

ALASKA LEGISLATIVE COMMITTEE FILES 1900-1900 00/2

4031 SJUD MAGISTRATES / CONDUCT 907

- A. What should Magistrate Brown do?
  - B. Which canon gives Magistrate Brown guidance in this situation?
4. Magistrate White is the only court employee in her court. She has fallen far behind in her paperwork. She has not sent in judgments in four months. She has not filed recent forms received from the Alaska Court System. In the last year, she has not filed new pages in her copies of the Alaska Statutes, Alaska Rules of Court, or the Alaska Administrative Code. However, Magistrate White holds all court proceedings promptly.
- A. Is Magistrate White doing her job properly? If so, why? If not, why not?
  - B. Which canon gives Magistrate White guidance in this situation?
5. Fishing season has arrived. Magistrate Henry is busy fishing, but still works three hours a day as a magistrate. Magistrate Henry is having difficulty with his arraignments and trials because some of the witnesses are at fish camp.
- A. What should Magistrate Henry do if the defendant is in custody?
  - B. What should Magistrate Henry do if the defendant is not in custody?
  - C. Which canon gives Magistrate Henry guidance in this situation?
6. Magistrate Henry is in a community where there is a great deal of commercial fishing. A defendant charged with violations under Fish and Game regulations is brought before Magistrate Henry for arraignment. The defendant, Terry Trout, is brought before the magistrate and yells at the policeman. He is rude and swears.

- A. What should Magistrate Henry tell defendant Terry Trout?
- B. Which canons give Magistrate Henry guidance in this situation?
7. Mary Green has filed a petition for an emergency injunction in a domestic violence action. A reporter from the Tundra Times comes into the court and wants to listen to Ms. Green's hearing.
- A. Should the magistrate allow the reporter from the Tundra Times to listen to Ms. Green's domestic violence hearing?
- B. Which canon gives the magistrate guidance in this situation?
- C. At which type of court proceedings is broadcasting, televising, recording, or taking still photographs by anyone other than court personnel forbidden?
- D. Which canon gives a magistrate guidance about the broadcasting, televising, recording, or taking still photographs by anyone other than court personnel during court proceedings?
8. Magistrate Duke has just been appointed. He recognizes that he must conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Still, Magistrate Duke likes to smoke marijuana. He wants to get some marijuana plants, grow marijuana and, if the crop is good, sell it to his friends.
- A. Should Magistrate Duke go ahead with his plan to grow marijuana and sell it to his friends? If so, why? If not, why not?

- B. Which two canons give Magistrate Duke guidance in this situation?
9. Magistrate White is very far behind in her paperwork. Her presiding judge has given her permission to hire a clerk for two weeks to help with the back filing. Magistrate White's best friend applies for the two-week job.
- A. Should Magistrate White hire her best friend? If so, why? If not, why not?
- B. Which two canons give Magistrate White guidance in this situation?
10. Magistrate Martin is in the community store, waiting in line to buy groceries. The cashier says, "Hey, what do you think about Billy Bad Guy being in jail? Do you think the Anchorage court will put him away like he deserves?"
- A. Can Magistrate Martin say what he thinks? If so, why? If not, why not?
- B. Which canon gives Magistrate Martin guidance in this situation?
11. Assume the same facts as Question 10. Magistrate Martin's part-time clerk, Claude Klerk, is also in line. When Claude Klerk hears the cashier's question, he perks up. Before Magistrate Martin can say a word, Claude Klerk says, "Yeah, that guy has quite a record on him. I hope the Anchorage judge puts Billy Bad Guy away for life."
- A. Was Claude Klerk's comment proper? If so, why? If not, why not?

- B. What, if anything, should Magistrate Martin say or do to Claude Klerk?
  
  - C. Which canon gives Magistrate Martin guidance on whether court employees should comment publicly on proceedings in any court?
  
  - D. Define "abstain."
  
  - E. Define "abstention."
12. Magistrate Salmon works as a magistrate fifteen hours each week. He also owns a commercial fishing boat. During the summer, Magistrate Salmon works long hours processing fish which a crew catches for him. One day in July two crew members say they are sick and can't go out in the boat. Magistrate Salmon thinks he should go out on the boat. Then he remembers that he has scheduled a felony first appearance hearing, an arraignment, and a presumptive death hearing for that same afternoon. He is worried about losing money and also worried about not doing his job as magistrate properly.
- A. Should Magistrate Salmon go fishing or stay at home for the court proceedings?
  
  - B. Which canon gives Magistrate Salmon guidance in this situation?
13. Felix Friend has known Magistrate Caring for many, many years. Felix Friend has decided to run for city council. Felix Friend is also backing Gary Governor in Alaska's gubernatorial election. Felix goes to Magistrate Caring and asks if Magistrate Caring can put up a sign for Friend and Governor on the side of his house and in his office.
- A. Can Magistrate Caring put up a sign for Felix and Governor on the side of his house? If so, why? If not, why not?

- B. Can Magistrate Caring put up a sign for Felix and Governor in his office? If so, why? If not, why not?
  - C. Which canon gives Magistrate Caring guidance in questions 13A and 13B?
  - D. Can Magistrate Caring collect money for Friend's campaign? Which canon gives Magistrate Caring guidance in this situation?
14. Felix Friend goes to talk with Magistrate Caring. Felix reminds Charlie Caring that the two men have been friends for fifteen years. Felix says he wants Charlie Caring to go to a potlatch where money will be collected for his campaign.
- A. Can Magistrate Charlie Caring buy a ticket and go to the political dinner being given for Friend? If so, why? If not, why not?
  - B. Which two canons give Magistrate Caring guidance in this situation?
15. Magistrate Frankfurter has been asked by the Hot Dog Party of Alaska to run for the Alaska State Legislature.
- A. Can Magistrate Frankfurter run for public office while he is a magistrate? If so, why? If not, why not?
  - B. Which canon gives Magistrate Frankfurter guidance in this situation?

16. Magistrate Brandeis has been working with a judges' committee to come up with new sentencing guidelines. The Senate Judiciary Committee calls Magistrate Brandeis to ask him to come to Juneau to testify in hearings before the Alaska State Legislature.
- A. Is it proper for Magistrate Brandeis to testify on behalf of the judges' committee on sentencing before the Alaska State Legislature? If so, why? If not, why not?
  - B. Which canon gives Magistrate Brandeis guidance in this situation?
  - C. Brandeis is offered \$10,000 per day for each day he testifies or is in Juneau. Can Magistrate Brandeis accept the \$10,000 per day fee? If so, why? If not, why not?
  - D. Which canon gives Magistrate Brandeis guidance about what pay (compensation) he can receive for services rendered?
  - E. The Senate Judiciary Committee also offers Magistrate Brandeis per diem of \$500 per day while he is in Juneau. Should Magistrate Brandeis accept the per diem? If so, why? If not, why not?
  - F. Which canon gives Magistrate Brandeis guidance about how much per diem or expense money is permitted?
17. Magistrate Salmon runs a commercial fishing boat in the summer. He also processes all fish caught from the boat. One of the fish buyers, Harry Fishie, visits Magistrate Salmon in his office and says, "Hey, Salmon, because you are the magistrate in this place, I am going to offer you ten cents more per pound on your fish than the other guys get."
- A. Should Magistrate Salmon accept Harry Fishie's offer on the fish? If so, why? If not, why not?

- B. Which canon gives Magistrate Salmon guidance in this situation?
  - C. Define "refrain from."
  - D. Magistrate Salmon heard a case in which he learned that Fishie's company was going broke and that the Happy Herring Company gave the best deals. Can Magistrate Salmon use that information by going to the Happy Herring Company to offer them the fish he catches? If so, why? If not, why not?
  - E. Which canon gives Magistrate Salmon guidance in this situation?
  - F. Felicia Foxe and Magistrate Salmon are discussing fish prices over tea at the lodge. Ms. Foxe suggests that Magistrate Salmon go up to the Homely Halibut Company to try to sell his fish. Is it proper for Magistrate Salmon to act on Ms. Foxe's suggestion? If so, why? If not, why not?
18. Magistrate Kanuk is bilingual, speaking fluent Yup'ik and English. She has been asked by the local high school to teach Yup'ik. She has also been asked to teach traditional basket weaving to the high school girls.
- A. Should Magistrate Kanuk accept the job teaching Yup'ik and traditional basket weaving? If so, why? If not, why not?
  - B. Which canon gives Magistrate Kanuk guidance in this situation?
  - C. Define "avocation."
19. Magistrate Bell receives a telephone call from Harry Horrible. Mr. Horrible lives in a neighboring community. Mr. Horrible is the defendant in a rape case. He is trying to find people who will testify at the rape trial.

Mr. Horrible asks Magistrate Bell if she will testify about his character. Magistrate Bell says she will think about it.

A. Should Magistrate Bell testify as a character witness for Harry Horrible at the rape trial? If so, why? If not, why not?

B. Which canon gives Magistrate Bell guidance in this situation?

20. Magistrate Moore went into his office once morning and found a whalebone spirit mask Mary Muffet had left him as a gift. The spirit mask is of a fine quality and worth a great deal of money. Ms. Muffet's son has a trial scheduled before Magistrate Moore in a few weeks.

A. Should Magistrate Moore accept the whalebone spirit mask from Ms. Muffet? If so, why? If not, why not?

B. Which canon gives Magistrate Moore guidance in this situation?

21. Magistrate Salmon needs a bank loan to fix his commercial fishing boat for the fishing season. He calls the bank and asks them if he can get a loan. Bobby Banker says, "For you, anything. I'll also check to see if we can get you better terms than most of our borrowers get."

A. May a magistrate or judge borrow money?

B. If Bobby Banker is able to get better terms for Magistrate Salmon than other borrowers receive, should Magistrate Salmon borrow money at a lesser interest rate than the bank's other borrowers?

C. What are the terms suggested by the Code of Judicial Conduct if a judge borrows money?

- D. Which canon gives guidance on the standards for loans by judges?
22. Magistrate Brown and her family are invited to dinner by friends.
- A. Is it proper for Magistrate Brown and her family to go to dinner at a friend's house?
- B. Which canon gives a judge and his family guidance about what hospitality should be accepted?
23. Magistrate Brown's son still lives at home, but is getting married soon. As soon as the date of the wedding is announced, gifts from friends start arriving.
- A. May Magistrate Brown's son and wife-to-be accept the wedding gifts from their friends?
- B. Which canon gives Magistrate Brown and her son guidance about accepting gifts?
- C. Magistrate Brown's son, on the same terms as all other applicants, applied for and received a scholarship from the University of Alaska. May the son accept the scholarship? If so, why? If not, why not?
- D. Which canon gives Magistrate Brown and her son guidance about whether the scholarship should be accepted?
24. A friend gives Magistrate Brown a \$500 gift certificate which can be used at a grocery store in Anchorage. The friend tells Magistrate Brown that the gift certificate is to help buy food for her son's wedding.

- A. May Magistrate Brown accept the gift certificate?  
If so, why? If not, why not?
  - B. What is the test as to whether or not the \$500 gift certificate should be accepted?
  - C. If Magistrate Brown is a full-time magistrate, does she need to make a report of the gift to the Administrative Director of the Alaska Court System?  
If so, why? If not, why not?
  - D. Which two canons and sections of the Code of Judicial Conduct give guidance about gifts to magistrates and their family members and the reporting of those gifts?
25. Magistrate Salmon got the loan to fix his commercial fishing boat. Two crew members have quit. Magistrate Salmon works sixty hours a week on the fishing boat and has little time for his magistrate duties. He is doing arraignments at midnight and 1:00 a.m.
- A. Does the commercial fishing interfere with the performance of Magistrate Salmon's judicial duties?
  - B. What is Magistrate Salmon's first priority?
  - C. Which two canons give Magistrate Salmon guidance in this situation?
26. Magistrate Slick has been a member of the Akpak Search and Rescue Society, not conducted for profit, for eighteen years. In that time Magistrate Slick has been a director and officer of the nonprofit organization. Recently, she was asked to raise money for the Akpak Search and Rescue Society.

- A. Was it proper for Magistrate Slick to be a director and an officer of the Akpak Search and Rescue Society while she was a magistrate?
  - B. In organizations not conducted for profit, such as a parent and teacher association at a local school, a church, a search and rescue organization, the Elks Club, or a theatre group, what positions could a judge hold in the organization?
  - C. Which canon gives a judge guidance about what he or she may do with respect to civic and charitable activities?
  - D. May Magistrate Slick raise money for the Akpak Search and Rescue Society?
  - E. May Magistrate Slick speak at a fund raising event for the Akpak Search and Rescue Society?
  - F. Which canon gives a judge guidance about standards for conduct in raising funds for civic and charitable activities?
27. Magistrate Douglas comes from the Douglas family which has been feuding and fighting with the Harlan family for twenty years. One of the Harlan boys is accused of assault and reckless endangerment. The Harlan boy pleads not guilty and requests a trial. Magistrate Douglas secretly thinks the Harlan family is a disgrace to the community and this boy is the worst.
- A. If the Harlan boy consents in writing to have Magistrate Douglas hear his case should Magistrate Douglas conduct the trial? If so, why? If not, why not?
  - B. Which canon gives Magistrate Douglas guidance in this situation?

