



December 19, 2019

The Honorable Michael J. Dunleavy
Governor, State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: Retaliatory Refusal to Rehire Keren Lowell to the Alaska State Council on the Arts

Dear Governor Dunleavy:

I am writing on behalf of Keren Lowell, a former staff member of the Alaska State Council on the Arts, who, along with the rest of the Council's staff, lost her job after you vetoed the Council's funding on June 28, 2019. Because the Arts Council is the only public agency in Alaska that fosters the development of the arts, the Council's elimination was a significant loss to the public at large. To Ms. Lowell, working at the Council meant much more than a paycheck; it was also an opportunity to be meaningfully engaged in work that enriched the lives of others. So, like many Alaskans, Ms. Lowell was later heartened to learn that you reversed course on your veto and allowed the Council's funding to be restored.

Immediately after the funding was reinstated in August, the Council's executive director and board chair sought to quickly rehire all of the Council's staff, including Ms. Lowell, so that the agency could immediately resume its important work; however, political appointees on your staff refused to allow Ms. Lowell to be reinstated to her position. Ms. Lowell's return was blocked not because of her performance, or any other reason related to her work, but solely because she had spoken out against your policies and supported efforts to recall you in her posts and comments on social media. Yet Ms. Lowell was not a confidential employee, did not hold a policy making position, and did nothing more than join the growing chorus of those frustrated with your policies and their impacts on other Alaskans. Nothing she said or did impacted her ability to do her job, to work effectively with her colleagues, or otherwise justified barring

her from state employment. Her only transgression was to publicly disagree with your fiscal management and its effects of the citizens of this state.

Your administration's refusal to rehire Ms. Lowell violates her rights to free speech and freedom of association under both the United States and Alaska Constitutions. Public employees do not surrender their right to criticize their government in order to hold a job. Clearly established legal precedent prohibits public employers from retaliating against people like Ms. Lowell simply because they take positions that those in power disagree with. There is no doubt that a court, if called upon, would order Ms. Lowell to be reinstated to her position and award her back pay and significant damages to remedy this illegal act. I am writing, therefore, to ask that you exercise your authority to override the ill-informed decision to prevent Ms. Lowell from regaining her job, and return her to her position at the Council with the appropriate back pay and other compensation that adequately addresses the harms she has suffered.

Factual Background

The Alaska State Council on the Arts represents, supports, and advances the creative endeavors of individuals, organizations, and agencies throughout Alaska. Ms. Lowell first joined the Arts Council in 2011 after having established a successful career as an artist, arts educator, and administrator. She first worked for the Council in an administrative position and received consistent accolades for her work. She was a "terrific addition" to the agency, a team player who was resourceful and easy to work with, and a "reliable and professional employee" who was a "valued member" of the staff. In each successive year with the agency she received merit pay raises, and in 2016 she was promoted to a position with significantly greater responsibilities.

Ms. Lowell was promoted again in 2018 to become the Council's Visual and Literary Arts Program Coordinator. In this role, Ms. Lowell was responsible for grants administration, coordinating the Percent for Art program, professional development and advising for individual artists, literary arts programs and projects, staff support for the Alaska Contemporary Art Bank, and event planning (including the Governor's Arts Awards, the Council's biennial statewide arts conference, and council meetings). In an April 2019 evaluation, the Council's executive director, Andrea Noble, found Ms. Lowell to be an outstanding employee in every regard, summing up by saying, "[i]t is not often that evaluator may express than an employee is irreplaceable, however, Ms. Lowell is truly a backbone for the agency."

By this time, however, the Council was operating under a cloud of uncertainty. The proposed budget you unveiled in February 2019 zeroed out the

Council's state funding and would have prevented it from accepting even federal or private grants to carry on its work. Funding was restored by the Legislature in a budget bill sent to you later in the year, but on June 28 you vetoed the entirety of the Council's budget, completely liquidating the agency. Your veto made the Council the only agency to be wholly eliminated in your budget and made Alaska the only state in the country without a publicly funded arts organization. Your veto also meant that the four staff members employed by the Council, including Ms. Lowell, were out of a job.

