

other commissioners as chairmen, Hollis French was appointed as chairman of the AOGCC shortly after his appointment.

On January 17, 2019 Governor Michael J. Dunleavy issued a letter setting forth Notice of Charges for removal of Commissioner French for cause and giving notice that Commissioner French was entitled to a public hearing to determine if there was substantial evidence to support removal for cause pursuant to AS 31.05.007(d). Commissioner French contested the charges and asserted his right to a public hearing.

Public hearing was held on this matter on February 6 through 8, 2019, pursuant to AS 31.05.007(d). The Undersigned Hearing Officer was charged with conducting a hearing pursuant to Subsection (d) and finding the facts to provide to the Governor of the State of Alaska for his ultimate decision as to whether there exist grounds to remove Commissioner Hollis French as Commissioner of the AOGCC. The grounds for removal as alleged in the Governor's letter are set forth in Exhibit 1 to the hearing. The hearing was conducted by receiving documents and taking testimony under oath from witnesses presented by the State of Alaska Department of Law (State) and Commissioner French. The Parties were represented by counsel who presented the evidence. Testimony was proffered in support of a for cause finding by the State from AOGCC Commissioners Dan Seamount and Cathy Foerster, AOGCC Sr. Petroleum Engineer James Regg, and AOGCC Executive Secretary Samantha Carlisle. Commissioner Hollis French testified on his own behalf and proffered testimony from former Deputy Commissioner of the State of Alaska Department of Natural Resources Mark Wiggen and former State of Alaska Commissioner of Administration Leslie Ridle. Voluminous documents were also received as exhibits and are part of the public record of the hearing. The rules of evidence

were not applied, though the Hearing Officer took into account the extent to which the evidence presented was based upon first hand knowledge of the events in weighing the evidence.

For context, it is apparent that AS 31.05.007 is intended by the Legislature to provide for the independence and autonomy of AOGCC commissioners by requiring that a commissioner may not be removed during office except for specific cause shown. Commissioners of the AOGCC, unlike other commissioners within Alaska state government, do not serve at the pleasure of the governor. AOGCC is, in part, a quasi-judicial agency in that it hears individual cases and controversies within its regulatory jurisdiction. It is principally for this reason that the independence of the commissioners is protected by AS 31.05.007, such that a Commissioner may not be removed merely because the governor, another commissioner, staff or anyone else disagrees with a decision or policy position taken by a AOGCC Commissioner. On the other hand, the legislature balanced the need for commissioner independence by providing for accountability of AOGCC commissioners, during their terms of appointment, to the extent that grounds for cause as enumerated in AS 31.05.007(d) support their removal for cause. Whether such cause exists must be determined in a hearing open to public scrutiny. At the hearing, the governor, or the governor's representative, is tasked with presenting specific facts regarding the existence of cause, and the commissioner who is subject to proceedings under the statute is afforded the opportunity to specifically controvert the facts in support of the alleged removal for cause and has the opportunity to present witnesses, documents and facts in defense of the claims asserted.

In this instance, the Hearing Officer understands that the Governor has charged the Hearing Officer with presiding over and administering the hearing, listening to and evaluating the evidence, making credibility assessments as to witnesses who attended the hearing and report

to the Governor the Hearing Officer's factual findings for the Governor's ultimate use in determining whether cause exists under AS 31.05.007(d), as that cause is alleged in the Governor's letter of January 17, 2019. Exhibit 1. Commissioner French is entitled to notice of the grounds alleged to support the application for removal by the due process clauses of the constitutions of the United States and Alaska. Consequently, no ground for removal was considered except for the grounds set forth in the Governor's letter, Exhibit 1. That letter sets forth the grounds for removal in five separate enumerated paragraphs. Each of the findings that follow address the grounds set forth in Exhibit 1 in their turn.