28. Magistrate Douglas lives next door to the Stone family. One evening, as Magistrate Douglas is coming home, he sees Mr. Stone in a fist fight with another neighbor. The neighbor files a complaint for assault and battery with the village police.
- A. Should Magistrate Douglas, who saw the events, conduct the arraignment? If so, why? If not, why not?
  - B. Should Magistrate Douglas conduct the trial? If so, why? If not, why not?
  - C. Which canon gives Magistrate Douglas guidance in this situation?
29. Magistrate Timmons, his wife, and children are shareholders in the village native corporation. The village native corporation owns and manages the village grocery store. When the grocery store has a "good year", profits are high and each shareholder of the village native corporation receives a dividend. When the grocery store profits are low, no one in the village native corporation receives a dividend. The grocery store gives "credit" to some people and allows them to pay grocery bills at the end of the month. John Jerk has been getting groceries on credit and has not paid his bill of \$887.42 in three months. The village native corporation, for and on behalf of the grocery store, decides to file a small claims action in the amount of \$887.42 in Magistrate Timmons' court.
- A. Does Magistrate Timmons have a financial interest in the subject matter of the small claims trial? If so, why? If not, why not?
  - B. Should Magistrate Timmons conduct the small claims trial? Is there any basis to believe he could not be fair?
  - C. What canon defines "financial interest" of a judge?

- D. Despite Magistrate Timmons having a financial interest in the outcome of the case is there any procedure which could be used to allow Magistrate Timmons to hear the case?
  - E. What canon gives guidance to a judge with a small interest in a case to enable the judge to hear the case?
30. Magistrate Slick's ex-husband is accused of assault and reckless endangerment. He pleads not guilty at arraignment.
- A. Can Magistrate Slick conduct the trial? If so, why? If not, why not?
  - B. Which canon gives Magistrate Slick guidance in this situation?
31. Which six canons are not applicable to part-time judges?
- |          |          |
|----------|----------|
| A. _____ | D. _____ |
| B. _____ | E. _____ |
| C. _____ | F. _____ |
32. The presiding judge of the fourth judicial district asks Magistrate Salmon to be on a committee studying sentencing of fish and game violations.
- A. May Magistrate Salmon sit on such a committee? If so, why? If not, why not?
  - B. Which canon gives Magistrate Salmon guidance in this situation?

- C. May Magistrate Salmon testify at a public hearing on the sentencing of fish and game violations? If Magistrate Salmon may testify, what limitation is placed on his appearance at the public hearing?
- D. Which canon gives guidance to a magistrate desiring to testify at public hearings on matters concerning the administration of justice?
33. If a magistrate has any ethical questions to which he or she does not know the answer, who should the magistrate contact?
34. In a few sentences, why are the canons set out in the Code of Judicial Conduct so important?



## Trial Courts

State of Alaska

FIRST JUDICIAL DISTRICT  
P. O. BOX 869  
WRANGELL, ALASKA  
99929

December 12, 1985

Kevin K. Bruce  
Senate Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Re: CSSB 321: "An Act including magistrates within the jurisdiction of the commission on judicial qualifications."

Dear Mr. Bruce:

The majority of magistrates who responded to my request for comments on CSSB 321 had no objection to passage of the bill. However, many concerns and questions were raised which we believe must be addressed prior to an official response from the Association of Alaska Magistrates. I will list those concerns as presented to me.

- 1) The magistrates feel they are treated fairly by presiding judge with no fear of arbitrary or capricious acts. The consensus is that a magistrate would be afforded due process should a problem arise. However, it would be beneficial to know the procedure that would be employed upon the filing of a complaint.
- 2) What are the rules within which the Commission operates? How and when is a complaint determined to be "formal"? When is notification given to the judge?
- 3) Since we serve at the pleasure of the presiding judge, it is requested, should this bill pass, that any complaint filed against a magistrate be immediately copied to the presiding judge.
- 4) If magistrates were placed under the jurisdiction of the Commission, would attorneys fees be paid by the state as is now the practice with other judges?



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Kevin K. Bruce  
December 12, 1985  
Page Two

5) If the Commission recommends action after investigating a complaint, does this recommendation go to the supreme court or to the presiding judge? Who makes the final decision?

6) Would passage of this bill mean that magistrates, in the future, would have to stand for retention election?

7) Since this is one of two areas where the statutes still differentiate between magistrates and other judges, would inclusion under the jurisdiction of the Commission also mean inclusion under judicial retirement?

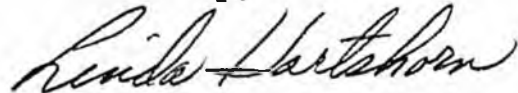
As you can see, there are many questions that need to be answered before we can make the decision to support or oppose this legislation. The general feeling is that it would be good to know there is a fixed procedure for dealing with complaints. However, there is no perception of unfairness or lack of due process under the current system.

The Commission is sending to me their operating manual and annual report, which includes rule and procedures. When this information is received and the above concerns are addressed, we will be able to present a response to your request. I understand that the Court System and the Commission have not yet taken a stand on the bill. We will get ours to you as soon as possible.

I believe the reference in the bill to "Commission on Judicial Qualifications" should be changed to "Judicial Conduct Commission".

Please give me a call at 874-2311 if you have any questions.

Sincerely,



Linda Hartshorn, Magistrate  
for The Association of  
Alaska Magistrates

cc: All Magistrates



Commission on Judicial  
Conduct

303 K STREET  
ANCHORAGE, ALASKA 99501  
264-0528

December 13, 1985

Mr. Kevin Bruce  
Office of Senator Rodey  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

RE: SB 321

Dear Mr. Bruce:

In talking with Ms. Linda Hartshorn, magistrate from Wrangell yesterday, it occurred to me that you are perhaps not familiar with our Staff Manual. I do recall sending you a copy of our Rules of Procedure, but the Staff Manual might be more helpful in that it includes the staff's investigative guidelines. I did send a copy of the current staff manual (legal size paper) and the proposed staff manual (letter size paper) to Ms. Hartshorn for her information. The proposed staff manual incorporates primarily staff procedures which have been adopted since the Commission acquired and electronic typewriter/word processing system. If I can be of further assistance, please let me know. The Commission's Annual meeting is scheduled for Thursday, January 16th, 1986 in Anchorage.

Thank you for your patience and consideration.

Sincerely,

*Jane S. Rosenquist*  
Jane S. Rosenquist  
Legal Assistant

encl.

ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL

POLICY 1 - OPENING ACCUSATION FILE

Upon receipt of a written or oral request for investigation setting forth allegations of judicial misconduct by a member of the state judiciary, or at the direction of the Commission, the following procedure is to be followed:

A. A legal size file folder is punched by a two-hole punch and clip fasteners are attached.

B. Any written communication (date stamped with date of receipt) is punched and inserted on the left side of the folder.

C. An accusation number is assigned and the complainant name is logged in the written complaint log next to the appropriate inquiry number. Further, the same information is logged into the accusation log disk under the appropriate year file name (i.e., 85log, 84log, etc.)

D. An Intake Form is prepared and clipped to the left side of the file folder (Form 1). Two copies are made if nonjurisdictional, three if jurisdictional [see Intake Form Instructions (E)].

E. An Investigation Log Form is prepared and clipped to the left side of the file folder (Form 2).

F. A file tab with the complainant's last name, the judge's last name, and the accusation number typed on it is attached to the file folder. The folder is stamped "confidential".

G. The accusation number is noted on all documents in the file and all materials subsequently received.

H. Cross index system is prepared as follows:

1. The following information is entered on "card file system-complainant" disk under file name which corresponds to complainant last name, first initial:

Complainant name	Accusation number
Judge name	Date opened
Brief statement of complaint	
Date closed & disposition	

2. The "card file system-judge name" disk contains the same information as above, except that the judge's name is typed first and the complainant name second.
- 
- I. An introductory acknowledgement letter is sent to the complainant, with file number, following form letter A in the form file book.
  - J. If the conduct complained of requires a case file or tapes of proceedings, order those using form letter B in the form file book.
  - K. The file is given to the Executive Director for examination and action.

FORM 1 - INTAKE FORM

A. As much information as possible is filled out from available information.

B. A case number is assigned from the "Accusation Log". The complainant's name is logged in the Accusation Log next to the appropriate complaint number.

C. If a letter, affidavit, or other materials are available explaining the nature of the accusation, this is noted in the "Accusation Summary" portion of the Intake Form.

D. The appropriate status and disposition of the accusation, if known, are marked on the Intake Form. For example, if the complaint is against a magistrate, the form is marked under "Non-jurisdictional", "Magistrate". If the accusation is jurisdictional, the statutory ground(s) for jurisdiction is noted, and the appropriate code from the "Code List of Fact Patterns" is selected and entered under "Type of Misconduct". The first copy of the Intake Form is automatically filed in the "Judge's File" if the accusation is jurisdictional.

E. The original of the Intake Form is placed in the case file. The second copy is placed in the "open" file until the accusation is closed. This copy is removed from the open file and placed in the "closed" file when the accusation is closed. The third copy is placed in the "numerical" file.

FORM 2 - INVESTIGATION LOG FORM

A. The accusation number is typed into the appropriate space on the investigation log form at the time the accusation file is opened.

B. Any time action is taken or occurs concerning the accusation, it is logged on this form. For example, if phone calls are made, correspondence is sent out or received, or files in the clerk's office are researched, a note is made, dated, and the person noting the information logs in their initials.

ALASKA COMMISSION ON JUDICIAL CONDUCT  
CODE LIST OF FACT PATTERNS

A. Physical and mental disability

1. Physical illness
2. Age and senility
3. Mental illness
4. Alcohol or drug abuse

B. Judicial Misconduct

1. Improper court decorum (on bench or in chambers)
  - a. Improper consideration and treatment of attorneys, court employees, witnesses and others
  - b. Improper or eccentric bench conduct such as sleeping or drunkenness
  - c. Interference in making the record and conducting trials in own court
2. Failure or refusal to dispose promptly of judicial business, enter orders, or cooperate in administration of court
3. Prohibited practice of law
4. Conducting ex parte proceedings or engaging in ex parte discussions
5. Interference with attorney-client relationship

6. Improper use of judicial authority (doing something in judicial capacity that judges are not authorized to do)
  - a. In conducting proceedings (refusing to appoint public defenders, not holding court in courtroom, not observing formalities, not informing defendants of their rights or depriving them of their rights, setting bail when defendants are not represented by counsel, or otherwise failing to observe normal procedures as to where or how court is held)
  - b. In entering judgement
  - c. In threatening or determining bail, sentences, punishment, or contempt
  - d. In entering or threatening to enter other judicial orders
  - e. In falsely or improperly certifying documents or court records
7. Influence of family, social, political, business, and property relationships
  - a. On judicial decisions
    - (1) Own decisions
    - (2) Decisions of other judges
  - b. On making appointments
  - c. On other matters relating to the administration of justice - transferring case and reducing charges
8. Conflict of interest
9. Bias
10. Giving or receiving gifts, bribes, loans or favors

11. Impropriety off the bench
  - a. Misappropriation or misuse of public employees, property, or funds
  - b. Improper comments, accusations, associations or connections
  - c. Interference with or influence on pending or impending litigation (litigation before other judges)
  - d. Lewd or corrupt personal behavior
  - e. Business dealings; extrajudicial business activity conducted for compensation or personal advantage
  - f. Use of judicial position to extort or embezzle private funds
  - g. Misconduct in the permitted practice of law
  - h. Improprieties in personal debts and loans
12. Political and campaign activities - own campaign or other politicians'
13. Abuse of prestige of office
14. Obstruction of justice, perjury, filing false document
15. Criminal behavior
16. Failure to disqualify self
17. Ticket fixing

ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL

POLICY 2 - INVESTIGATIVE GUIDELINES

The following are guidelines which govern the general approach taken by the staff in the conduct of its investigations and interviews:

A. The Executive Director or investigator shall initially identify him or herself to the witness.

B. Where applicable, reference shall be made to the authority by which the Commission conducts its investigations, specifically, Alaska Const., Art. IV, Sec. 10, and A.S. 22.30.011.

C. Clear and emphatic reference shall be made to the strict confidentiality of the investigation, and reference made to the prohibition imposed on the Commission and its staff regarding disclosure of the existence or content of the investigation.

D. A request shall be made that the witness, in turn, keep the interview confidential.

E. No admission is to be made by the investigator regarding the subject of the investigation and the witness is to be admonished that no inference regarding the subject of the investigation should be drawn from the questions asked.

F. The investigator shall indicate that the statement given by the witness will remain confidential as a part of the Commission's investigative file until such time, and only if and when, the Commission files a formal complaint pursuant to Rule 9C(4) of the Commission's Rules of Procedure.

G. Further caution shall be given that in the event of an ensuing hearing, the witness may be called to testify and the present statement given by the witness could be used to refresh his or her recollection or point out any material contradiction in his or her later testimony.

H. Unless otherwise approved by the Commission, only those witnesses who are believed to have specific knowledge of the subject matter of the investigation are to be contacted and interviewed.

I. During the course of the interview, generalized questions shall be employed regarding the alleged misconduct of a particular judge, which would not reveal the source of previously supplied information.

J. During the course of the interview, factual or leading questions shall be employed only for the purpose of attempting to refresh the recollection or seek clarification of a prior contradictory response.

