



June 3, 2008

Members of the Legislative Audit Commission:

On March 28, 2008, commission members discussed allegations concerning the Minnesota Attorney General's Office and considered a motion to direct the Office of the Legislative Auditor (OLA) to investigate the allegations. The motion was withdrawn, with the understanding that OLA would conduct a preliminary assessment of the allegations and decide whether to investigate further.

We are writing to report that we did not find a basis for further investigation by OLA. Unless we are directed by the commission to take further action, we consider our review of the allegations closed.

Allegations Presented to the Legislative Audit Commission

Representative Steve Simon presented the allegations to the Legislative Audit Commission. He indicated that his knowledge of the allegations was based on accounts from several current and former attorneys in the Attorney General's Office provided through letters, e-mails, telephone conversations, and media reports. Representative Simon stressed that he did not know whether the allegations were true; only that they were "serious and troubling." He also stressed that the allegations involved attorneys saying they had felt pressured to take actions they considered inappropriate. Representative Simon said it was not clear whether the pressure ever led to laws or rules being violated.

Specifically, Representative Simon said it had been alleged that some attorneys in the Attorney General's Office felt pressured to: (1) sign and issue a civil investigative demand without sufficient merit; (2) insert unsubstantiated information in an affidavit; (3) give advice that was not in the best interest of a client; (4) find defendants to help the Attorney General's Office bring certain types of lawsuits; and (5) post comments favorable to the office and Attorney General Swanson on an internet blog and record the time used for blogging as annual leave even though state time was used. After enumerating the allegations, Representative Simon moved that the commission direct the Legislative Auditor to investigate the allegations.

In the discussion that followed, commission members were divided. Some members agreed with Representative Simon that the allegations were serious and needed to be examined thoroughly and objectively by someone with independence and investigative authority (specifically, authority to subpoena witnesses and take statements under oath). They suggested there was no adequate alternative to an investigation by OLA. However, other members characterized the allegations as vague and about personnel matters related to the internal management of the Attorney General's Office. They noted that investigations by the Legislative Auditor typically focus on specific allegations of financial impropriety. They also noted that, although evaluations by OLA's Program Evaluation Division often examine internal management in state agencies, traditionally, OLA evaluations have not been directed at constitutional officials, since they are directly accountable to voters for the performance of their offices.

Senator Rest reminded commission members that the Legislative Auditor normally assesses allegations and decides whether to conduct an investigation without action by the Legislative Audit Commission. With the understanding that the Legislative Auditor would assess the allegations concerning the Attorney General's Office and decide whether an investigation by OLA was needed, Representative Simon withdrew his motion.

Some commission members continued to question the need for any type of inquiry by OLA. They cautioned that OLA's preliminary assessment should not be a "fishing expedition" to broadly search out former and current employees of the Attorney General's Office who might have complaints about the office. It was also agreed that OLA should not become involved in the dispute over attempts by some employees of the Attorney General's Office to join a union.

Scope, Objective, and Methods of Preliminary Assessment

The scope of our preliminary assessment included events that occurred during former-Attorney General Hatch's second term (2002-2006) and during 2007, the first year of Attorney General Swanson's current term.

The objective of OLA's preliminary assessment was to:

- Determine whether the allegations concerning the Attorney General's Office presented to the Legislative Audit Commission on March 28, 2008, should be investigated by OLA.

We emphasize the limited objective of our preliminary assessment. It was not to prove or disprove the allegations. As stated, our objective was to determine whether we should investigate the allegations further. To go forward with an investigation, OLA must find that allegations have a basis in reliable information and involve issues OLA has authority to investigate.

To establish whether the allegations presented to the commission have a basis in reliable information, we discussed the allegations with several current and former attorneys in the Attorney General's Office. We subpoenaed seven individuals and interviewed them under oath.¹ To establish whether the allegations involve issues OLA has authority to investigate, we assessed the allegations presented by Representative Simon and the testimony we obtained under oath. Given our limited objective, we did not interview either former-Attorney General Hatch or Attorney General Swanson.

Results of Preliminary Assessment

The individuals we interviewed under oath testified that the events involved in the allegations did occur. The individuals said—as Representative Simon relayed to the commission—that they felt

¹ The interviews were audio recorded and transcribed. Pursuant to *Minnesota Statutes* 2007, 3.979, subdivision 3(c), these recordings and transcripts are classified as private. Therefore, disclosure of information obtained from these interviews is limited to summary characterizations that do not reveal details that could be used to identify individuals.

pressured to act inappropriately, and they gave detailed accounts of specific events. However, they also stated that no inappropriate, unethical, or illegal actions resulted from the pressure.