CHRONIC UNEXCUSED ABSENTEEISM

1. Four witnesses from the AGOCC who were present in the office on a daily basis testified that Commissioner French was normally not in attendance during the full work day at the offices of the AOGCC. The full work day was normally from around 8:30 a.m. to 4:30 p.m. with a lunch break (7.5 hours per day). Commissioners and staff became concerned that the work of the AOGCC and its staff was being disproportionately allocated away from Commissioner French's normal duties to others as a result of Commissioner French's chronic pattern of absences from the office. Commissioner Foerster became sufficiently concerned about the pattern of attendance by Commissioner French at the office that in mid-June of 2017 she began to document, on a daily basis, the number of hours per day that Commissioner French was physically in the offices of AGOCC. Exhibit 2. While the notes/journal/diary contain some errors, the document presents substantial evidence that the overall pattern of Commissioner French's presence in the offices of AGOCC was perennially and significantly less than a full day. Leave slips did not account for these absences, which were more norm than the exception.

2. The entries in Commissioner Foerster's notes/journal/diary with respect to this pattern of absences from the office was corroborated by others who were present at the office and who testified at the hearing. Specifically, Commissioner French's own secretary testified that she routinely had to cover for Commissioner French's absences when inquiries came in for him from outside the Commission and that it made her uncomfortable. A Senior Petroleum Engineer at the Commission who oversees the Commission's inspection program testified that he passes by Commissioner French's office routinely in the course of his duties and that he estimates that Commissioner French was absent in a pattern of 8 out of 10 times that he would pass by. The other Commissioners and the Engineer had tenure with the Commission for some number of years, and all testified that Commissioner French's absence from the office was markedly different from other past and present Commissioners.
3. Testifying witnesses presented by the State from the offices of the AOGCC agreed that Commissioner French's absences had a deleterious affect on morale, showed poor leadership and created tension within the office. Witnesses from the office stated that workload was affected by Commissioner French's absences such that others had to take on more responsibility. The Hearing Officer finds that Commissioner French routinely was absent from Commission offices for substantial parts of the normal workday and that this affected morale at the office, constituted poor leadership and resulted in reallocation of his workload to others.
4. Commissioner French presented substantial evidence of work he conducted while outside of the office, including research at the law library, meetings, work with outside legal counsel and attendance at Commission business outside of the office. The Hearing

Office finds credible that substantial work was conducted by Commissioner French outside the office, and also while on annual leave and on weekends. Further, the Hearing Officer finds that it would not be expected that a commissioner would normally inform members of staff of the work being done by the commissioner outside the office on a routine basis. However, the pattern of absences and the anecdotal evidence as to the reason stated for some of the absences is such that the absences are not fully explained by Commission work being conducted outside of the office.

5. The Hearing Officer finds that the absences did not affect or delay the work of the Commission in any material way. Commissioner French credibly established that he responded in a timely way to calls or texts requesting him to return to the office for needed signatures and authorizations. No witness presented could point to a specific significant delay or failure of Commission action that was caused by the absence of Commissioner French.
6. The harm to the office morale, work ethic and reallocation of work due to the chronic absences by Commissioner French did not seem to be adequately addressed internally at the Commission. Though Commissioner Foerster testified that she was engaged in documenting Commissioner French's chronic absences from the office for many months, she also testified that she didn't speak to Commissioner French about the problem or confront the problem other than taking her concerns to personnel outside of the Commission, relatively close in time to the events that led to the for-cause proceedings.
7. In summary, the Hearing Officer finds with respect to chronic absenteeism:
 - a. Chronic absenteeism from the office of the AOGCC by Commissioner French was established by substantial evidence;

- b. This chronic absenteeism had a deleterious affect on office morale, employees and staff and caused a reallocation of work away from Commissioner French and to others.
- c. No work of the Commission was delayed or affected in any material way by Commissioner French's absences.
- d. Commissioner French was not seriously confronted or informed internally at AOGCC of other Commissioners' concerns or those of the staff about his chronic absences so that Commissioner French could address the issue or modify his behavior prior to the for-cause allegations.