Unsurprisingly, your action was met with widespread criticism and public disapproval. While some supported the move as a cost saving measure, the majority of the public commentary was overwhelmingly negative. Many pointed out the tremendous benefit that such a small agency provided to the state, citing to all of its various programs, such as the Artists in Schools residency program, the Governor's Arts and Humanities Awards, Creative Forces, an art therapy program for service members, administration of the official seal for authentic Alaska Native art, the Poetry Out Loud competition, and the Alaska Contemporary Art Bank Loan program, which lends artwork to state agencies for public display. Others noted the fiscal absurdity of the action, given that the relatively small appropriations to the Council were more than tripled in federal and private grants that would also be lost if the agency was abolished. Still others lamented what the loss of public support for culture and the arts said about our values as Alaskans.

Of course, as you know, your veto eliminating the Arts Council was one of numerous line item vetoes you issued that generated a significant amount of public controversy and anxiety. To many, these budget cuts threatened to change the character of Alaska as we know it by, for example, decreasing or eliminating funding for innumerable social services resulting in catastrophic impacts on the poor and elderly, "eviscerating" Alaska's public university, and causing significant job losses and severe economic recession.

The cuts incited mass protests, and many people, including Ms. Lowell, took to social media to express their outrage and disappointment. Ms. Lowell voiced her criticism of your fiscal policies in posts on her Facebook page, and in comments on the pages of others. In particular, she lent her support to the efforts of the Recall Dunleavy organization, which seeks your removal from office, offering, for example, to purchase small stickers, help with logistical support, and gather petition signatures. None of Ms. Lowell's critical posts or comments about you could be considered in the nature of a personnel dispute or personal grievance over the loss of her job. Indeed, any of her disapproval or condemnation of you was distinctly relevant to the public's assessment of your

performance as the Governor of Alaska. In this way, Ms. Lowell, like thousands of other Alaskans, exercised her right to speak freely about her government on a matter of legitimate public concern.

Many people remained hopeful, however, that the Council's funding could yet be restored by the time the dust fully settled on the fiscal year 2020 budget. On August 7, the Legislature, after meeting in special session, forwarded to you a renewed spending bill that reversed most of the cuts made by your June 28 vetoes and included renewed funding for the Arts Council. And although you again vetoed the majority of the items you had previously cut in June, you restored funding to the Council, explicitly recognizing, as so many had urged you to do, the Council's valuable role in promoting and fostering the development of the arts in Alaska.

While many commended your decision and cheered the reversal, those involved with the Council recognized that they had much work to do to get the agency back up and running again. As part of these efforts, the Council immediately rehired Ms. Noble as its executive director, and Benjamin Brown, the chair of the Council's Board of Trustees, reached out to the remaining Council staff that had been let go to gauge their interest in returning to their jobs. Ms. Lowell was excited about the chance to rejoin the staff, but she told Mr. Brown and Pat Race, another Council board member, that she had been actively participating in the Recall Dunleavy campaign and wondered whether this would "exempt her" from being asked to work for the agency. Mr. Race assured her that, as far as he was concerned, Ms. Lowell had a First Amendment right to do as she pleased with her free time.

Both Mr. Brown and Ms. Noble were eager for Ms. Lowell to rejoin the Council as soon as possible. Together with Laura Forbes, another former Council staff member, Ms. Lowell met with Mr. Brown and Ms. Noble on September 12 to discuss a plan of return. Ms. Lowell again raised the issue about her Facebook posts regarding the governor and wondered whether they would get in the way of her reappointment. Both Mr. Brown and Ms. Noble reassured Ms. Lowell that her social media activity would have no effect on her ability to do her work at the Council, and that they considered it a nonissue.

Ms. Lowell was buoyed by the confidence placed in her by Ms. Noble and the Council's Board of Trustees and completed the paperwork to facilitate her reinstatement. But unlike previous times she was considered for hire or advancement by the agency, the Council's hiring process had by then become inadvertently politicized. When Ms. Lowell joined the Council in 2011, she was hired into the "classified" service, giving her the protections set forth in Alaska's State Personnel Act, including protections against retaliation for her political

beliefs that ensured she would be considered and evaluated according to her merit. But in 2017, the Council was looking for ways to streamline its processes and unencumber itself from the State's unwieldy procurement system, which stood in the way of the Council's ability to efficiently raise private funds. As a result, legislation was adopted amending the Council's authorizing statute to restructure it as a public corporation within the Department of Education and Early Development (DEED), allowing it to more easily accept money from "non-governmental contributors." A byproduct of this effort was the movement of the Council's staff from the classified to the "exempt" service of state employment.