K. The interview shall be immediately terminated upon the expression of the witnesses' reluctance or refusal to participate in the interview or to answer further questions.

L. Generally, the investigation should be limited to the initial scope of the inquiry.

M. If there is indication of possible criminal involvement, the witness should be advised that the Commission may refer the matter to the proper law enforcement authority for further investigation.

N. All witnesses may be interviewed by members of the Commission staff or by other individuals appointed in writing by the Commission or its Executive Director.

O. In an interview with the Respondent, counsel for the Respondent may be present during the course of the interview if the Respondent so desires.

P. A witness may be accompanied by legal counsel during the course of an interview.

Q. If deemed necessary, an interview can be preserved by means of a stenographic record or taped recording, subject to the prior approval of the Executive Director and with the initial indication to the witness that the interview will be so preserved.

Staff Manual  
page nine

R. Under normal circumstances, a witness is to be interviewed at a location convenient to the witness.

S. An investigative report should contain a summary of all pertinent facts.

T. Staff investigations are to be completed as expeditiously as possible with cumulative evidence sought only where necessary to establish a continuing pattern of misconduct.

U. In analyzing judicial conduct the Executive Director and the investigator(s) shall be guided by Art. IV, Sec. 10 of the Alaska Constitution and A.S. 22.30.011.

ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL

POLICY 1 - OPENING INQUIRY FILE

Upon receipt of a written or oral request for investigation setting forth allegations of judicial misconduct by a member of the state judiciary, or at the direction of the commission, the following procedure is to be followed:

- A. A legal size file folder is punched by a two hole punch and clip fasteners are attached.
- B. Any written communication (date stamped with date of receipt) is punched and inserted on the left side of the folder.
- C. An inquiry number is assigned and the complainant name is logged in the complaint log next to the appropriate inquiry number.
- D. An Intake Form is prepared and clipped to the left side of the file folder. (Form 1)
- E. An Investigation Log Form is prepared and clipped to the left side of the file folder. (Form 2)
- F. A file tab with the complainant's last name, the judge's last name, and the inquiry number typed on it is attached to the file folder. The folder is stamped "confidential".
- G. The inquiry number is noted on all documents in the file and all materials subsequently received.
- H. File index cards are prepared and filed as follows:
  - 1. The following information is typed on a 3 x 5 card:

Complainant name	Inquiry number
Judge name	
Date opened	
Brief statement of complaint	
Date closed and disposition	
  - 2. A second index card is typed with the same information as above, except that the judge's name is typed first and the complainant's name second. The first card is to be filed in the "complainant card file" and the second card is to be filed in the "judge card file".
- L. The file is given to the staff assistant for examination and action.

ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL

FORM 1 - INTAKE FORM

- A. As much information as possible is filled out from available information.
- B. A case number is assigned from the "Complaint Log". The complainant's name is logged in the Complaint Log next to the appropriate complaint number.
- C. If a letter, affidavit, or other materials are available explaining the nature of the complaint, this is noted in the "Complaint" block of the Intake Form.
- D. The appropriate status and disposition of the inquiry, if known, is marked on the Intake Form. For example, if the complaint is against a magistrate, the form is marked under "Non-jurisdictional", "Magistrate" and under "Referral" to "Presiding Judge". If the complaint is jurisdictional, the appropriate code from the "Code List of Fact Patterns" (Form 1a) is selected and entered. A copy of the Intake Form is automatically filed in the "Judge's File" if the complaint is jurisdictional.
- E. The original copy of the Intake Form is placed in the case file. The second copy is placed in the "open" file until the inquiry is closed. This copy is removed from the open file and placed in the "closed" file when the inquiry is closed. The third copy is placed in the "numerical" file.

**ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL**

**FORM 2 - INVESTIGATION LOG FORM**

A. The inquiry number is typed into the appropriate space on the investigation log form at the time the inquiry file is opened.

B. Any time action is taken or occurs concerning the inquiry, it is logged on this form. For example, if phone calls are made, correspondence is sent out or received, or files in the clerk's office are researched, a note is made, dated, and the person noting the information logs in their initials.

ALASKA COMMISSION ON JUDICIAL CONDUCT  
INTAKE FORM

Accusation No. \_\_\_\_\_ Date Opened: \_\_\_\_\_ Date Closed: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: (Hm) \_\_\_\_\_ (Wk) \_\_\_\_\_

RESPONDENT JUDGE: \_\_\_\_\_

JUDICIAL DISTRICT: 1 2 3 4 COURT: Superior, Appeals, Supreme, District

NONJURISDICTIONAL: Attorney, Magistrate, Federal, Other \_\_\_\_\_

JURISDICTIONAL: Misconduct, Mental Disability, Physical Disability

STATUTORY GROUNDS:

Disability: \_\_\_\_\_

Conviction: \_\_\_\_\_

Wilful Misconduct: \_\_\_\_\_

Wilful/Persistent Failure to Perform Duties: \_\_\_\_\_

Conduct Prejudicial to Admin. of Justice: \_\_\_\_\_

Conduct that Brings Judicial Office into Disrepute: \_\_\_\_\_

Violation of Code of Conduct: \_\_\_\_\_

Habitually Intemperate: \_\_\_\_\_

TYPE OF MISCONDUCT:

Improper Court Decorum: \_\_\_\_\_

Administrative Failure/Refusal: \_\_\_\_\_

Prohibited Practice of Law: \_\_\_\_\_

ExParte Proceedings/Discussions: \_\_\_\_\_

Interference - Attorney/Client: \_\_\_\_\_

Improper Use of Judicial Authority: \_\_\_\_\_

Improper Influence: \_\_\_\_\_

Conflict of Interest: \_\_\_\_\_

Bias: \_\_\_\_\_

Gifts, Bribes, Loans, Favors: \_\_\_\_\_

Impropriety Off Bench: \_\_\_\_\_

Improper Political/Campaign Activities: \_\_\_\_\_

Abuse of Prestige of Office: \_\_\_\_\_

Obstruction of Justice: \_\_\_\_\_

Criminal Behavior: \_\_\_\_\_

Failure to Disqualify: \_\_\_\_\_

Ticket Fixing: \_\_\_\_\_

DISPOSITION: \_\_\_\_\_

RECOMMENDATION: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

ACCUSATION SUMMARY - SEE REVERSE



ALASKA COMMISSION ON JUDICIAL CONDUCT  
CODE LIST OF FACT PATTERNS

## A. Physical and mental disability

1. Physical illness
2. Age and senility
3. Mental illness
4. Alcohol or drug abuse

## B. Judicial Misconduct

1. Improper court decorum (on bench or in chambers)
  - a. Improper consideration and treatment of attorneys, court employees, witnesses and others
  - b. Improper or eccentric bench conduct such as sleeping or drunkenness
  - c. Interference in making the record and conducting trials in own court
2. Failure or refusal to dispose promptly of judicial business, enter orders, or cooperate in administration of court
3. Prohibited practice of law
4. Conducting ex parte proceedings or engaging in ex parte discussions
5. Interference with attorney-client relationship
6. Improper use of judicial authority (doing something in judicial capacity that judges are not authorized to do)
  - a. In conducting proceedings (refusing to appoint public defenders, not holding court in courtroom, not observing formalities, not informing defendants of their rights or depriving them of their rights, setting bail when defendants are not represented by counsel, or otherwise failing to observe normal procedures as to where or how court is held)
  - b. In entering judgment
  - c. In threatening or determining bail, sentences, punishment, or contempt
  - d. In entering or threatening to enter other judicial orders
  - e. In falsely or improperly certifying documents or court records
7. Influence of family, social, political, business, and property relationships
  - a. On judicial decisions
    - (1) Own decisions
    - (2) Decisions of other judges
  - b. On making appointments
  - c. On other matters relating to the administration of justice - transferring case and reducing charges
8. Conflict of interest
9. Bias

10. Giving or receiving gifts, bribes, loans or favors
11. Impropriety off the bench
  - a. Misappropriation or misuse of public employees, property, or funds
  - b. Improper comments, accusations, associations, or connections
  - c. Interference with or influence on pending or impending litigation (litigation before other judges)
  - d. Lewd or corrupt personal behavior
  - e. Business dealings; extrajudicial business activity conducted for compensation or personal advantage
  - f. Use of judicial position to extort or embezzle private funds
  - g. Misconduct in the permitted practice of law
  - h. Improprieties in personal debts and loans
12. Political and campaign activities - own campaign or other politicians'
13. Abuse of prestige of office
14. Obstruction of justice, perjury, filing false document
15. Criminal behavior
16. Failure to disqualify self
17. Ticket fixing

**ALASKA COMMISSION ON JUDICIAL CONDUCT  
STAFF MANUAL**

**POLICY 2 - INVESTIGATIVE GUIDELINES**

The following are guidelines which govern the general approach taken by the staff in the conduct of its investigations and interviews:

- A. The staff assistant or investigator shall initially identify him or herself to the witness.
- B. Where applicable, reference shall be made to the authority by which the commission conducts its investigations, specifically, Alaska Const., Art. IV, Sec. 10, and AS 22.30.011.
- C. Clear and emphatic reference shall be made to the strict confidentiality of the investigation, and reference made to the prohibition imposed on the commission and its staff regarding disclosure of the existence or content of the investigation.
- D. A request shall be made that the witness, in turn, keep the interview confidential.
- E. No admission is to be made by the investigator regarding the subject of the investigation and the witness is to be admonished that no inference regarding the subject of the investigation should be drawn from the questions asked.
- F. The investigator shall indicate that the statement given by the witness will remain confidential as a part of the commission's investigative file until such time, and only if and when, the commission files a formal complaint pursuant to Rule 10E(4) of the commission's Rules of Procedure.
- G. Further caution shall be given that in the event of an ensuing hearing, the witness may be called to testify and the present statement given by the witness could be used to refresh his or her recollection or point out any material contradiction in his or her later testimony.
- H. Unless otherwise approved by the commission, only those witnesses who are believed to have specific knowledge of the subject matter of the investigation are to be contacted and interviewed.
- I. During the course of the interview, generalized questions shall be employed regarding the alleged misconduct of a particular judge, which would not reveal the source of previously supplied information.
- J. During the course of the interview, factual or leading questions shall be employed only for the purpose of attempting to refresh the recollection or seek clarification of a prior contradictory response.
- K. The interview shall be immediately terminated upon the expression of the witnesses' reluctance or refusal to participate in the interview or to answer further questions.
- L. Generally, the investigation should be limited to the initial scope of the inquiry.
- M. If there is indication of possible criminal involvement, the witness should be advised that the commission may refer the matter to the proper law enforcement authority for further investigation.
- N. All witnesses may be interviewed by members of the Commission staff or by other individuals appointed in writing by the Commission or its Staff Assistant.
- O. In an interview with the Respondent, counsel for the Respondent may be present during the course of the interview if the Respondent so desires.
- P. A witness may be accompanied by legal counsel during the course of an interview.

Q. If deemed necessary, an interview can be preserved by means of a stenographic record or taped recording, subject to the prior approval of the staff assistant and with the initial indication to the witness that the interview will be so preserved.

R. Under normal circumstances, a witness is to be interviewed at a location convenient to the witness.

S. An investigative report should contain a summary of all pertinent facts.

T. Staff investigations are to be completed as expeditiously as possible with cumulative evidence sought only where necessary to establish a continuing pattern of misconduct.

U. In analyzing judicial conduct the staff assistant and investigator(s) shall be guided by Art. IV Sec. 10 of the Alaska Constitution and AS 22.30.011.

## Filing a Complaint

To file a complaint, contact the Commission office in person, by telephone, or in writing. The address and telephone number is on the back of this brochure.

## Investigating a Complaint

The Commission will review the complaint, a step which usually involves an interview by Commission staff with the person who filed the complaint. The person who has alleged the misconduct must submit facts surrounding the incident to the Commission. No complaint will be decided solely on the basis of claims made by the complainant. All allegations will be thoroughly investigated.

The Commission has the authority to initiate its own inquiry into possible judicial misconduct.

After the initial inquiry, the Commission may dismiss the complaint or conduct a full investigation, including formal hearings. A complaint against a judge may be dismissed by the Commission at any time during the investigation, if the charge is found to be without merit.

Complaints filed with the Commission and all Commission inquiries, investigations, and hearings are confidential. They become public when Commission recommendations are filed with the Supreme Court.

## Powers of the Commission

The Commission only has the power to investigate charges of judicial misconduct or disability. After a formal hearing, the Commission may:

- Exonerate the judge of the charge or charges
- Reprimand the judge publicly or privately
- Recommend that the Supreme Court take one of the following actions against the judge:

Suspension  
Removal  
Retirement  
Public Censure  
Private Censure

## Powers the Commission Does Not Have

The Commission does not have the authority to hear an appeal for judicial error, mistake, or other legal reasons for appeals. That is the role of the state's appellate courts.

The Commission cannot supervise any local court administration.

The Commission has no authority to evaluate judges for retention elections.

## For Information/ To File a Complaint

Alaska Commission on Judicial Conduct  
Boney Memorial Court Building  
303 K Street  
Anchorage, Alaska 99501  
(907) 264-0528

# THE ALASKA COMMISSION ON JUDICIAL CONDUCT

## The Alaska Commission on Judicial Conduct

Complaints from the public about the conduct of judges in Alaska are handled by the constitutionally created Alaska Commission on Judicial Conduct. The Commission provides an open channel for any individual who feels he or she has a legitimate complaint about the conduct of any state judge in Alaska.