BROWBEATING FELLOW COMMISSIONERS AND OTHERS

- 8. Commissioner French fervently and ardently believed that a position he had taken in connection with an adjudicatory matter, with respect to the scope of jurisdiction of the AOGCC, was correct though it was in the minority.
- 9. The AOGCC is a regulatory body that performs a variety of functions. Though it adjudicates Notices of Violations and conducts investigations, it also passes regulations, seeks modifications to relevant statutes and addresses matters in its regulatory capacity which are more legislative in nature from time to time.
- 10. Commissioner French was persistent and energetic in pursuing his view that the jurisdiction of the AOGCC was being interpreted more narrowly than he believed that the enabling statutes intended. He persisted in attempting to secure a written response from the Department of Law as to whether his legal reasoning had merit, and conducted his own research and issued writings of his own supporting his point of view. Commissioner French requested and was granted a conference with the Attorney General and other

members of the Department of Law to discuss and argue for his point of view without other Commissioners being present. Commissioner Seamount testified that this contact with the Attorney General didn't bother him. No record of the conference with the Attorney General was made and no one from the conference testified at the hearing.

11. With the advance knowledge of at least one other Commissioner, Commissioner French wrote to Governor Walker on May 10, 2018 to state his position. Exhibit 11. The majority Commissioners wrote their rebuttal in a separate letter on May 15, 2018. Exhibit 13.
12. Commissioner French engaged in numerous conferences with other Commissioners and persisted in his point of view. Commissioner Seamount described Commissioner French as being, in general, an affable fellow though ardent and persistent in his point of view. The issue was brought up on numerous occasions by Commissioner French. While it may have been the case that Commissioner French argued his position forcefully, fervently and persistently, there is insufficient evidence that Commissioner French was unprofessional, rude or bullying when he did so.
13. There is one written communication in which Commissioner Seamount complained about Commissioner French's demeanor, tone and attitude toward Assistant Attorney General Ballantine who was assigned to the Commission. Though available to both parties, AAG Ballantine did not present testimony at the hearing.
14. On balance, the testimony presented at the hearing was not directed to the tone, respectfulness or professionalism of Commissioner French's communications about views he held, but rather to Commissioner French's persistence.

15. The State argued that Commissioner French's letter to the Governor, Exhibit 11, contained inaccuracies and misleadingly made it appear that the letter stated the position of the AOGCC as opposed to Commissioner French's minority view. The Hearing Officer finds that the letter was not misleading or inappropriate in any respect.
16. The definition of "browbeat," as set forth in the Merriam-Webster dictionary (<https://www.merriam-webster.com/dictionary/browbeat>) is "to intimidate or disconcert by a stern manner or arrogant speech." The witnesses presented testified that Commissioner French forcefully argued his position and was like a "dog hanging on to a bone." The gravamen of the complaints about the matter by the testifying witnesses were more directed to Commissioner French's persistence and doggedness than the manner or professionalism in which Commissioner French pursued his position.
17. Though the issue of the scope of jurisdiction first surfaced during an adjudicatory hearing, Commissioner French's subsequent communications did not seek to change or modify the Commission's adjudicatory decision, but rather was directed at how the Commission should view its jurisdiction prospectively.
18. The Hearing Officer, on these facts, believes that it would set a dangerous precedent to consider removing a Commissioner under AS 31.05.007(d) for ardently pursuing a matter though the Commissioner be in the minority. The entire point of AS 31.05.007(d) is to ensure that removal for cause does not come about as a consequence of policy disagreements or points of view, but for elements of misconduct unrelated to the merits of any issue before the AOGCC. Though this persistence may be experienced by others to be a waste of time, be annoying or frustrating, it is too close to the prohibition against issue-based removal to stand scrutiny on these facts. This Governor, and future

governors, should be free to hear from commissioners, even minority view commissioners, without the fear that the commissioner could be removed for bringing issues to the governor or attorney general's attention. There is insufficient evidence to support any claim that the manner in which Commissioner French pursued his ardently held beliefs amounted to browbeating others. The Hearing Officer finds that there is no substantial evidence to support a removal for cause due to "browbeating" as set forth in Paragraph 2 of the Governor's letter. Exhibit 1.