Although the change had nothing to do with Ms. Lowell's job duties or role with the Council, all of which remained the same after the restructuring, this seemingly innocuous shift in her employment status placed the fate of Ms. Lowell's return to work squarely within the hands of your political appointees. Shortly after you assumed office, your then-Chief of Staff, Tuckerman Babcock, issued a directive to department commissioners to submit all hiring requests for exempt and partially-exempt positions to your Boards and Commissions office, which would then review information about the applicant and decide whether to approve the hire. The person authorized to make these decisions was Gina Ritacco, Boards and Commissions director, who had previously served as your legislative aide, and later played an integral part in your gubernatorial campaign, before you appointed her to the position.

Accordingly, on September 23, at the request of Ms. Noble, DEED Commissioner Michael Johnson sent a memorandum to Ms. Ritacco requesting permission to hire Ms. Lowell. With this request, Mr. Johnson also sought approval to rehire Ms. Forbes, who had agreed to return to work at the same time as Ms. Lowell. In his memorandum, Mr. Johnson glowingly described Ms. Lowell's talents and previous "exemplary" contributions to the Council, stating

Ms. Lowell has served as the Visual and Literary Arts Program Director for the past year, and Office Administrator and Office Assistant within the Council for 7 years. Her performance in all of these roles has been rated as outstanding. Her abilities, knowledge and experience have elevated ASCA's networks and resources and positioned the agency as a trusted partner both in Alaska and nationally.

On September 30, Ms. Ritacco approved the request to rehire Ms. Forbes, but rejected Ms. Lowell's application, seemingly out of hand, stating, "Keren Lowell's offer will not be moving forward. I do not plan to forward this request to the [chief of staff] and have removed [it] from our pending files." Ms. Ritacco was more forthcoming in a conversation with Mr. Johnson, however, who relayed her

decision to the Council itself. It then fell to Ms. Noble to convey the bad news to Ms. Lowell, explaining in an email that “[t]he reason provided by [Mr. Johnson] is related to statements made on social media about the governor.” Ms. Noble went on to say:

I am so sorry to deliver the message in this way and I’m saddened at the outcome, especially after our meeting in September when we hoped to resurrect the agency with knowledgeable and dedicated staff. Your work, your talent and your contribution to ASCA was beyond exceptional. I will miss you dearly and I’m grateful for the opportunity to work with you for so many years.

Legal Analysis

Ms. Ritacco’s refusal to allow Ms. Lowell to return to the Arts Council was a deliberate act of retribution that any reasonable person would understand violated Ms. Lowell’s clearly established constitutional right to free speech. More than fifty years ago, the United States Supreme Court made clear that the state may not unduly suppress the First Amendment rights its employees “would otherwise enjoy as citizens to comment on matters of public interest.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Since then, it has become equally well settled that the First Amendment prohibits public employers from retaliating against a person for their protected speech activities. *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). While the government has an interest in regulating some of what its employees say publicly, it must be able to adequately justify any steps it takes to curtail an employee’s speech or any adverse action it takes against an employee because of their speech. *Eng v. Cooley*, 552 F.3d 1062, 1072 (9th Cir. 2009). Courts have developed a familiar and widely understood approach to determine whether a public employer’s interests outweigh an individual’s free speech rights. *Id.* at 1070–72.

Thus, when a person speaks as a citizen on a matter of public concern, as Ms. Lowell did in her Facebook posts and comments, a court will ask:

(1) whether the employee’s speech disrupted harmony among co-workers; (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful; (3) whether the employee’s speech interfered with performance of his duties; (4) whether the employee’s speech was directed to the public or the media or to a governmental colleague; and (5) whether the employee’s statements were ultimately determined to be false.

Bauer v. Sampson, 261 F.3d 775, 785 (9th Cir. 2001). A plaintiff need not prevail on all five of these factors to succeed on her free speech claim. *Gilbrook v. City of Westminster*, 177 F.3d 839, 868 (9th Cir. 1999). It is clear, however, that the government employer bears the burden of demonstrating that any of these factors weigh in its favor. *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004).

