

4-127

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Forrest Cole /R10/USDAFS
11/21/2007 07:44 AM

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<ARLEAN.LELAND@OGC.USDA.GOV>, "MOULTON,
JEFF" <JEFF.MOULTON@OGC.USDA.GOV>,
bcc
Subject RE: Ith

I do have some significant concerns and as I stated a few weeks back we had new information that needed to be gathered before an opinion was rendered. The interviews were completed three weeks ago and as have not been completed yet due to the interviewer having an accident. I will contact her again to see if the final document can be completed and then get with all the interest to go over this information as well as the issues you have raised.

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11/21/2007 07:23 AM

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Subject RE: Ith

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION - NOT FOR RELEASE

Melvin,

I have completed my thorough review of the Ith removal decision letter, rebuttal evidence, and the applicable case law. On behalf of OGC, I have several concerns that lead me to recommend a reduction in penalty to a 14-day suspension. I also recommend accepting the Office of Special Counsel suggestion for mediation of this case. I believe this is a situation that is ripe for resolution.

First, I was not aware that Mr. Ith has been on administrative leave since July. I am not sure why the decision was made to place him on administrative leave, but I hope it is consistent with an agency policy to place all persons facing proposed removal on administrative leave. Otherwise, I am concerned that there is a potential reprisal claim here.

Second, the rebuttal evidence provided by Mr. Ith, including the two affidavits from external witnesses, will be very persuasive to an

adjudicating body. Although the Agency will appropriately argue that it determines what is deliberative and available for public release, it is possible that the fact that the Alaska Department of Fish & Game had a copy of the draft report may be considered a waiver of the Federal deliberative process privilege. This is particularly true since it seems that the agency made little effort to safeguard release of the document or advise its partners not to release the document to the public.

Third, the agency should be sure that draft reports of this nature are never made a part of the EIS, despite Mr. Ith's claims. If these draft reports are part of public deliberations in other matters, then the agency will be hard-pressed to explain why this particular report should have been withheld, other than it did not like the conclusion.

Fourth, with respect to the fundraising specification, it seems the agency has a stronger argument. The actions were clearly deliberate but it will come down to an interpretation of whether or not Mr. Ith was acting in his official capacity. I think an adjudicating body would be more persuaded if the agency had an independent ethics evaluation to support its position. Since it appears that Mr. Ith has not ceased this activity, I recommend the reduced penalty of suspension immediately followed by additional disciplinary action for the repeated behavior. This will show that despite being disciplined for the action, Mr. Ith willfully continued the behavior, thus, supporting a stronger subsequent penalty.

Given the whistleblower allegations and the fairly persuasive rebuttal arguments, I think the fact that there is no progressive discipline in this case will be fatal. The agency is on much steadier ground if it suspends Mr. Ith now, and then punishes any subsequent violations with the harsher penalty of removal. This places the agency in a far better position than the risk of removing him now and ultimately being required to reinstate him.

If you have any questions or concerns about this recommendation, please feel free to contact me.

Tami

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