In addition to reviewing complaints against judges, the Commission helps promote compliance with established codes of conduct for judges.

The Commission consists of nine members:

- Three justices or judges of state courts elected by fellow justices and judges.
- Three attorneys who have practiced law in Alaska at least 10 years. The attorneys are appointed by the Governor from nominations made by the Alaska Bar Association. The appointments must be confirmed by a majority of both houses of the state legislature meeting in joint session.
- Three members of the public who are not attorneys, judges or retired judges. The public members are appointed by the governor and must be confirmed by a majority of both houses of the state legislature meeting in joint session.

## Complaints Against Judges

A complaint can be filed by a member of the public against a justice of the supreme court, a judge of the court of appeals, a superior court judge, or a district court judge.

Complaints against magistrates can be filed with Magistrate Services, Boney Memorial Court Building, 303 K Street, Anchorage, AK 99501. These complaints will be referred to the appropriate presiding superior court judge for investigation.

## Types of Complaints

The Commission has the authority to handle a wide range of complaints against judges for alleged misconduct both inside and outside the courtroom, or because of a mental or physical disability that seriously interferes with judicial duties.

## Judicial Misconduct

Alleged judicial misconduct can include, but is not limited to:

### Improper Courtroom Decorum

- Improper consideration and treatment of counsel, witnesses, and others
- Improper or eccentric bench conduct, such as sleeping or drunkenness
- Failure or refusal to dispose of judicial business promptly, enter orders, or cooperate in court administration.

### Improper or Illegal Influence

- Allowing family, social, or political relationships to influence any judicial decision, making appointments, or other matters relating to the administration of justice, such as transferring cases or reducing charges.
- Conflict of interest
- Giving or receiving gifts, bribes, loans, or favors.

### Impropriety Off the Bench

- Misappropriation or misuse of public employees, property or funds
- Improper comments, accusations, associations, or connections.
- Interference with or influence on a pending or impending lawsuit.
- Lewd or corrupt personal life.
- Use of judicial position to extort or embezzle private funds.

## Other Improper or Illegal Activities

- Conducting proceedings or engaging in discussions involving one side or in the interest of one party only.
- Interfering with the attorney-client relationship.
- Improper use of judicial authority
- Bias
- Improper political campaign activities involving the judge or any political candidate.
- Abusing the prestige of the judicial office.
- Obstruction of justice, perjury, filing a false document.
- Criminal behavior
- Failure to disqualify self.
- Ticket Fixing.

## Physical or Mental Disability

Physical or mental disability can include, but is not limited to:

Alcohol or drug abuse  
Senility  
Serious physical illness  
Mental illness

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53USL104306(1985)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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JAMES HOLLOWAY,  
Plaintiff,  
vs.  
HONORABLE JUDGE S. J. BUCKALEW;  
HONORABLE JUDGE RALPH E. MOODY;  
and STATE OF ALASKA,  
Defendants.

No. 3AN-77-8145 CIV

PLAINTIFF'S REPLY MEMORANDUM AND MEMORANDUM  
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In their memorandum in opposition to plaintiff's motion for summary judgment and in support of defendants' motion for summary judgment, defendants make several points that will be dealt with sequentially. However, plaintiff notes that defendants' position completely overlooks and ignores the critical and central point made by plaintiff in his submission--that under the Supreme Court's decision in this case, Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979), the presiding Superior Court Judge's statutory power to remove a judge--notwithstanding the "serves at the pleasure" language--was narrowly interpreted so as to provide a means of quickly removing a magistrate when, and only when, such action was justified on the basis of judicial unfitness. By totally ignoring this argument, and presenting nothing to dispute the correctness of it, defendants are able to argue their position on a rationale that makes it wholly irrelevant that the officerholder in question is a judge rather than a political appointee serving at the whim of some elected official.

Defendants cite several cases to the effect that one who "serves at the pleasure" of another has no right to a hearing before being terminated. These cases involve officials such as

1 city managers, deputy sheriffs, and officers of legislative  
2 bodies. Plaintiff will concede at the outset that if the language  
3 "serves at the pleasure" in A.S. 22.15.170(c) relegates the  
4 tenure of magistrates to that of purely political functionaries,  
5 he has no case. Plaintiff's argument, which is determinative of  
6 the case if plaintiff prevails on it, and which the defendants  
7 have ignored, is that it was plainly held not to mean the same  
8 thing by the Alaska Supreme Court.

9 Defendants argue that plaintiff had no "property inter-  
10 est" or "liberty interest" and consequently there are no due  
11 process implications to his summary dismissal. They further  
12 argue that no "stigma" attached to his dismissal, that his dis-  
13 missal was in any event proper because of his acknowledgement  
14 that he had used marijuana, and that he somehow waived his right  
15 to a hearing because he did not specifically request one after he  
16 had been informed of a fait accompli--his summary termination.  
17 If plaintiff's argument that he could only be removed for judi-  
18 cial unfitness is accepted hypothetically, it becomes clear that  
19 the defendants position crumbles. Clearly, if judicial unfitness  
20 is the only criterion that justifies removal, he had a "property  
21 interest"--an expectation of continued employment so long as he  
22 performed his duties and was fit, at least during the two-year  
23 period that he was expected to commit to the job. Similarly, the  
24 cases cited by both parties make it clear than an officeholder's  
25 "liberty interest" is involved where his termination stigmatizes  
26 him, thereby entitling him to a hearing. If judicial unfitness  
27 is the only legitimate basis for removing him, his summary removal  
28 necessarily implies--whether the actual reasons are publicly  
29 stated or not--that he is unfit and he has, ipso facto, been  
30 stigmatized by his removal.

31 Finally, if "judicial unfitness" is the only basis for  
32 removal, Holloway's acknowledgement about marijuana use can

33 PAGE 2  
34 REPLY MEMORANDUM

1 hardly obviate the need for a hearing directed at determining  
2 whether, and to what extent, such conduct affected his fitness or  
3 performance of duties as a judge. Private marijuana use is  
4 constitutionally protected in Alaska, and could not, in and of  
5 itself, justify his removal.<sup>1/</sup>

6 The Waiver Question

7 Defendants' argument that plaintiff somehow waived his  
8 right to a hearing is based upon portions of an answer to a  
9 request for admission that are taken out of context, and is  
10 totally inconsistent with defendants' position in this lawsuit.  
11 Defendants rely upon an admission that, as quoted in their memo-  
12 randum at page 3, Judge Holloway "did not specifically request a  
13 hearing prior to the issuance of the order which terminated [his]  
14 appointment. . . ." The answer, in its entirety, states as  
15 follows:

16 Admit that I did not specifically request  
17 a hearing prior to the issuance of the order  
18 which terminated my appointment, since I  
19 had assumed that some kind of hearing would  
20 be held as a matter of course prior to such  
21 action. Deny that I had a full opportunity  
22 to make a comprehensive and detailed pre-  
23 sentation of my views prior to the order of  
24 termination, since I was not on notice that  
25 such order would be issued swiftly and with-  
26 out utilization of a hearing process.

22 See Responses to Request for Admission, December 27, 1977.

23 The circumstances leading up to Judge Holloway's termi-  
24 nation are that on August 19, 1977 he received a call from Jim  
25 Arnold advising him that various charges had been leveled against  
26

27 <sup>1/</sup> In fact, the original reason for his suspension was not  
28 marijuana use at all, but rather the fact that he was living  
29 in the same house as a woman to whom he was not (although  
30 now is) married. In fact, Judge Holloway believes that he  
31 was removed as the culmination of a process that was started  
32 by the District Attorney because of dissatisfaction with  
33 certain judicial actions he had taken that were wholly  
34 unrelated to his personal life. Complaint, para. 5(c).  
These issues need to be resolved at a hearing directed at  
the sufficiency of grounds for his removal. See discussions,  
infra.

33 PAGE 3  
34 REPLY MEMORANDUM

1 him and that he and Judge Moody were scheduled to leave on vaca-  
2 tion and that Judge Holloway had to respond promptly so that the  
3 matter could be cleared up before the impending vacations. Judge  
4 Holloway denied the serious charges, admitted to living in the  
5 same dwelling unit with other persons, one of whom was his  
6 girlfriend, and admitted that he "sometimes used marijuana."  
7 Affidavit of James Holloway, April 1983, para. 8. Judge Holloway  
8 requested the names of the individuals making the charges, which  
9 information was denied. Shortly thereafter, he received a tele-  
10 phone call from Judge Buckalew demanding his resignation, which  
11 Holloway refused to give, whereupon Judge Buckalew orally sus-  
12 pended him "on the grounds of living with the woman without a  
13 license." Ibid., para. 9. Five days later he received a copy of  
14 an order signed by Judge Buckalew terminating his appointment.  
15 Ibid., para. 10. Judge Holloway asked, through his attorneys,  
16 that he be afforded a due process hearing. Ibid., para. 11. He  
17 has never received an explanation of the charges, the names of  
18 the accusers, or any kind of a hearing. Id.

19           On the basis of the above, it is clear that Judge  
20 Holloway had no opportunity to obtain a hearing, because he was  
21 informed of the adverse action after it had been taken. More-  
22 over, the defendants have consistently maintained throughout  
23 these proceedings that he has no right to a hearing, and there is  
24 no specific provision for a hearing in the statutes or regulations  
25 relating to magistrates. Consequently, a request for a hearing  
26 would plainly have been a futile act on his part and one already  
27 rendered moot by past events. In recognition of the unclear  
28 procedures to follow to obtain a hearing, counsel for Holloway  
29 contacted Judge Moody and Judge Buckalew on August 31, 1977 and  
30 stated as follows:

31           At this stage of my research, it is unclear  
32           what person or forum Mr. Holloway's position

33 PAGE 4  
34 REPLY MEMORANDUM

1           should be communicated to, and your advice  
2           in this respect would be greatly appreciated.

3           See Affidavit of John S. Hedland. It is clear that Judge Holloway  
4           did everything humanly possible to obtain a hearing, and it  
5           is equally clear that at no point did defendants have the slight-  
6           est intention of affording him one. Under these circumstances,  
7           he cannot be held to have waived his right to a hearing.

8           Here Holloway was not aware of his pending termination  
9           until he was informed that he had in fact been terminated.

10           What the Constitution does require is "an  
11           opportunity . . . granted at a meaningful  
12           time and in a meaningful manner," . . .  
13           "for [a] hearing appropriate to the nature  
14           of the case." The formality and procedural  
15           requisites for the hearing can vary, depending  
16           upon the importance of the interests involved  
17           and the nature of the subsequent proceedings.  
18           That the hearing required by due process is  
19           subject to waiver, and is not fixed in form  
20           does not affect its root requirement that an  
21           individual be given an opportunity for a  
22           hearing before he is deprived of any signi-  
23           ficant property interest, except for extra-  
24           ordinary situations where some valid govern-  
25           mental interest is at stake that justifies  
26           postponing the hearing until after the event.

27           Boddie v. Connecticut, 401 U.S. 371, 378-9 (1971). [Citations and  
28           footnotes omitted; emphasis original]. It is indisputable here  
29           that Holloway was never afforded any opportunity for a hearing  
30           before or after he was terminated, and thus the argument the  
31           State makes that Holloway "waived" his right to a hearing is  
32           illusory.

33           It is well settled that:

34           [t]o constitute a waiver there must be an  
          existing right, a knowledge of its existence,  
          and an actual intention to relinquish it, or  
          such conduct as warrants an inference of the  
          relinquishment. It is a voluntary act and  
          implies an abandonment of a right or privilege--  
          an election to dispense with something of value  
          or to forego some advantage which one might,  
          at his option, have demanded. In no case will a

35           PAGE 5  
36           REPLY MEMORANDUM

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waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.

Chase v. National Indemnity Co., 278 P.2d 68, 72 (Cal.App. 1954).

See also, Ed Black's Chevrolet Center, Inc. v. Melichar, 471 P.2d 172, 174 (N.M. 1970). In no way can Holloway's conduct be inferred as a waiver of his right to a hearing, and in no way can the State realistically contend that it has been prejudicially misled into the honest belief that Holloway intended to waive his constitutional right to a hearing or consented to a relinquishment of that right.

PAGE 6  
REPLY MEMORANDUM



1           Secondly, Holloway was never charged with or convicted  
2 of any offense whatsoever under the federal drug laws. Even if  
3 it is assumed, for the sake of argument, that his acknowledgement  
4 of having used marijuana establishes beyond argument that he had  
5 violated 21 USC §844(a), the State's conclusion--that this  
6 acknowledgement established judicial unfitness sufficient to  
7 warrant his summary removal without a hearing--is incorrect. The  
8 defendants cite no authority whatsoever for the proposition that  
9 judicial unfitness is established per se through the establish-  
10 ment of facts which demonstrate the technical violation of some  
11 penal statute-even in the absense of prosecution or conviction.  
12 Indeed, in an analogous situation, the statutes of Alaska pro-  
13 viding for discipline of a judge pursuant to Judicial Qualifi-  
14 cations Commission action set out clearly what the Legislature  
15 regards as judicial unfitness.<sup>4/</sup> Judge Holloway could not have  
16 been disciplined under these procedures on the evidence of his  
17 acknowledgement of marijuana use without inquiry into its effect,  
18 if any, on his general judicial fitness.