PUBLICLY UNDERMINING THE AOGCC

19. Much of the evidence relied upon for the argument that Commissioner French publicly undermined the AOGCC appears to have been based upon the same evidence relating to Commissioner French's minority theory of expanded jurisdiction as set forth above. For the same reasons as set forth in paragraph 18 above, the Hearing Officer believes it is contrary to the intent of the statute setting forth cause for removal to use a good faith disagreement with the majority of the Commissioners as grounds for removal. Merit based dissent by a minority held belief should not, in and of itself, be grounds for removal. This comes too close, in the Hearing Officer's view, to removal based primarily upon policy dissent, which is part of how the independence of commissioners is protected. The balance of the evidence is that Commissioner French was consistently clear in his communications that his view was not that of a quorum of the Commission. Judicial and regulatory decisions are often accompanied by dissents without undermining the majority decision of the courts and regulatory bodies that issue them. Though there has not been a history of the filing of dissenting views at the AOGCC, neither is there any policy in place prohibiting them. Moreover, because the AOGCC is a regulatory body, it

does more than issue rulings on contested matters. Merely because a Commissioner disagrees, and communicates that disagreement in a professional manner, does not rise to the level of publicly undermining the Commission. Indeed, reasoned discourse from commissioners with differing points of view may serve to enhance the Commission's credibility, while stifling opposing views through the threat of commissioner removal has the potential to undermine the AOGCC's credibility. There is no substantial evidence, based upon Commissioner's merit-based disagreements, and his expressions of them, to justify removal for publicly undermining the AOGCC.

20. A second instance of undermining is based upon an appearance by Commissioner French as a guest presenter at a class at a local university. While the Hearing Officer did not require that evidence be presented in accordance with the rules of evidence, given the nature of the proceedings, the Hearing Officer informed the parties that the reliability and the extent of first-hand knowledge with respect to the evidence received would be taken into account. This particular episode regarding the quality of Commissioner French's presentation to the university class was based on double hearsay, rumor and speculation to such a degree that there cannot be said to have been substantial evidence of undermining the AOGCC's work based upon Commissioner French's appearance at the university class.
21. The Hearing Officer finds that there is no substantial evidence to support Commissioner French's removal for cause on the ground that Commissioner French undermined the AOGCC as set forth in paragraph 3 of the Governor's letter, Exhibit 1.

SECURITY BREACHES

22. The evidence in support of a termination for cause related to security breaches covers two topics. First, it is alleged that Commissioner French allowed visitors to be in the office without signing in and allowed visitors to walk around the office unescorted. The Hearing Officer finds insufficient evidence to support this claim. There is one anecdotal instance regarding Deputy Commissioner of DNR Mark Wiggen, who visited Commissioner French and entered the office when no one was present to sign him in. Dep. Commissioner knew Commissioner Foerster and stopped by to say hello by going next door to Commissioner French's office to say greetings to her. Commissioner Foerster did not return the greeting and instead admonished Dep. Commissioner Wiggen for going between the offices unescorted. Deputy Commissioner Wiggen became offended and immediately left the office without continuing the conference with Commissioner French. This interchange does not rise to the level of a security breach and seems a petty instance to raise in support of a for cause removal of a commissioner. The remaining evidence regarding unescorted visitors is vague and unspecific and does not arise to substantial evidence that Commissioner French routinely engaged in security breaches based upon unescorted guests. There is insufficient evidence to remove Commissioner French on this ground.
23. The second ground pertains to a disclosure by Commissioner French to a news reporter that the location of sensitive information relating to the KIC well was being maintained in a safe at the offices of the AOGCC. The substance of this article, published on July 22, 2017 and updated on December 2, 2017, is contained in Exhibit 8. There is no dispute that the source of the information as to the location of the safe containing the KIC well data disclosed in the news article, which was at that time located at the offices of

AOGCC, was Commissioner French. There is no dispute that other information relating to the fact that codes to the safe are held by multiple state employees, was provided by Commissioner French. Commissioner French admitted this in his testimony. The evidence presented was that while some members of the oil and gas industry assumed or knew of the location of the data within AOGCC's offices, its location was not generally or routinely shared with the public.

