
From: De La Garza, Henry </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2B68ADADC7E84EE7AAF4C01E1F911FF6-HD1>
To: Moody, Grace; Webster, Brent; French, Lesley; Cowles, Shawn; Kinghorn, Austin; Varela, Enrique; Hilton, Christopher; Ardolino, Emily; Reitz, Aaron
CC: Hornsey, Brittany; Burgess, Sarah
Sent: 11/24/2020 3:14:19 PM
Subject: RE: Prepping Our Response (Conference Call-In 866-250-3053, No pin)

PRIVILEGED & CONFIDENTIAL

All:

Here is my list of why Vassar/Maxwell/Penley/Brickman should be considered high-level policymakers who are exempt from Whistleblower protection. I relied heavily on some excellent research by Enrique. I've included hiring information about the four plaintiffs at the end of the email.

- They were public employees whose responsibilities required more than simple ministerial competence, whose decisions created or implemented policy, and whose discretion in performing duties or in selecting duties to perform was not severely limited by statute, regulation, or policy determinations made by supervisors. *Aucoin v. Haney*, 306 F.3d 268, 273 (5th Cir. 2002) (quoting *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir. 1979)).
- They controlled or exercised a role in a decision-making process as to the goals and general operating procedures of the OAG. *Aucoin v. Haney*, 306 F.3d 268, 273 (5th Cir. 2002) (quoting *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir. 1979)).
- They ensured that policies which the electorate had sanctioned by electing the Attorney General were effectively implemented. *Lewis v. Guerrero*, 978 S.W.2d 689, 692 (Tex.App. —Corpus Christi 1998, no pet.) (quoting *Elrod v. Burns*, 427 U.S. 347, 372 (1976)).
- They all had access to confidential documents or other materials that embody policymaking deliberations and determinations. *Stegmaier v. Trammell*, 597 F.2d 1027, 1039 (5th Cir. 1979); see also *Maldonado v. Rodriguez*, 932 F.3d 388, 393 (5th Cir. 2019) (quoting *Wiggins v. Lowndes Cty., Miss.*, 363 F.3d 387, 391 (5th Cir. 2004)).
- Party affiliation was an appropriate requirement for effective performance of the public office involved. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).
- They served as advisors to the Attorney General and the First Assistant Attorney General. See *Maldonado v. Rodriguez*, 932 F.3d 388, 393 (5th Cir. 2019) (quoting *Wiggins v. Lowndes Cty., Miss.*, 363 F.3d 387, 391 (5th Cir. 2004)).
- They received their positions non-competitively and were appointed by the First Assistant Attorney General and/or Attorney General and always with approval from the Attorney General. (The Attorney General does not approve competitive postings.)
- They formed part of the agency's exclusive "Executive Administration," which has a specific policy in the Policy & Procedures Manual.
- They all had offices on the executive floor of the Price Daniel Building and shared the floor with the Attorney General. (Note: I'm not sure if Maxwell did.)
- They attended and actively participated in confidential and high-level weekly and ad-hoc "Deputies meetings," where very confidential and high-level matters concerning the operations of the agency and the initiatives of the Attorney General were discussed.
- They had higher classifications than other employees.
- Deputy Attorneys General (e.g., Vassar, Penley) and Executive Deputies (e.g., Maxwell) oversaw the operations of various divisions headed by division chiefs.
- They had special signatory authority (as reflected in the Signature Matrix).
- Note: The problem with the certificate is that most AAGs get certificates that also mention that they are "appointed."
- I'm not aware of other special privileges or perks. Brittany Hornsey might be aware of some of them.
- In my opinion, the following do not constitute strong evidence: (1) Certificates: Most AAGs

CONFIDENTIAL

OAG_SUB-00056360

HBOM00184533

AG Exhibit 0120

get certificates that also mention that they are "appointed." (2) Parking: Many employees have reserved parking. (3) Access to the 8th Floor: Many non-Exec employees have access.

James Blake Brickman

Original agency hire date: 02/01/2020
Competitive or non-competitive: Non-competitive appointment
Original classification: Deputy Director I (B33)
Final classification: Deputy Attorney General (B33)
Final working title: Deputy AG for Policy and Strategic Initiatives
Salary group: B33
Competitive or non-competitive: non-competitive

David Maxwell

Original agency hire date: 12/01/2014 after retiring 08/31/2014
Competitive or non-competitive: Non-competitive appointment
Original classification: Director IV (B29)
Final classification: Director VI
Final working title: Director of Law Enforcement
Salary group: B31
Competitive or non-competitive: Non-competitive appointment

Mark Penley

Original agency hire date: 10/08/2019
Competitive or non-competitive: Non-competitive appointment
Original classification: Deputy Attorney General (B33)
Final classification: Deputy Attorney General
Final working title: Deputy AG for Criminal Justice
Salary group: B33

Ryan Vassar

Original agency hire date: 07/01/2015 (direct transfer from Supreme Court of Texas)
Competitive or non-competitive: Competitive
Original classification: AAG III (B23)
Final classification: Deputy Attorney General
Final working title: Deputy AG for Legal Counsel
Salary group: B33
Competitive or non-competitive: Non-competitive appointment

I will think about what else we can add. In the meantime, thank you and Happy Thanksgiving.

Best,
Henry

-----Original Appointment-----

From: Moody, Grace <Grace.Moody@oag.texas.gov>

Sent: Tuesday, November 24, 2020 8:15 AM

To: Webster, Brent; French, Lesley; Cowles, Shawn; Kinghorn, Austin; Varela, Enrique; De La Garza, Henry; Hilton, Christopher; Ardolino, Emily; Reitz, Aaron

Cc: Hornsey, Brittany; Burgess, Sarah

Subject: Prepping Our Response (Conference Call-In 866-250-3053, No pin)

When: Tuesday, November 24, 2020 4:45 PM-5:45 PM (UTC-06:00) Central Time (US & Canada).

Where: PDB 8th Floor Conference Room

866-250-3053

CONFIDENTIAL

OAG_SUB-00056362

HBOM00184535

AG Exhibit 0120