19           A.S. 22.30.070 provides for automatic discipline in the  
20 event of conviction "of a crime punishable as a felony under  
21 state or federal law or of a crime that involves moral turpitude  
22 under state or federal law." A.S. 22.30.070(c) provides for

23 3/ continued

24           are fair game for anyone wishing him to be removed because  
25 of dissatisfaction with the judge's official actions. The  
26 defendants' red herring marijuana argument should not be  
27 allowed to obscure the real issues that this case presents.

28 4/ In its decision, the Supreme Court reserved judgment on  
29 whether or not Judicial Qualifications Commission procedures  
30 applied to a magistrate. Buckalew v. Holloway, 604 P.2d  
31 240, 246 (Alaska 1979). However, whether Judicial Council  
32 procedures are applicable or not, it is impossible to ration-  
ally conclude that the definition of judicial fitness should  
vary depending upon whether the judge in question is a  
magistrate, a district court judge, a superior court judge,  
or an appellate judge. Indeed, if any distinction is logical,  
it would require a lesser showing of unfitness of a judge  
occupying a higher level of responsibility and, presumably,  
possessing a greater potential for mischief in the event of  
unfitness.

33 PAGE 8  
34 REPLY MEMORANDUM

1 discipline of a judge in the event of a disability, or for action  
2 that "constitutes willful misconduct in the office, willful and  
3 persistent failure to perform duties, habitual intemperance, con-  
4 duct prejudicial to the administration of justice, or conduct  
5 that brings the judicial office into disrepute." Judge Holloway  
6 was not convicted of any crime, and the offense referred to in  
7 the plaintiff's memorandum is only a misdemeanor, not a felony,  
8 under federal law<sup>5/</sup> and is not a crime of any type under state  
9 law. Moreover, mere possession of marijuana is not a crime that  
10 involves moral turpitude, even in states where it is a criminal  
11 act. See, generally, In re Kreamer, 535 P.2d 728 (Calif. 1975),  
12 cited in Matter of Preston, 616 P.2d 1, 5, n. 10 (Alaska 1980);  
13 In re Higbie, 493 P.2d 97 (Calif. 1972).

14           Consequently, the conduct acknowledged by Holloway  
15 relating to marijuana could not obviate the need for a hearing  
16 prior to his dismissal, whether it amounts to admission of a  
17 crime under federal law or not. Judge Holloway was not convicted  
18 of any offense, the offense which defendants claim he admitted  
19 committing is only a misdemeanor, and it does not involve moral  
20 turpitude. If reference is made to the only statutory standard  
21 available governing "judicial fitness", the specific statutory  
22 provisions enacted to govern discipline of judges, it is clear  
23 that the automatic provisions relating to conviction of a felony  
24 or a crime involving moral turpitude have not been met. While it  
25 is possible that use of marijuana could conceivably, under certain  
26 conditions, amount to evidence of unfitness under the more flex-  
27 ible standards A.S. 22.30.070(c), a finding of unfitness in  
28 the absence of a hearing could not be based upon mere acknowl-  
29 edgement of the use of marijuana. That provision requires that

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30  
31 <sup>5/</sup> Under 21 U.S. §844, a first conviction is punishable by up to  
32 one year in prison, meaning that it is a misdemeanor. 18  
U.S.C. §1. Holloway had never been (and has never been) con-  
ficted of any drug law violations.

33 PAGE 9  
34 REPLY MEMORANDUM

1 the conduct in some manner interfere with a judge's ability to  
2 function as such or impair the integrity of the office. In this  
3 case, there has been no inquiry whatsoever into the frequency,  
4 circumstances, or other factors surrounding the use of marijuana.  
5 There has been no finding, inquiry, or development of any facts  
6 relating to how, if at all, it interfered with his performance of  
7 judicial duties, amounted to "habitual intemperance" or otherwise  
8 was prejudicial to the administration of justice or subjected the  
9 court system to disrepute. These are precisely the factors that  
10 a hearing would have to be directed at to justify Judge Holloway's  
11 removal.

12 Finally, defendants' argument wholly overlooks the  
13 import of the Supreme Court's decision in Ravin v. State, 537  
14 P.2d 494 (Alaska 1975). In Ravin, the court considered the  
15 effect of State action interfering with an individual's private  
16 use of marijuana, 537 P.2d at 497-99, under Alaska's right to  
17 privacy amendment, Alaska Constitution Article I, Section 22, and  
18 held that "possession of marijuana by adults at home for personal  
19 use is constitutionally protected . . . ." 537 P.2d at 511. If,  
20 as the defendants now maintain, Judge Holloway was removed because  
21 of an acknowledgement that he had used marijuana, then it neces-  
22 sarily follows that his removal constituted State action that is  
23 constitutionally prohibited under the Ravin decision. There is  
24 absolutely no evidence, no showing, and as far as plaintiff  
25 knows, no contention, that Judge Holloway's use of marijuana  
26 interfered in the slightest with his effective and proper func-  
27 tioning as a Judge, or otherwise reflected upon his fitness.

28 The plaintiff is aware of the supremacy clause, and  
29 realizes that the Alaska Constitution and Supreme Court cannot  
30 abrogate a federal statute. On the other hand, the court can  
31 judicially notice that prosecutions of adults under the federal  
32 drug laws for mere possession of marijuana without intent to sell

33 PAGE 10  
34 REPLY MEMORANDUM

1 or distribute are, for all practical purposes, non-existent.  
2 Cf., Ravin v. State, supra, 537 P.2d at 511, n. 70. More import-  
3 antly, plaintiff is not requesting that this court attempt to  
4 interfere with federal action or any federal prosecutions that  
5 may be appropriate. The guarantees of the Alaska Constitution do  
6 not confer any immunity from federal prosecution. On the other  
7 hand, under the Ravin decision, state action that interferes with  
8 private use of marijuana by an adult is prohibited. What plain-  
9 tiff is asking is that this court recognize that, absent some  
10 inquiry into its effect upon Judge Holloway's performance or  
11 fitness as a judge, state action removing him from that position  
12 for no other reason than an acknowledgement of private use of  
13 marijuana is violative of the policy and constitution of Alaska  
14 as pronounced by the Alaska Supreme Court. Consequently, absent  
15 a hearing in which the marijuana use in question can be consid-  
16 ered in the context of judicial fitness, his removal cannot  
17 stand.

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PAGE 11  
REPLY MEMORANDUM

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trate at Dillingham. He has admitted the truth of facts I gave him as the reasons for my terminating his employment. True, he disagreed as to the reasons being sufficient cause to warrant his termination. However, I felt otherwise since he accepted the position with the understanding that he could not retain the position if such facts develop.

See Affidavit of John S. Hedland, Exhibit "E".

As extensively discussed before, it is neither customary, good policy, nor, in plaintiff's view, legal for a judge to be subjected to arbitrary termination for political or other reasons. While it does not stigmatize a political appointee to be summarily removed from appointive position, because such removal is part of the rough and tumble of politics and implies no wrongdoing on his part, the same is not true where a judge in a small town is removed. The public will naturally believe that some impropriety on his part is the cause of the removal. Both the Supreme Court and the defendants in this case have vigorously argued that remedying judicial unfitness is the precise reason why the power of summary removal is necessary. Under these circumstances, it is obvious that Judge Holloway's removal is going to be construed as reflecting on his fitness whether the reasons are publicly stated or not.

PAGE 13  
REPLY MEMORANDUM



1 saying in the quoted passage was that the mere right to a hearing  
2 did not entitle the employee to reinstatement. It was not saying  
3 that, if he prevailed at the hearing, he would not be entitled to  
4 reinstatement. See Perry v. Sindermann, supra, 408 U.S. at 603.  
5 In that case, as here, there was no express statutory right to  
6 continued employment, but the court held that the teacher in  
7 question had a "de facto" right based upon past practice. Essen-  
8 tially the same situation is present here, given the Supreme  
9 Court's narrow constriction of the power of summary removal con-  
10 tained in the statute authorizing summary termination of a mag-  
11 istrate to situations where such action is necessitated by con-  
12 siderations of judicial fitness.

13           The State attempts to distinguish University of Alaska  
14 v. Geistauts, 666 P.2d 424 (Alaska 1983), where a non-tenured  
15 teacher's application for tenure status was denied at a meeting  
16 that did not comply with the State open meeting law. The case is  
17 simply not distinguishable from the instant case insofar as the  
18 consequences of denial of a hearing are concerned. The court in  
19 Geistauts held that the teacher in question was entitled to  
20 reinstatement until such time as a proper hearing on his tenure  
21 application was held, notwithstanding the absence of any "prop-  
22 erty" or "liberty" interest such as the State asserts to be a  
23 prerequisite to a due process hearing. The holding of the case  
24 is clear; until proper procedures are followed, adverse action is  
25 null and void. See, also, Owen v. City of Independence, 445 U.S.  
26 622, 632, n. 12 (1980).

27           DATED at Anchorage, Alaska, this 17th day of October, 1983.

28                           HEDLAND, FLEISCHER & FRIEDMAN  
29                           Attorneys for Plaintiff

30  
31           By John S. Hedland

32           The undersigned hereby swears that on the 17th day of  
33           October, 1983, the attached documents were  
34           presented to the attorneys of record.  
35           Lee Y. [Signature]  
36           Subscribed and sworn to before me  
37           the date last written.  
38           [Signature]  
39           Notary Public  
40           My Commission Expires 7/22/84

33 PAGE 15  
34 REPLY MEMORANDUM

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HONORABLE JUDGE S. J. BUCKALEW; )  
 HONORABLE JUDGE RALPH E. MOODY; )  
 and STATE OF ALASKA, )  
 )  
 Defendants. )

No. 3AN-77-8145 CIV

AFFIDAVIT OF JOHN S. HEDLAND

STATE OF ALASKA )  
 ) ss.  
 THIRD JUDICIAL DISTRICT )

JOHN S. HEDLAND, being duly sworn according to law,  
deposes and states:

1. Shortly after Judge Holloway's termination, he retained me as counsel to represent him in respect thereto.

2. No formal statement of grounds for his termination was ever given, and the statutes and regulations did not set out any procedure for obtaining a hearing except through the Commission on Judicial Qualifications, which had made no charges against him. I therefore contacted Judge Moody and Judge Buckalew by letter on August 31, 1977 to determine how to proceed. A copy of my letter is annexed hereto as Exhibit "A".

3. Subsequently, no action was taken and suit was instituted on Judge Holloway's behalf alleging, among other things, that he could not be terminated without a hearing, which we believed should be held before the Commission on Judicial Qualifications.

4. I also discussed the matter with Judge Moody and Jim Arnold. It was implicit in these discussions that the position of the court system was that Judge Holloway was not entitled

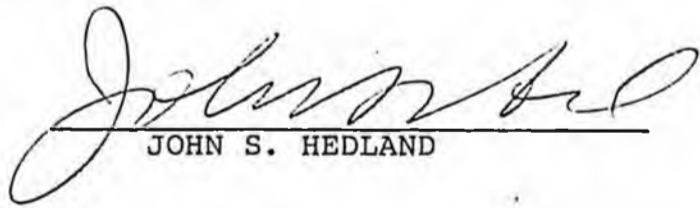
1 to a hearing, and was not going to get one. I was totally flab-  
2 bergasted, and still am, at the defendants' suggestion that Judge  
3 Holloway had somehow waived his right to a hearing by allegedly  
4 not requesting one.

5 5. On June 23, 1983 I sent the letter annexed hereto  
6 as Exhibit "B" to Madeleine R. Levy, attorney for defendants.  
7 Included therewith was a proposed stipulation that is annexed  
8 hereto as Exhibit "C". Among other things, the proposed stipu-  
9 lation incorporates a summary of a conversation which I had with  
10 Jim Arnold on September 20, 1977. A copy of my memorandum of the  
11 conversation, with certain portions excised as set out in my  
12 letter to Madeleine Levy, is annexed to the proposed stipulation.  
13 Exhibit "D". The memorandum is a true and correct statement of  
14 what was said during the conversation.

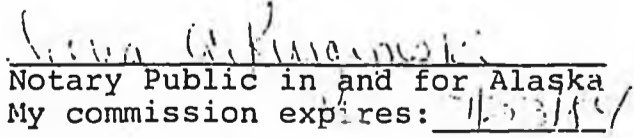
15 6. So far as I know, defendants do not deny the  
16 correctness of the stipulation except as to a question about a  
17 possible prosecution within the ambit of paragraph 4, but have not  
18 entered into it. Accordingly, we are filing the substance of the  
19 stipulation in the form of a request for admissions.

20 7. Exhibit "E" hereto is a copy of a letter forwarded  
21 to me and apparently sent by Judge Moody to Mr. Paul Post.