24. Though the incident occurred shortly before July 22, 2017 when the article was published, Commissioners Seamount and Foerster did not confront Commissioner French with their concern about the disclosure or seek his removal for cause. Commissioners Seamount and Foerster instead took it upon themselves to remove the data to another location, without informing Commissioner French that they had done so, to protect the information. Commissioner French did not learn of the removal until late December of 2017 in connection with conducting a tour of the office for a law student who was not affiliated with the AOGCC, apparently to show him the location of the safe as part of the tour. Commissioner French became aware for the first time that the safe had been moved without his knowledge.
25. After this second incident, Commissioners Foerster and Seamount did not take any action to report the matter or seek Commissioner French's removal for cause. Commissioners French and Seamount then began to work together on updated written security policies to be employed by AOGCC, in part as a result of these incidents.
26. Commissioner French has defended this allegation, not on the ground that the disclosure did not occur, but on the ground that the disclosure did not materially risk a security breach and that the settlement agreement with the owners of the data that led to AOGCC

receiving custody of the data, did not specify that the location of the data remain confidential.

27. There was no significant dispute at the hearing as to what took place. The Governor is the decision maker as to whether these facts constitute a material cause for removal of Commissioner French. But what the disclosure was, and that Commissioner French was the source of the disclosure, was not disputed at the hearing.

FAILURE TO PERFORM ROUTINE WORK AND NON-WORK-RELATED TASKS

28. The Hearing Officer has already found that there is substantial evidence that while Commissioner French's chronic absences did not ultimately affect the timeliness and the quality of the AOGCC's work, it did affect the allocation of work away from Commissioner French and to others at the AOGCC. To the extent that Commissioner French's absences resulted in allocation of work away from Commissioner French and to others at the AOGCC, there is substantial evidence to support that Commissioner French failed to perform routine work which had to be handled by others. Four witnesses from the AOGCC testified to this in substance and effect and Commissioner French presented no evidence from anyone else in the office to contradict these assertions.
29. As to the second part of the allegations on this ground, that Commissioner French engaged in non-work-related interests on office time, there is insufficient evidence to support this allegation. The evidence in support of this ground is sporadic and highly anecdotal. For example, Commissioner French was criticized for openly attending the Alaska Federation of Natives conference during business hours. Whether Commissioner French's attendance was AOGCC business is sufficiently debatable such that a commissioner's discretion and decision to attend cannot be said to be non-work-related.

Native Corporations which conduct business within the oil and gas industry attend. It could be well within the public function of a commissioner to be present and acquaint attendees with the mission of the AOGCC. These are the type of discretionary decisions as to the use of a commissioner's time that should not be subject to the second guessing of other commissioners rising to the level of grounds for cause.

30. Anecdotal evidence that Commissioner French on occasion would delegate tasks to others or would make the off-hand comment that a particular task was "boring" does not rise to the level of grounds for removal for cause. Commissioners should be expected to prioritize and delegate tasks in their discretion without it being grounds for removal.
31. There is not sufficient evidence that Commissioner French did non-AOGCC work on office time in a material way. The evidence presented was vague, episodic and did not reflect a systemic use of AOGCC by Commissioner French to pursue other interests. It is common for staff and professionals to occasionally take a phone call or have some personal interaction while on office time which does not significantly interfere with office business or rise to the level to a for-cause termination. The evidence presented was in the nature in intermittent and non-substantial not rising to a material or significant level.
32. In summary, with respect to this ground:
 - a. There is substantial evidence that Commissioner French's persistent absences led to others having to do work on his behalf;
 - b. There is insufficient evidence that Commissioner French routinely pursued other non-AOGCC interest while working at the AOGCC offices on office time.

GUIDANCE WITH RESPECT TO THE LEGAL CONTEXT

The findings as set forth herein will be more useful if coupled with a short explanation by the Hearing Officer of the Hearing Officer's understanding of the applicable law. Three cases were cited to the Hearing Officer as bearing upon the issue presented. The Governor's Office cited *Braun v. Alaska Commercial Fishing and Agricultural Bank*, 816 P.2d 140, 142 (Alaska 1991) and *Cassel v. State Dep't of Admin.*, 14 P.3d 278, 284 (Alaska 2000). Commissioner French cited *In re McNabb*, 395 P.2d 847 (Alaska 1964).