It is apparent from the facts described above that, were Ms. Lowell to seek to vindicate her rights in court, the State would be unable to meet this burden. First, it is obvious that Ms. Lowell's speech had no effect on her relationship with her coworkers. Indeed, even after learning about her social media posts and participation in the recall efforts, the Council's management eagerly sought her return. Second, Ms. Lowell was not a confidential employee in a "close working relationship" with you or anyone else in your administration tasked with carrying out the policies she criticized publicly. Third, Ms. Lowell's speech had no effect on the performance of her duties, nor could it be shown that it would, had she been rehired, evidenced again by the lack of concern for her public speech shown by the Council's executive director and board members. Fourth, Ms. Lowell's speech was obviously not directed to her coworkers; it was published on a very public social media platform with the intent that it be viewed by anyone. And finally, nothing Ms. Lowell said could be considered false or even misleading. She simply voiced her opinion, and supported the views of others, that were critical of your policies.

It is equally apparent that you and Ms. Ritacco, and anyone else who acted with intent to deny Ms. Lowell re-employment, can be held personally liable for damages to Ms. Lowell for violating her rights to free speech and freedom of association. *See* 42 U.S.C. § 1983. Government actors cannot be held immune from this liability when the conduct in which they engage violates a clearly established constitutional right. *Eng*, 552 F.3d at 1075. A constitutional right is "clearly established" if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right at the time of his conduct." *Id.* (citations and quotation marks omitted). Courts need not have decided a case "precisely like" the one in which a government official acts to have clearly established a right. *Id.* at 1076. Government actors can "be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). What matters is "whether the state of the law" gives a government official "fair warning" that their actions could be unconstitutional. *Id.*

Furthermore, you may be held liable even if you were not aware at the time of Ms. Ritacco's decision to reject the Council's request to rehire Ms. Lowell,

because it is apparent that she acted at your behest when she did so. You have established a system of patronage review for anyone seeking employment with the state who is not statutorily protected from political retaliation.¹ On the first day of your administration, you made clear that loyalty to your political agenda is a necessary criterion for public service when you fired those who had spoken out with opposing views or those who refused to pledge their allegiance to your political cause. By establishing these expectations early in your tenure, you have put yourself at the head of a “civil conspiracy . . . by setting in motion a series of acts by others” to deny applicants for state employment their constitutional rights. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012) (quoting *Johnson v. Duffy*, 588 F.2d 740, 742 (9th Cir. 1978)). You and the political appointees you have put in place to vet applicants seeking state jobs can only be assumed to act with a “unity of purpose or a common design” when you retaliate against employees or applicants for employment for exercising their constitutional rights. *Gilbrook*, 177 F.3d at 857.

Conclusion

Ms. Lowell is prepared to vindicate her constitutional rights by initiating a civil action against you, Ms. Ritacco, and the State of Alaska, in which she will seek to be reinstated to her job and to be awarded back pay, front pay, and damages. Recognizing, however, that litigation takes time and resources that could be better spent in other ways, we ask that you directly intervene in this matter now by reversing Ms. Ritacco’s decision and immediately rehiring Ms.

¹ You and others in your administration seem to be influenced by the legal fiction that employees not in the classified service and who are “at will” are subject to dismissal by you or your designees for any reason at all. But an employee’s status in the exempt or partially exempt service does not give you license to insist that the employee conform their political ideology—and their political speech—to your own. While not explicitly covered by the protections afforded those in the classified service, “[n]ot every person in the exempt service is a confidential employee.” *Zerbetz v. Alaska Energy Ctr.*, 708 P.2d 1270, 1276–77 (Alaska 1985). Rather, “exempt” means “a category of jobs which, for whatever reason, the Legislature wanted to exclude from the state personnel system.” *Id.* In fact, many employees are classified as exempt simply because they are “not susceptible to ordinary recruiting and examining procedures.” *Hafling v. Inlandboatmen’s Union of Pac.*, 585 P.2d 870, 875 (Alaska 1978). Such is the case with Ms. Lowell, whose accidental status as an exempt employee was merely the result of the Council’s restructuring and had nothing to do with political considerations or a legitimate need for loyalty to your agenda.

Lowell into her position with the Council, and agreeing to adequately compensate Ms. Lowell for her injuries. Doing so would not only avoid a costly and protracted court battle, it would return to the Arts Council a much valued and experienced staff member who could help it regain its footing after the significant disruption caused by its vetoed funding.

If you are willing to consider resolving Ms. Lowell's claims without litigation, please have your designee contact me by phone at (907) 263-2007, or by email at skoteff@acluak.org. If we do not hear from you by the close of business on January 9, 2020, we will assume you have rejected this proposal and we will seek court intervention to obtain the relief Ms. Lowell seeks.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Koteff', with a long horizontal flourish extending to the right.

Stephen Koteff
Legal Director