In addition, the individuals we interviewed did not cite direct and specific job-related threats from either former-Attorney General Hatch or Attorney General Swanson in connection to the events in the allegations. Rather, the individuals we interviewed linked the pressure they felt to the fact that attorneys in the Attorney General's Office work "at the pleasure" of the Attorney General; in other words, they can be dismissed or demoted "at will" rather than "for cause." In addition, they said it was "well-known" that termination, demotion, or reassignment often fell on an employee who lost favor with the Attorney General. Some of the individuals we interviewed said they thought his or her demotion or reassignment was retaliation for having not followed a directive from either former-Attorney General Hatch or Attorney General Swanson, but acknowledged they could not prove the connection.

The individuals we interviewed also linked the pressure they felt to an office environment that focused on obtaining favorable media attention rather than the methodical legal work required to successfully litigate cases. Several of the individuals we interviewed pointed to cases they thought had merit that were dropped in favor of new cases that would draw media attention.

The individuals we interviewed focused a large share of their criticism and discontent on Mike Hatch, both as Attorney General and during the time he served as a deputy to Attorney General Swanson.² Indeed, a principal criticism they made of Attorney General Swanson was that she appointed Mr. Hatch to a position in the office after Attorney General Swanson was sworn into office in 2007. This—and Mr. Hatch's continued influence on the office—was said to be the "tipping point" that caused some current and former employees to voice criticisms and accusations against Attorney General Swanson. Mr. Hatch resigned his position with the office in May 2007.

While the individuals we interviewed provided sworn statements based on first-hand knowledge, their testimony did not establish a basis for further investigation by OLA. OLA has authority to investigate alleged noncompliance with legal requirements related to the use of public funds. That authority is contained in *Minnesota Statutes* 2007, 3.971, subdivision 6, which says in part:

The legislative auditor shall see that all provisions of law respecting the appropriate and economic use of public funds are complied with and may, as part of a financial audit or separately, investigate allegations of noncompliance by employees of departments and agencies of the state government and the other organizations listed in this subdivision.

OLA's preliminary assessment confirmed what some members of the Legislative Audit Commission concluded on March 28—the allegations presented by Representative Simon are not the kinds of issues the Legislative Auditor addresses through an investigation. The few issues involving public funds that were presented to us during our preliminary assessment were assessed and resolved, or they will be addressed during our next financial audit of the Attorney General's Office in early 2009.

² Mike Hatch served as Minnesota Attorney General from 1999 through 2006. In January 2007, he was appointed by the newly-elected Attorney General, Lori Swanson, to manage "complex litigation."

Additional Legislative Consideration

We understand that legislators do not want to become involved in the recent unionization dispute in the Attorney General's Office. However, the "at will" status of attorneys in the Attorney General's Office is a separate issue, and we think it should be considered by the appropriate legislative committees.

The status of employees that work for the state's elected constitutional officials is mixed. All employees in the Governor's and Lieutenant Governor's offices are in the unclassified civil service (in other words, they are "at will" employees). In contrast, most employees (60 of 77) in the Secretary of State's Office are in the classified civil service, and most employees (86 of 110) in the State Auditor's Office are in the classified civil service. In the Attorney General's Office, 87 employees (secretaries and administrative staff) are in the classified civil service, and 267 employees (attorneys, legal assistants, investigators, etc.) are in the unclassified civil service.³

Since a state employee's status as either a classified or unclassified employee is largely determined by law, we think a legislative review of the current status of attorneys in the Attorney General's Office would be appropriate. The question for the Legislature to consider is whether the legal services provided by the Attorney General's Office require that all of the attorneys in the office serve "at the pleasure" of the Attorney General.

In closing, we thank the individuals we interviewed for their cooperation. We also thank Attorney General Swanson and Solicitor General Al Gilbert for their cooperation.



James Nobles
Legislative Auditor



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cc: Attorney General Lori Swanson

³ Most employees in the Legislative Branch are in the unclassified civil service, with employees in the Office of the Legislative Auditor being the exception. Most OLA employees are in the classified civil service and, although the Legislative Auditor and Deputy Legislative Auditors are in the unclassified civil service, they serve statutorily established six-year terms and cannot be removed from office except "for cause" after a public hearing.