22 DATED: October 17, 1983.

23  
24   
25 JOHN S. HEDLAND

26 SUBSCRIBED AND SWORN TO before me this 17th day of  
27 October, 1983.

28  
29   
30 Notary Public in and for Alaska  
31 My commission expires: 11/30/84

32  
33 PAGE 2  
34 AFFIDAVIT

*Law Offices*

RICE, HOPPNER & HEDLAND

1016 WEST 6TH AVENUE  
ANCHORAGE, ALASKA 99501  
(907) 279-5528

FAIRBANKS OFFICE  
330 WENDELL STREET  
P. O. BOX 2551 (99707)  
(907) 452-1201

August 31, 1977

JULIAN C. RICE  
LLOYD I. HOPPNER  
JOHN S. HEDLAND  
HUGH W. FLEISCHER  
MILLARD F. INGRAHAM  
SAUL R. FRIEDMAN  
PATRICK T. BROWN  
LINDA L. WALTON  
MARK I. WOOD  
NIESJE J. STEINKRUGER  
ROGER BRUNNER  
STEPHANIE J. COLE  
JAMES T. BRENNAN  
JANALEE R. STRANDBERG

CHARLES J. CLASBY  
OF COUNSEL

Honorable Ralph E. Moody  
Presiding Judge  
Superior Court, State of Alaska  
Third Judicial District  
303 K Street  
Anchorage, AK 99501

Honorable S.J. Buckalew  
Acting Presiding Judge  
Superior Court, State of Alaska  
Third Judicial District  
303 K Street  
Anchorage, AK 99501

Dear Judges Moody and Buckalew:

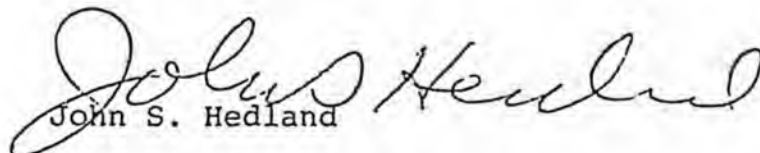
This office has been retained by James Holloway in regard to his reported termination as a magistrate in Dillingham. I would therefore appreciate being advised of any further steps that are taken in this matter, and request that any communications in regard thereto are directed to me.

At this stage of my research, it is unclear what person or forum Mr. Holloway's position should be communicated to, and your advice in this respect would be greatly appreciated. He will be in town on Friday, September 2, and an informal meeting after that date may be beneficial to all concerned.

Thank you very much for your attention.

Sincerely,

RICE, HOPPNER & HEDLAND

  
John S. Hedland

JSH/rl

Exhibit "A"

June 23, 1983

Madeleine R. Levy  
Assistant Attorney General  
State of Alaska  
1031 West Fourth Avenue, Suite 200  
Anchorage, AK 99501

Re: Holloway v. Buckalew, et al.  
Superior Court No. 77-8145 CIV

Dear Lonnie:

Pursuant to our conversation of June 22, 1983, I enclose for your consideration a copy of a proposed stipulation as to facts which I do not believe to be in dispute in this case. If your clients are agreeable to the stipulation, in whole or in part, it will probably save all parties a good deal of time that would otherwise be spent in discovery. I am particularly reluctant to take Joe Arnold's deposition because of his health. Moreover, if I am going to have to be a witness to the conversation with him, I might as well know it now to be able to consider what, if any, effect it may have on my continued representation of Mr. Holloway. If it is not possible to stipulate to the contents of the conversation, perhaps we could at least stipulate to some of the facts reflected in the memorandum.

I obviously do not have first-hand knowledge as to the policies and practices of the Department of Law referred to in paragraphs 4 and 5 of the stipulation. However, the stipulation correctly states the facts based upon anything I have seen during 15 years of practice here, and the fact that there are no annotations to the statutes in question which would suggest that they had ever been enforced. Judge Moody and Judge Buckalew, given their background in politics, law enforcement, prosecuting and on the bench, and the Department of Law, should be aware of any information that indicates that the proposed paragraphs in the stipulation are incorrect, if such is the case.

Please note that the memorandum reflecting the phone call with Jim Arnold that I am forwarding contains two paragraphs

Exhibit "B"

Madelcine R. Levy  
Assistant Attorney General  
State of Alaska  
Page 2  
June 23, 1983

of a three-paragraph memorandum. The other paragraph does not relate or refer to the conversation with Mr. Arnold or bear upon its contents. The memo has been Xeroxed so that only the first and last paragraphs are included and the unrelated paragraph excluded. I will be happy to provide the entire memo to Judge Johnstone for in camera inspection if you would feel more comfortable handling it that way.

Thank you for your cooperation.

Sincerely,

John S. Hedland

JSB:jp  
Enclosure



1 that such offenses were included within other charged conduct  
2 that was commercial, forcible, or involved children, or unless  
3 said charges arose out of plea bargains or negotiated resolutions  
4 of cases in which the charged or alleged conduct was commercial,  
5 forcible, or involved children.

6           5. At the time of James Holloway's termination as a  
7 magistrate, there existed within the Department of Law of the  
8 State of Alaska a policy not to prosecute or charge individuals  
9 under the statutes set out above or under any other statutes  
10 prohibiting private, noncommercial sexual conduct between con-  
11 senting adults, unless such charges or prosecutions were for  
12 conduct that was included within or resulted from plea bargains  
13 arising out of charges of conduct that was commercial, forcible,  
14 or involved children.

15           6. Except for statements by Holloway acknowledging  
16 the use of marijuana and living with a woman to whom, at the time  
17 of his termination, he was not married, his termination was not  
18 predicated upon any determination that he had done any act that  
19 reflected negatively on his fitness as a magistrate, or otherwise  
20 was unfit as a magistrate. The parties do not, by this paragraph,  
21 intend to stipulate as to whether or not the acknowledgements by  
22 Holloway referred to herein establish his unfitness as a magistrate,  
23 or reflect upon his fitness as a magistrate.

24           7. At no time, prior or subsequent to James Hollo-  
25 way's termination as a magistrate, was he afforded or offered the  
26 opportunity for a hearing as to any charges made against him in  
27 connection with or leading up to his termination as a magistrate,  
28 or as to the decision to terminate him, and at no time was he  
29  
30

31 Page 2  
32 STIPULATION

33

34

1 afforded the opportunity to confront or cross-examine anyone who  
2 may have made allegations or charges against him.

3 DATED: June 23, 1983.

HEDLAND, FLEISCHER & FRIEDMAN  
Attorneys for Plaintiff

4  
5 By John S. Hedland  
John S. Hedland

6 DATED: June     , 1983.

STATE OF ALASKA, DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
Attorneys for Defendants

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10 By \_\_\_\_\_  
Madeleine R. Levy

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The undersigned hereby swears that on the 23 day of  
1983, the attached documents were  
mailed to the attorney of record.  
Subscribed and sworn to before me  
this date by written  
John S. Hedland  
Notary Public  
My Commission Expires 12/23/84

Page 3  
STIPULATION

MEMO TO THE FILE

RE: Jim Holloway

FROM: John Hedland

On September 20, 1977, at approximately 4:45 p.m. I contacted on the telephone Jim Arnold. I was in Jim Brennan's office and he was able to hear my side of the conversation although I believe he left the office for a brief period while it was going on. Mr. Arnold confirmed that he had contacted Mr. Holloway and reported to him that five complaints had been lodged against him, that he was living with a girl, that he held pot parties, that he smoked pot, that one or more occasions he had repeatedly talked defendants out of pleading guilty and that he was contributing to the delinquency of a minor. He said that Holloway had admitted to living with the girl and smoking pot, and had denied the other allegations. He said that all of his information had come from Judge Madsen, and that it was his information that the allegations relating to talking defendants out of pleading guilty were the result of complaints by the district attorney to Judge Madsen. He then said that he may have on one occasion discussed the guilty plea question with Bill Mackey, but that this had been a couple of months earlier and was in addition to the conversation with Judge Madsen. He also said that Judge Madsen had expressed his concerns about Holloway to him on many occasions, and was "very concerned". He also said that Judge Madsen had the highest regard for Judge Holloway as a Judge. Arnold specifically said that Madsen had discussed the matter with Judge Buckalew and Judge Moody but did not recommend that Jim be fired, or make the decision that he be fired. He said the decision had been made by Judge Buckalew and concurred in by Judge Moody. He said he had asked Jim Holloway to "recant" and apply to me that he could have kept his job had he done so. He denied knowing that Jim was living with a girl at the time Jim was hired and said that Judge Moody also did not know. I pointed out to him that Judge Moody had said to me that he was aware that Jim was living with a girl, but had told me that he (Judge Moody) was under the impression that Jim had agreed to stop doing so. He said that when Holloway was hired he had requested a two year commitment and that Jim had expressed the intention to stay for that long but had failed to make an ironclad promise to that effect.

In my conversation with Arnold I asked him what new facts had come to light between the suspension and firing to justify the more drastic action. Arnold said he was not present when the decision was made but believed the decision to fire rather than to suspend was not based upon any new information. He also denied that the question of talking people out of guilty pleas played any part in the decision to terminate Holloway.



## Trial Courts

State of Alaska

THIRD JUDICIAL DISTRICT  
303 K STREET  
ANCHORAGE, ALASKA 99501

RECEIVED  
1977

Rice, Hobbner,  
& Hedland

RALPH E. MOODY  
Presiding Judge

September 22, 1977

Mr. Paul Post  
Box 348  
Bethel, Alaska 99559

Dear Mr. Post:

This is in response to your letter of September 1, 1977, regarding the termination of Mr. James Holloway as magistrate at Dillingham.

As Presiding Judge, it is my policy not to release the reasons for terminating a magistrate's services unless the magistrate requests me to do so or the magistrate makes a release as to the cause of his termination which is not in conformity with the reasons stated to him by me for his being terminated.

Your letter does not indicate that Mr. Holloway has released the reasons given him for terminating his services, and he has not asked me to release the reasons I gave for his termination. Until such time as I have cause to release the reasons for his termination because of his request to me to do so or he publicizes reasons different from what I gave, I do not propose to comment upon the speculated cause or causes you have advanced in your letter.

At this time, I believe it sufficient to say that Mr. Holloway made certain commitments to me as to what I could expect of him as magistrate at Dillingham. He has admitted the truth of the facts I gave him as the reasons for my terminating his appointment. True, he disagreed as to the reasons being sufficient cause to warrant his termination. However, I felt otherwise since he accepted the

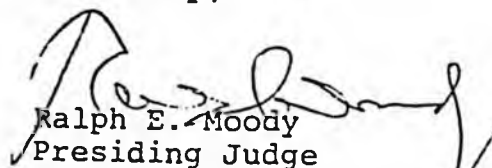
Exhibit "E"

Mr. Paul Post  
September 22, 1977

Page 2

position with the understanding that he could not retain  
the position if such facts developed.

Sincerely,



Ralph E. Moody  
Presiding Judge  
Third Judicial District

REM:dpd

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HONORABLE JUDGE S. J. BUCKALEW; )  
HONORABLE JUDGE RALPH E. MOODY; )  
and STATE OF ALASKA, )  
 )  
Defendants. )  
 )

RECEIVED  
1983  
Clerk of the Trial Courts  
3rd Judicial District

No. 3AN-77-8145 Civ.

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants respectfully move this Court for summary judgment as follows:

1. A judgment that plaintiff was not entitled to a pre-termination hearing prior to his dismissal as magistrate; and
2. An order that plaintiff's dismissal was valid.

This motion is based upon the attached Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment and the pleadings on file in this case.

Respectfully submitted this 30th day of August, 1983, at Anchorage, Alaska.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 30th day of August 1983 a true and correct copy of 1 stated was served by mail on the following attorneys: Hickman  
By Maureen R. Levy

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By: Maureen R. Levy  
Maureen R. Levy  
Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HONORABLE JUDGE S. J. BUCKALEW; )  
 HONORABLE JUDGE RALPH E. MOODY; )  
 and STATE OF ALASKA, )  
 )  
 Defendants. )  
 )

RECEIVED  
JAN 11 1977  
Clerk of the Trial Courts  
and Judicial District

No. 3AN-77-8145 Civ.

DEFENDANTS' MEMORANDUM IN OPPOSITION  
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff James Holloway has moved this Court for partial summary judgment seeking a declaration that his termination as a magistrate was void because no pre-termination hearing was held, and requesting this Court to order the defendants to hold such a hearing. Holloway claims that he is entitled to a pre-termination hearing under the due process clauses of the state and federal constitutions.

The effect of the relief requested would be to reinstate Holloway as a magistrate and to award him back pay from August 1977 to the present. Holloway is not entitled to summary judgment as a matter of law. For the reasons more fully stated below, his motion for partial summary judgment should be denied and defendants' cross-motion for summary judgment should be granted.

FACTUAL BACKGROUND

On January 31, 1977, James Holloway was appointed magistrate of the Third Judicial District, in Dillingham, Alaska, by presiding Judge Ralph E. Moody. The statute which authorized this appointment is AS 22.15.170(c) which reads:

The presiding judge of the superior court in each judicial district shall appoint the magistrates for the judicial district. Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

(Emphasis supplied).

In August of 1977, acting Presiding Judge Buckalew and Trial Court Administrator James E. Arnold had conversations with Holloway concerning his use of marijuana. <sup>1/</sup> Holloway admitted to them that during the course of his service as magistrate he used marijuana. <sup>2/</sup> On August 22, 1977, Judge Buckalew issued an order removing Holloway from the Dillingham magistrate post. Judge Moody later approve this termination action.

The order terminating Holloway's appointment, like the order appointing Holloway to the magistrate post, was based upon AS 22.15.170(c).

