive director lies exclusively within the authority and discretion of the Board.¹ There is no statutory provision for legislative oversight of the Board’s personnel decisions or processes. The Committee’s purpose is to “monitor[] and report[]” on “the *performance* of the agencies of the state that *perform* lending or investment functions.”² And its statutory duties include reviewing, reporting, and auditing APFC’s “investments” and “investment programs.”³ Thus, the Committee’s oversight of APFC is directed toward its investment practices and policies, not its personnel management. The broad reading of the Committee’s jurisdiction as advanced by its investigator threatens the Board’s independence by permitting legislative micromanagement of the Corporation not contemplated by the statutory scheme. Moreover, such a broad assertion of legislative authority to effectively micromanage a public corporation such as APFC can trigger serious separation of powers issues. APFC, by statutory design, has an independent board tasked to make decisions regarding the management of the corporation, but, like all state public corporations it is a part of the executive branch of state government.

Regarding due process, the Alaska constitution is the only state constitution that includes express protection for the subjects of and witnesses in legislative investigations. The framers of Alaska’s Constitution had observed the abusive practices of Congress during the McCarthy hearings of the 1950s and were determined not to permit Alaska’s legislative branch to engage in unfair treatment of Alaskans by legislators. Thus, they adopted in the first article of Alaska’s Constitution—the due process provision in section 7—the requirement that there be “fair and just treatment” of all persons in the course of legislative investigations. Delegate Rivers stated at the constitutional convention that the fair and just treatment requirement was intended “to extend the due process to legislative proceedings and endeavored to simply highlight the point by asking that the legislature set up proper and adequate procedures to safeguard witnesses and principals against abusive treatment in legislative procedures.”⁴ The legislature unfortunately has not

¹ AS 37.13.100.

² AS 24.20.156(1)(A) (emphasis added).

³ AS 24.20.206.

⁴ *See* Proceedings of the Alaska Constitutional Convention, Day 46 (January 7, 1956, at 1465).

enacted specific rules regarding legislative hearings as intended by the framers. But that is not a license to ignore the requirements of Article I, section 7.

The Committee Chair and its members have publicly stated that the investigation needs to be fair and impartial. But the investigation plainly does not live up to that aspiration. The recent actions of the Committee include its decision to grant the Committee Chair, alone, the authority to subpoena individual Trustees and APFC employees. This subpoena power is presently being used to support the investigator's demand that these Alaskans testify before the Committee's investigator even about matters that they are specifically required to keep confidential under state law.⁵ Specifically, APFC Trustees have been informed that they will be required to answer questions about what occurred during APFC's executive session in December 2021 despite the fact that such discussions are confidential under AS 44.62.310(c)(2)—or face subpoenas. The letter further threatens adverse consequences, up to and including dismissal, that are beyond the authority of either the investigator or the Committee to impose. This is completely inappropriate and this sort of abuse of authority so early in the investigation clearly raises serious due process concerns.

This delegation of subpoena power to one individual and its current use as a threat to APFC Trustees and employees has been made even more problematic because of a clear conflict of interest at the center of the Committee's investigation. The Committee Chair has been granted subpoena authority over an investigation into "the termination of Angela Rodell as Executive Director/CEO of the Alaska Permanent Fund Corporation" even though she acknowledged on the record at the Committee's December 15, 2021 hearing that she and Ms. Rodell "are friends."⁶ Other Committee members have already stated publicly on the record that they are not friends with Ms. Rodell and have not and do not socialize with her. The obvious point of these declarations was an attempt to show they would not be biased in investigating the issue, implicitly conceding that if they were friends, an obvious conflict would exist. Whether other Committee members have a relationship with Ms. Rodell outside their professional capacity remains to be determined.

Certainly, Alaska can be a "small" place and friendships among public officials are not uncommon. But no one in a position of authority can serve as the judge or juror or investigator in a proceeding involving their friend. This is because the law recognizes that it is unreasonable to expect any person to be free of the influence of a friendship when called upon to make an impartial judgment. Moreover, the appearance of bias or interest

⁵ Schwabe Williamson & Wyatt letter dated Feb. 16, 2022.

⁶ December 15, 2021 Legislative Budget & Audit Committee hearing.

based on a personal relationship undermines the public's trust and expectation that trials and investigations will be conducted fairly. As the United States Supreme Court has made clear: "[a] fair trial in a fair tribunal is a basic requirement of due process."⁷ For this reason, judges and members of boards and commissions recuse themselves from cases involving their friends. Unfortunately, the Committee did not require the Chair's recusal here. Instead, it delegated its subpoena authority to her after she disclosed her conflict when in any other legal proceeding she would have been required to recuse herself.

The problems raised by the current investigation are also not limited to questionable legal jurisdiction and authority, use of subpoenas to compel disclosure of confidential information, idle threats of employment termination and conflicts of interest. For example, the Committee violated its rules when it attempted to authorize an investigation, delegate its subpoena authority to the Chair, and hire an outside law firm to conduct an investigation. When the Committee met on January 27, 2022, the Chair stated "this committee will now go into executive session to consider Alaska Permanent Fund Corporation personnel and related procurement." But no vote was taken to go into executive session. Uniform Rule 22(c) provides that "[w]hen a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present." When the rules regarding executive session are not followed by a government agency, the Alaska Supreme Court has held that the actions of the entity can be vacated.⁸ Moreover, even if a proper vote had been taken to go into executive session, the discussion of whether to hire outside counsel and to delegate subpoena authority to one member of the Committee should have been debated in public as there is no provision in the Uniform Rules for such actions to be discussed in executive session.

These issues are serious and go to the heart of due process, the fairness of any investigation, and the separation of powers. If not resolved, these issues and others have the potential to trigger extensive litigation between the Committee and the Corporation. This is why the Trustees believe that the current approach of the Committee should be reconsidered.

The Trustees have set forth an approach that serves the public interest and provides a truly fair, impartial and independent investigation into the areas detailed by the

⁷ *In re Murchison*, 349 U.S. 133, 136 (1955).

⁸ *See University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983).

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Committee. APFC believes the Committee should give this option consideration before moving any further in this matter.

Sincerely,

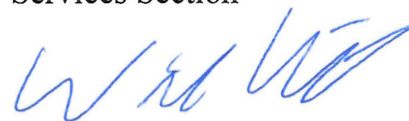
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Cc: Board of Trustees