The *Braun* and *Cassel* cases are cited for the proposition that where an employer seeks to remove an employee for cause, it cannot be for an arbitrary, capricious or illegal reason but must instead be based upon substantial evidence believed by the employer to be true. The *McNabb* case is cited for the proposition misconduct in office requires more than carelessness or neglect in the performance of duties and must rise to the level of a lack of personal honesty, integrity or good moral character, arising in most instances of the commission of a crime or an ethical breach.

Braun is a case which sets forth the common law standard for "just cause" when that term appears in contracts for employment or when a contract for an employment term incorporates a for-cause requirement. *Cassel* involved a termination under a collective bargaining agreement which required proof of "substantial evidence" with respect to determinations of questions of fact. The court held that "substantial evidence" exists when, in light of the whole record, reasonable minds might accept the agency decision. AS 31.05.007(d) does not expressly contain the term "substantial evidence," but it appears from the citation to the authority that the Hearing Officer's findings are intended to be based upon substantial evidence. Substantial evidence can apply in two ways. One would relate to the substance of the conduct which distinguishes conduct from the anecdotal, isolated and inconsequential as opposed to material, repeated and

substantively important conduct. The second could refer to the quantum of proof and its persuasiveness. This can have impact on the quality of the proof, and though the evidence rules do not apply to the admissibility of evidence, substantial evidence contains an element of the quality of the evidence presented. The Hearing Officer has applied both elements of the concept of “substantial evidence” to these findings.

McNabb is a 55 year old case involving the suspension of an attorney’s license to practice law. The grounds for suspension alleged were based upon the legal canons of ethics which have long been superseded by more modern Rules of Professional Conduct. The holding in *McNabb* is based entirely on the construction of the Canons of Professional Ethics then applicable to attorneys. To the extent that the grounds and requirements for discipline in *McNabb* are disparate from the language of AS 31.05.007(d), the case is distinguishable.

The guidance, therefore, for determining what conduct justifies termination must be found within the language of AS 31.05.007(d) applying the substantial evidence standard to both the substance, quantum and persuasiveness of the evidence presented. In addition to misconduct, lesser causes for termination, including neglect of duty or incompetence, are set forth. In combination, it would appear that as a requirement for termination, more is required than a single instance or anecdotal conduct. Instead, the conduct should be material and pervasive, not petty or inconsequential. This is consistent with the intent of the statute to protect the independence of commissioners while providing for a mechanism to remove a commissioner for material, non-frivolous or anecdotal cause.

Commissioner French raises the issue of the concept of the right to progressive discipline for employees. As set forth in these findings, some of the grounds for removal, particularly those for which there appears to be substantial evidence (chronic absenteeism and security

issues) were not brought as grounds for removal until after the passage of a substantial period of time. In the case of the security breaches, it appears that some accommodation was reached whereby the commissioners began to work on clarification of written security related protocols, with Commissioner French's participation and without any call for his removal. With respect to chronic absenteeism, the issue does not appear to have been broached directly with Commissioner French prior to these proceedings, which supports Commissioner French's point that he was not given the opportunity to address, explain or remedy concerns before being subject to these proceedings.

On the other hand, the independence of commissioners provided for under the statute works against this argument. Commissioner French was the chairman of the AOGCC and at the top of the AOGCC's authority. It is difficult to conceptualize, in these circumstances, who would have the authority to engage in progressive discipline. The governor's office does not have authority to interpose itself into the day to day operations of the AOGCC and is limited in remedy and oversight to AS 31.05.007(d). It is unfortunate that communication at the AOGCC had come to the point where concerns about the matters addressed at the hearing could not have been worked out internally. But it appears difficult, if not impossible, given our statutory scheme, for the governor's office to interpose any form of intermediate discipline or supervision given the statutes that clearly protect commissioner independence. Under these circumstances, it is not clear who would be in a position to interpose progressive discipline with respect to the chairman of this independent commission.

These findings are entered this 12th day of February 2019.



Timothy Petumenos, Hearing Officer

Certificate of Service

The undersigned certifies that on the 12th day of February, 2019, a true and correct copy of the Hearing Officer's Findings of Fact were served via electronic delivery on the following:

Kevin Fitzgerald: kevin@impc-law.com

Laura Fox: laura.fox@alaska.gov

Karina Chambers