On September 23, 1977, Holloway filed a Petition for Review in the Nature of Prohibition in the Supreme Court of the State of Alaska challenging the authority of defendants Judges Buckalew and Moody to terminate him as a magistrate. On November 8, 1977, the court granted the defendants' motion for remand and remanded the case to the superior court for consideration.

Holloway challenged the termination order on two distinct grounds. First, Holloway claimed that AS 22.15.170(c), the statute under which he was terminated, violated the provisions of article IV of the Alaska Constitution governing appointment and removal of judges. Second, in the alternative, Holloway claimed that even if the presiding judge of the superior court had the constitutional power to appoint and remove a magistrate at his pleasure, Holloway's termination was nonetheless invalid for failure to give him a pre-termination

---

<sup>1/</sup> Defendants' Request for Admission No. 7 and Plaintiff's Response thereto, attached as Exhibits A & B respectively; Plaintiff's Affidavit in Support of his Motion for Summary Judgment filed on April 26, 1982 (Affidavit) at ¶ 8. That motion was subsequently withdrawn, n.4 infra, but the affidavit remains on record.

<sup>2/</sup> Id., No. 14; Holloway Affidavit at ¶ 8.

hearing. <sup>3/</sup> Based on these two grounds, Holloway sought relief in the form of reinstatement with back pay.

On November 28, 1977, the defendants served Holloway with a request for admissions, attached as Exhibit A. Holloway's response admitted that he "did not specifically request a hearing prior to the issuance of the order which terminated [his] appointment. . . ." See Response No. 8, attached as Exhibit B.

Holloway moved for summary judgment on the sole ground that AS 22.15.170(c), the statutory authority for the presiding judge to remove a magistrate, violated article IV of the Constitution of the State of Alaska.

The Superior Court granted summary judgment in favor of Holloway. On appeal, the Alaska Supreme Court reversed. Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979).

The Supreme Court held that although a magistrate is a judge within the meaning of article IV, section 4 of the state constitution, a magistrate, unlike other judges, serves for no fixed term. 604 P.2d at 243-44. The fact that magistrates serve at the pleasure of the presiding judge, rather than for a term fixed in time, neither violates the establishment of an independent judiciary nor impugns the administration of justice:

The legislature's intent in creating the office of magistrate was "to meet the immediate requirements of justice in the less populated areas of the state". . . . Magistrates normally serve in communities in which no superior or district court judges sit permanently, making day to day supervision impossible. It is apparent that the broad power vested in the presiding superior court judge to dismiss magistrates is intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is

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<sup>3/</sup> On November 28, 1977, the defendants served Holloway with a request for admissions, attached as Exhibit A. Holloway's response admitted that he "did not specifically request a hearing prior to the issuance of the order which terminated [his] appointment. . . ." See Response No. 8, attached as Exhibit B.

impairing the administration of justice in rural Alaska.

604 P.2d at 245 (footnotes omitted) (emphasis supplied).

The Court specifically reserved judgment upon the claim which is now presented by plaintiff's motion for partial summary judgment:

All other questions, such as whether Holloway's summary dismissal comports with due process, were expressly held in abeyance by the parties at the trial level, and we intimate no view on the merits of claims not yet litigated.

604 P.2d at 241 n.1.

On June 20, 1983, some three and one-half years after the Supreme Court rendered its decision, Holloway moved for partial summary judgment seeking reinstatement on the ground that his dismissal did not comport with procedural due process. <sup>4/</sup>

Holloway claims that his "property" interest in his continued employment as a magistrate, along with his "liberty" interest in his reputation, required a termination hearing to be held prior to his dismissal. Holloway then argues that his dismissal without a hearing entitles him to re-instatement. He is wrong on both assertions.

I. SUMMARY JUDGMENT IS PRECLUDED BY  
THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

This motion is supported by an affidavit from Holloway, a petition allegedly signed by residents of the Bristol Bay Recording District, and an affidavit of publication of a newspaper article relating to Holloway's dismissal. <sup>5/</sup>  
Taken as a whole, the motion and supporting documentation fail

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<sup>4/</sup> Holloway initially moved for a summary judgment on April 26, 1982, but withdrew this motion after defendants' filed their opposition.

<sup>5/</sup> These documents were part of Holloway's earlier summary judgment motion, supra n.4, and have been adopted by reference in Holloway's instant motion.

to satisfy the standard for summary judgment which is articulated in Alaska Rule of Civil Procedure 56(c). Summary judgment may not be granted in this case because there are genuine issues of material fact, <sup>6/</sup> and the moving party is not entitled to judgment as a matter of law. Alvey v. Pioneer Oilfield Services, Inc., 648 P.2d 599 (Alaska 1982); State v. Jennings, 555 P.2d 248 (Alaska 1976); Nizinski v. Golden Valley Electric Association, Inc., 509 P.2d 280 (Alaska 1973); Braund, Inc. v. White, 486 P.2d 50 (Alaska 1971).

The burden of showing the absence of genuine issues of fact is squarely upon the party moving for summary judgment, Ransom v. Hanar, 362 P.2d (Alaska 1961). Inferences of fact will be drawn in favor of the party opposing the motion. Alvey v. Pioneer Oilfield Services, Inc., supra.

In this case, there are several genuine issues of material fact which preclude the entry of summary judgment. First, Holloway has admitted that he did not request a hearing prior to the issuance of the order which terminated his appointment. <sup>7/</sup> This raises the material issue of whether Holloway waived any right which he may have had to a hearing. Holloway has the burden of establishing that no waiver was tendered. Ransom v. Hanar, supra. His failure to do so requires this court to infer that a waiver was made. Alvey v. Pioneer Oilfield Services, Inc., supra.

Second, Holloway's motion is predicated upon the claim that his dismissal has damaged his good name, his reputation and his future employment opportunities. However, Holloway has merely alleged this damage, he has not supported his claim by

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<sup>6/</sup> See Defendants' Statement of Genuine Issues of Material Fact.

<sup>7/</sup> N. 3, supra. Admissions may be used in support of and in opposition to a motion for summary judgment. Paulzer v. Serv-U-Meat Co., 419 P.2d 201 (Alaska 1966).

any facts. Holloway's affidavit does not even begin to meet the bare requirements for establishing these material facts.

For instance, he makes no representation concerning his efforts, much less his inability, to obtain employment after the dismissal. In his affidavit, he makes only the conclusory statement that his reputation and good name have been impugned. These unsupported statements are clearly insufficient for purposes of summary judgment. Ault v. Alaska State Mortgage Association, 387 P.2d 698 (Alaska 1964).

Holloway, in effect, asks this Court to take judicial notice of the alleged damage to his name and reputation and future employment. However, this is precisely the sort of "fact" of which a court will not take judicial notice. See Alaska Rule of Evidence 201. As the commentary to Rule 201 indicates, judicial notice should not extend to facts "normally decided by the trier of fact after being proved." There is ample reason for refusing judicial notice for such facts:

As Professor Davis says: The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either oral or written or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination and argument) to meet adverse materials that come to the tribunal's attention. "A System of Judicial Notice Based on Fairness and Convenience", in Perspectives of Law 69 at 93 (1964).

Rule 201 is based on the belief that wherever a lawmaking authority conditions the applicability of a law on the proof of facts, these considerations call for dispensing with traditional methods of proof only in clear cases regardless of what label is attached to the facts. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject

to the requirements of procedural fairness. Id.  
94.

Evidence Rules Commentary at 38-39. The question of whether Holloway suffered any damage or stigma to his name or reputation is one which can only be decided by a trial-type hearing.

In addition, the defendants have specifically denied in their answer to Holloway's complaint that his termination was ordered without affording him a right to an evidentiary hearing. See Complaint at ¶ 5 and Answer. The allegations in the complaint have been put at issue by the defendants' answer, and they are still at issue. They cannot be resolved by judicial notice or by plaintiff's affidavit.

To summarize, there are genuine issues of material fact which remain to be resolved prior to any grant of summary judgment on these issues. For these reasons alone, the motion for summary judgment should be denied.

Assuming arguendo that this Court finds no genuine issues of material fact to exist, plaintiff is still not entitled to summary judgment as a matter of law.

II. A PUBLIC OFFICIAL WHO HOLDS HIS OFFICE  
"AT THE PLEASURE OF" HIS SUPERIOR DOES NOT HAVE  
A "PROPERTY INTEREST" IN CONTINUED EMPLOYMENT  
AND IS NOT ENTITLED TO A HEARING PRIOR TO DISMISSAL

Holloway claims that his dismissal was void for failure to provide him with a pre-termination hearing. The fundamental flaw in this argument is that procedural due process protection becomes due only when there is a "property interest" in continued employment. Absent such an interest, there is no entitlement to procedural due process prior to dismissal.

As is more fully explained below, procedural due process is important not for itself but only as a means to protect rights which rise to a certain value. If there is no sufficiently valuable right at stake, the procedures, by themselves, have no value. Procedural due process, unlike Beauty, is not its own excuse for being.

Defendants do not disagree with the proposition that an individual has an "property interest" in his job which is protected by due process if he has a "legitimate expectation" of continued employment. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). However, a mere unilateral anticipation of continued employment, not guaranteed by statute or contract, does not confer a "property interest" which will be protected by due process. Bishop v. Wood, 425 U.S. 341, 344-45 (1976).

Roth established that government employment is "property" protected by due process only if the recipient has a legitimate expectation, grounded in state law, that his job will continue. Perry held that when such a "legitimate expectation" exists, the courts will determine the need for and sufficiency of procedural protections which attach to that expectation.

Roth was an untenured teacher at a state university. State law provided that untenured teachers who had not been hired for four continuous years were on probationary status. When Roth's one year teaching contract was not renewed he sued, claiming he had a due process right to a hearing before the non-renewal decision was made. The Supreme Court held that his probationary status, as a matter of state law, did not confer a fourteenth amendment "property interest" in his job. Therefore, no pre-termination hearing was required by due process. 408 U.S. at 577-78.

Perry was also an untenured state university teacher whose contract was not renewed. However, Perry, unlike Roth, was entitled by state law to continuing employment by a de facto tenure process. The Supreme Court held that Perry would be entitled to a hearing on his nonrenewal only if substantive state law gave him "a contractual or other claim to job tenure". 408 U.S. at 602 n.7.

By contrast, Bishop's employment as a policeman was terminated without a hearing to determine the sufficiency of the

charges against him. Although Bishop was classified as a permanent employee, the Supreme Court rejected his claim of entitlement to a pre-termination hearing because state law required an actual guarantee of continued employment, either by virtue of statute or contract, in order to create an enforceable expectation of continued employment. 426 U.S. at 345.

From these seminal cases and their progeny emerge the principle embraced by the Alaska Supreme Court that:

A person who is employed 'at the pleasure' of his employer has no 'property' interest in continued employment that is protected by due process. Bishop v. Wood, 426 U.S. 341, 345 n.8, 96 S.Ct. 2074, 2078 n.8, 48 L.Ed.2d 684, 690 n.8 (1976); Arnett v. Kennedy, 416 U.S. 134, 167 n.2, 94 S.Ct. 1633, 1650 n.2, 40 L.Ed.2d 15, 40 n.2, reh. denied, 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974) (Powell J., concurring).

Breeden v. City of Nome, 628 P.2d 924, 926 (Alaska 1981). Breeden is on all fours with this case and supplies the controlling rule of law.

Breeden was the city manager of Nome. The statute governing his term of office provided that "subject to the contract of employment, the manager holds office at the pleasure of the assembly or council." His contract stated that Breeden's employment could be terminated upon 30 days written notice by either party. Breeden had resigned on April 14, 1978, after some financial disputes with the city council. His resignation was to become effective in 30 days. Id. at 925-26.

On April 16, 1978, the city council fired Breeden, effective immediately. When the city sued to recover certain funds appropriated by Breeden, he counter-claimed that he had been denied due process because he was fired without proper notice and a hearing.

The Supreme Court held that since Breeden served at the pleasure of his superiors, he had no "property interest" which was protected by due process. The only "property" interest which the Court found was that which was created by

Breeden's employment contract. Without that contract, Breeden was entitled to no due process protections at all. Id. at 926.

Holloway served at the pleasure of the presiding judge. Unlike Breeden, he had no employment contract, and he had no "property interest" in his job. Holloway took his seat as magistrate with no statutory requirement that he be entitled or permitted to keep it for as long as a single day. Compare Delahev v. State, 476 P.2d 908, 911 (Alaska 1970) with Nichols v. Eckert, 504 P.2d 359 (Alaska 1973), and Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Alaska Supreme Court has already found that Holloway had no "property" interest in his job by virtue of the fact that he served at "the pleasure of" the presiding judge. Buckalew v. Holloway, supra, 604 P.2d 244-45. See also Malone v. Meekins, 658 P.2d 351, 358 n.13 (Alaska 1982) (Speaker of the House who served 'at the pleasure of the body' has no property interest protected by due process in the office).

The rule of Breeder, supra, is the universal rule. If one's position is held "at the will and pleasure of" one's employer, and state law grants no independent right to continued employment, dismissal is not a deprivation of a "property" interest and there is no right to a pre-termination hearing. Bishop v. Wood, supra, 426 U.S. at 345-46. See also Guv v. Mohave County, 688 F.2d 1287, 1290 (9th Cir. 1982) (deputy sheriffs who served at the pleasure of their appointing officer had not acquired a property interest in their jobs and thus were not entitled to a termination hearing prior to their discharge); Enomoto v. Brown, 172 Cal. Rep. 778, 780 (Cal. App. 1981) (Director of Corrections who serves at the pleasure of the Governor is not entitled to a pre-termination hearing); Bogacki v. Board of Supervisors, 489 P.2d 537, 544 (Cal. 1971) (Building inspector who serves at the pleasure of the County Board of Supervisors may be dismissed without a pre-termination hearing).

Holloway attempts to repel the application to him of this undebatable principle by arguing that AS 22.15.170(c) itself creates a legitimate expectation of continued employment. Holloway Memorandum at 6-7. Specifically, Holloway claims that he has a "property interest" which derives from "the interest in protecting an independent judiciary from abusive removal." Id. at 7.

In the first place, Holloway has failed to establish by any facts offered to this court that his removal was "abusive". Holloway's removal resulted from his own admission, in response to questions from Judge Buckalew, that he smoked marijuana. Supra at 2. Use of marijuana constitutes a federal criminal offense under 21 U.S.C. § 844(a). Use of marijuana is, therefore, a violation of Canon 2 of the Code of Judicial Conduct which state in pertinent part: "A judge should respect and comply with the law. . . ." The Code of Judicial Conduct is, of course, applicable to magistrates. See Part II, ¶ 1 of the Code of Judicial Conduct.

If conduct which is not a criminal offense is sufficient to warrant removal of a state court judge, Napolitano v. Ward, 317 F.Supp. 83 (N.D. Ill.1970), aff'd., 457 F.2d 279 (7th Cir.), cert. denied, 409 U.S. 1037 (1972), reh. denied, 410 U.S. 947 (1973), removal for conduct which is a criminal offense is clearly not abusive.

Holloway seems to imply that his right to hold office somehow derives directly from the due process clause of the United States Constitution. However, it is clear that that venerable document does not guarantee him a right or privilege to retain state judicial office. Snowden v. Hughes, 321 U.S. 1 (1944); Gruenberg v. Kavanaugh, 413 F.Supp. 1132, 1135 (E.D. Mich. 1976); Peterson v. Knutson, 367 F.Supp. 515, 517 (D. Minn. 1973); Napolitano v. Ward, supra. His right to hold office derives from the same statute which provides that he can be removed at the pleasure of the presiding judge. Where, as here,

removal followed upon Holloway's admission of conduct which constitutes a federal criminal offense, that removal can in no way be characterized as "abusive".

Second, Holloway's claim that removal in this case threatens judicial independence was squarely rejected by the Alaska Supreme Court in Buckalew v. Holloway, supra 604 P.2d at 246:

For a magistrate to serve 'at the pleasure of' the presiding superior court judge does not impair the independence of the magistrate to adjudicate cases impartially. The influence of the presiding judge simply cannot be equated with the undue influence potential in voter outrage or executive patronage. The latter may affect the outcome of particular cases in contravention of the dictates of the law, merely as a result of psychological pressure; the pressure that inheres in serving at the pleasure of the presiding judge, by promoting competency, tends to ensure precisely the opposite result, namely, that adjudication will be in conformity with the law.

(emphases added). The logical extension of Holloway's argument would be to invalidate the Alaska system of retention elections for judges: if a judge has a "property right" which stems from judicial independence, then judges could never be removed from office without a pre-termination hearing. This is clearly not the law in Alaska. Contrary to what Holloway states, "discontented litigants unhappy with the judge's official actions" can effect removal, and they often do by the power of the ballot.

Even if there were no retention election scheme, Holloway's nebulous claim of a "property interest" stemming from the notion of judicial independence has no validity. In Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir. 1983), members of the United States Department of Labor Review Board, which performed the same judicial functions exercised by the United States District Courts prior to 1972, and who served at the pleasure of the Secretary of Labor, sued when they were removed from office without a pre-termination hearing. They claimed, inter alia, that removal at will and without a hearing inhibited their

judicial independence in adjudicating private disputes. The Court of Appeals for the District of Columbia found that there was no constitutional underpinning to support their argument. 697 F.2d at 400-401 and n.102. Holloway's situation is undistinguishable from that presented in Kalaris, and the resolution of his claim here should be dictated by the result there.

For the reasons stated above, Holloway had no "property interest" in his job as magistrate. His procedural argument that he was entitled to a pre-termination hearing stands or falls with the substantive argument that he had "property right" to continued employment. Since no "property right" exists in this case, no pre-termination hearing was required.

III. HOLLOWAY WAS NOT ENTITLED  
TO A PRE-TERMINATION HEARING  
TO PROTECT HIS "LIBERTY INTEREST".

Holloway claims that his "dismissal, in and of itself, resulted in damages to his reputation and opportunities for re-employment." Holloway Memorandum at 13. He then argues that he was entitled to a hearing prior to his dismissal to determine whether or not the charges against him were true. Id. This argument suffers from two glaring errors.

First, Holloway has offered no factual support for his claim of damages to his reputation and opportunity for re-employment. See, supra at 6-7. Second, and more importantly, it ignores the fact that Holloway admitted that he was using marijuana. What purpose would be served by providing a hearing under these circumstances? In any event, Holloway is not entitled to a pre-termination hearing on the issue of his alleged deprivation of a "liberty interest".

Holloway essentially argues that his dismissal deprived him of a "liberty" interest in his good name and reputation, and that without a pre-termination hearing, the

dismissal is a nullity. This claim is on all fours with that asserted, and rejected, in Arnett v. Kennedy, 416 U.S. 134 (1974).

Kennedy was a civil service employee who was removed from office after charging that his immediate supervisor had tried to bribe another to make false statements against Kennedy. Kennedy claimed, inter alia, that since the charges against him affected his good name and reputation, he was entitled to a pre-termination hearing. In other words, Kennedy argued that a hearing was required before he could be deprived of his "liberty" interest in his good name.

Relying upon its earlier decision in Board of Regents v. Roth, supra (1972), the United States Supreme Court disagreed. The court held that a pre-termination hearing was not necessary to protect one's "liberty" interest.

That liberty is not offended by dismissal from employment itself, but instead by dismissal based upon a supported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

(Emphases supplied). 416 U.S. at 157. The United States Supreme Court has never retreated from this position.

Holloway has, in fact, cited no case law standing for the proposition that due process requires a "name-clearing" hearing to be held prior to termination or that failure to hold such a hearing vitiates the termination. The reason why he has not done so is, quite simply, that none exist.

In Nichols v. Eckert, supra, upon which Holloway relies, teachers who were dismissed midway through their contracts were held to have a "property" interest sufficient to trigger a due process pre-termination hearing. Holloway claims that his dismissal without a pre-termination hearing is a nullity, relying on language in Nichols, 504 P.2d at 1363.

However, a close examination of that language reveals that it is mere dicta and is limited only to those situations which, "in absence of a statute . . . permitting the removal of a teacher at pleasure, principles of justice require that a hearing should be given after notice to party to be removed". Since Holloway was serving "at the pleasure of," he cannot take succor in this mis-cited language. Compare Whaley v. State, 438 P.Ed. 718 (Alaska 1978) (employee serving "at the pleasure of" is not entitled to a hearing).

The other cases upon which Holloway relies for the proposition that failure to give him a "name-clearing" hearing before dismissal renders his termination a nullity, with reinstatement as the proper remedy, simply do not support him. In Board of Regents v. Roth, supra, the Supreme Court stated only that when non-renewal of a contract is based upon a charge implicating a person's good name, reputation, honor or integrity, due process requires an opportunity to refute the charge. 408 U.S. at 573. There is no suggestion whatsoever in Roth that failure to hold such a hearing prior to dismissal renders the termination a nullity, and requires reinstatement.

Indeed, the United States Supreme Court has specifically held that since the purpose of a "name-clearing" hearing is to refute charges which may damage one's reputation, the hearing may be held after the termination. Arnett v. Kennedy, supra. This ruling is hardly surprising; when a person is dismissed without a due process hearing, and alleges that he has an interest which entitles him to a pre-termination hearing, "proof of such an [interest] would not, of course, entitle him to reinstatement." Perry v. Sindermann, supra, 408 U.S. at 603 (emphasis supplied). In short, federal law is uniform on this issue: no pre-dismissal "name-clearing" hearing is required.

Holloway also relies upon Lubey v. City and County of San Francisco, 159 Cal. Rptr. 440 (Cal. App. 1979) for the proposition that failure to grant a pre-dismissal

"name-clearing" renders his termination a nullity, with reinstatement as the proper remedy. This case is clearly distinguishable.

In Lucey, two probationary members of the San Francisco police force were summarily dismissed based upon unsworn charges of misconduct against them. They were advised that they would be barred from future employment with the city. The California Court of Appeals for the First District found that, on those facts, the dismissal stigmatized or seriously impaired their reputations and opportunity to earn a living. The court ordered reinstatement based upon provisions of the city charter, and, in part relying on language in Board of Regents v. Roth, 159 Cal. Rptr. at 444-45. Roth has, of course, been refined in this regard by Perry v. Sindermann, supra, and Arnett v. Kennedy, supra.

Here, the dismissal was based upon Holloway's admission of conduct which constituted a federal criminal offense and which, under the Code of Judicial Conduct, is clearly grounds for removal. The dismissal was accomplished pursuant to a statute which the Alaska Supreme Court has recognized was "intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is impairing the administration of justice in rural Alaska". Eckalew v. Holloway, supra, 604 P.2d at 245 (emphasis added). A pre-termination "name-clearing" hearing is obviously inconsistent with the interest in expeditious removal of magistrates. See also Arnett v. Kennedy, supra, 416 U.S. at 168 (interest in expeditious removal of unsatisfactory personnel warrants removal without a hearing).

One additional factor remains to be addressed. Holloway has not, and could not, allege that the defendants in this case publicly disclosed the reasons for his dismissal. This lack of public disclosure is fatal to Holloway's claim of deprivation of a liberty interest. The United States Supreme

Court stated it plainly in Bishop v. Wood, supra: A public employee "whose position is terminable at the will of the employer" is not deprived of "liberty" when there is no "public disclosure of the reasons for the discharge." 426 U.S. at 348. There, as here, the reasons for the discharge were communicated orally and in private. "Since the . . . communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." Id. (footnote omitted). If any impairment to Holloway's liberty interest was effected, it was not as a consequence of any actions taken by the defendants.

Finally, it is clear that one is not entitled to a hearing to refute the charges underlying the dismissal if the truth of those charges is not contested. This very issue was addressed in Codd v. Velger, 429 U.S. 624 (1977). Velger alleged a wrongful dismissal from the New York City police force and sought re-instatement and damages for the resulting injury to his reputation and future employment. The Supreme Court refused to even consider whether a hearing to refute the alleged stigma was necessary because Velger could not, as Holloway cannot, refute the truth of the underlying reason for dismissal. "When we consider the nature of the interest sought to be protected, we believe the absence of any . . . allegation [that the reason for dismissal was false] is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing." 429 U.S. at 627.

This result is mandated by the limited purpose of such a hearing -- to provide an opportunity to clear one's name. Since Holloway does not challenge the truth of the underlying reason for his dismissal, no hearing could undo what he has already admitted.

In sum, there is no due process entitlement to a pre-termination hearing for deprivation of one's "liberty"

interest. In this case, no hearing is necessary at all because lack of public disclosure by the defendants, combined with Holloway's admission of the essential reason for dismissal, render any hearing meaningless.

For the foregoing reasons, Holloway's claim that he was entitled to a pre-dismissal hearing to protect his "liberty" interest is devoid of merit.

Obviously, Holloway is not entitled to re-instatement. Re-instatement might be an appropriate remedy where a dismissal is found to be a nullity. See University of Alaska v. Geistauts, \_\_\_\_\_ P.2d \_\_\_\_\_ (Alaska Supreme Court, Op. No. 2691 at 16-17, June 17, 1983). But Holloway's dismissal is not void. He had no "property interest" in his job and therefore was not entitled to a pre-termination hearing. He has been deprived of no "liberty" interest; even if he had been, the remedy is not reinstatement. The only possible remedy might be a post dismissal name-clearing hearing. However, for the reasons set forth above, even this is unwarranted. Codd v. Vegler, supra.

Since Holloway's dismissal was accomplished in a valid manner, his motion for partial summary judgment should be denied and defendant's cross-motion for summary judgment should be granted.

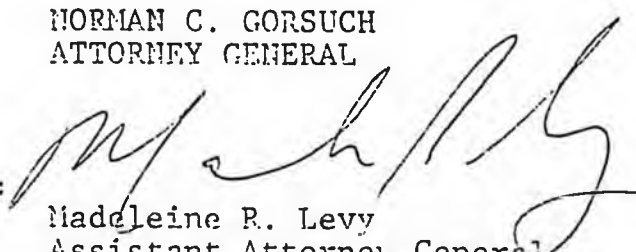
Dated this 30th day of August, 1983, at Anchorage, Alaska.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of AUGUST, 1983, a true and correct copy of \_\_\_\_\_ was served \_\_\_\_\_ on the following attorneys: \_\_\_\_\_  
By \_\_\_\_\_

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By:

  
Madeleine R. Levy  
Assistant Attorney General