Report

on the

Vetting and Hiring Practices of the Governor-elect's Transition Office and Related Issues

Submitted to the New Jersey Governor's Office
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Table of Contents

I.
Introduction

On October 15, 2018, Governor Philip D. Murphy announced that his administration would retain Peter G. Verniero and his firm, Sills Cummis & Gross P.C., to conduct a systemic review of the vetting and hiring practices of the Governor-elect's transition office. The administration asked that the review include the vetting and hiring of Albert J. Alvarez, regarding his position in the transition office and his eventual position at the New Jersey Schools Development Authority (SDA).

The announcement of this engagement followed publication of an article by the Wall Street Journal on October 14, 2018. As reported in that article, Katherine Brennan, who supported Phil Murphy's gubernatorial campaign, alleged that a campaign aide, Mr. Alvarez, had sexually assaulted her. The alleged assault occurred in the early hours of April 8, 2017.

Through his counsel, Mr. Alvarez, who has not been formally charged with a crime by law enforcement, has publicly denied the allegation, claiming any encounter with Ms. Brennan was consensual. During the transition timeframe, the Hudson County Prosecutor's Office declined to file charges. While our review was pending, a second prosecutorial agency, the Middlesex County Prosecutor's Office, also declined to file charges.

We were not tasked with reviewing the allegation, nor were we asked to review the investigatory work of any law enforcement agency.

Following the conclusion of the campaign in November 2017, Mr. Alvarez worked at the gubernatorial transition office in the paid position of deputy personnel director. Ms. Brennan served in an unpaid role overseeing the transition's housing policy committee.

The Wall Street Journal reported, among other things, that the transition office knew of the allegation against Mr. Alvarez before he was hired for state service, which began in January 2018, and that Ms. Brennan communicated the allegation directly to the Governor's Office in March 2018. Mr. Alvarez resigned his at-will position as chief of staff at the SDA on October 2, 2018. Ms. Brennan presently serves as chief of staff at the New Jersey Housing and Mortgage Finance Agency.

The Governor assured us access to relevant information. Consistent with that assurance, the Governor's Office arranged interviews of witnesses that we had requested. In some instances, we contacted witnesses directly. We interviewed those individuals whom we considered relevant to our charge, including the Governor, his senior aides, transition officials and the former and current chief executive officer (CEO) at the SDA.

We also requested and were supplied with documents, including hard copy material, emails and text messages, as well as other information relevant to our review. In addition, we reviewed publicly available material, including news articles, legal authorities and other sources of information.

Our first invitation to anyone for an interview was extended to Ms. Brennan. Through her counsel, Ms. Brennan declined our invitation,

explaining that she did not have relevant information within the scope of our review because she was not involved in any vetting or hiring process. Mr. Alvarez, through his counsel, also declined an invitation to speak with us.

While our review was pending, Ms. Brennan offered testimony before the New Jersey Legislative Select Oversight Committee on December 4, 2018. We have considered Ms. Brennan's public testimony in lieu of interviewing her. We have considered the legislative testimony of others as well.

II.
Executive Summary of Findings and Recommendations

As more fully explained in subsequent sections, we find and recommend the following:

A. Transition Practices Generally. A gubernatorial transition period, by statutory design, is abbreviated in duration. As a result, there is a highly compressed timeframe in which to prepare the governor-elect to assume office. New Jersey's Governor's Office is widely viewed as possessing the largest scope of authority of any such office in the United States. There are scores of jobs to fill. Due to the large number of gubernatorial appointments that need to be made in an accelerated period, vetting and hiring processes that might usually take weeks or even months to complete are compressed into timeframes sometimes lasting only a few days.

Finding:

Transition periods are too compressed for the vetting and hiring work that needs to be completed to staff an administration in New Jersey. That is especially true given the wide scope of appointing authority of the state's governor.

Recommendations:

1. We recommend that New Jersey consider adopting an approach similar to the federal model under which the major nominees for president each formally begin a transition operation well before the general election. Adopting an analogous model at the state level would better enable an incoming gubernatorial administration to prepare for office and more fully vet prospective senior transition employees and candidates for senior-level positions in state government.

2. If the federal model is not adopted, we recommend that major party candidates, shortly after winning their respective nominations for governor, begin on their own to plan for transition in an orderly way. To encourage early transition planning and reinforce the notion that such planning reflects a non-partisan act, election laws should be made explicit and clear (to the extent there is any room for doubt) that early transition services do not constitute in-kind contributions by an individual or entity providing such services. Nor should pay-to-play provisions apply under those circumstances.

B. The Gubernatorial Transition Act. There is only one statutory provision providing any real guidance on how a transition office should operate in New Jersey. It is found at N.J.S.A. 52:15A-3, part of "The

Gubernatorial Transition Act." The statute envisions that a governor-elect might call on existing state employees to assist in transition or hire new employees of his or her choosing to work in a transition office.

Most of the employees in the Murphy transition office were in this latter group of employees hired specifically for the transition period. By statute, they were considered state employees, but for only certain purposes. They: (1) earned a paycheck from the state treasury, (2) accrued benefits within the state pension system, (3) received state ethics training and (4) were subject to state conflicts laws.

The statute is explicit in providing that, other than for those four purposes, transition employees "shall **not** be held or considered to be employees of the State Government." N.J.S.A. 52:15A-3(a)(2) (emphasis added). That raises the question whether a transition office is governed by the provisions found under N.J.A.C. 4A:7-1.1 to 7-3.4. Those provisions are sometimes known as the Chapter 7 rules governing equal employment opportunity and affirmative action (EEO/AA) for state employees (hereinafter, the Chapter 7 rules).

By our reading of the rules, they would apply to the extent that an existing state employee would be interacting with transition employees or volunteers. (There were relatively few existing state employees working in the Murphy transition office.) If a transition employee or volunteer became an applicant for state service, then the protections found under Chapter 7 also would apply.

In nearly all other respects, it is unclear whether the Chapter 7 rules include a transition office within their purview. While the rules apply to

state agencies, those entities are listed under the rules as state departments, commissions, state colleges or universities, agencies and authorities. The rules do not specify whether a transition office is one of those entities. To the limited extent that transition employees are treated as state employees, they are considered part of the Department of the Treasury. In that respect, they are able to draw on that department's EEO/AA process; that ability, however, is not the same as having the transition office directly tethered to the Chapter 7 rules as a stand-alone agency.

Findings:

1. Because a transition office is not a stand-alone traditional agency, it is unclear whether state EEO/AA rules applied to the Murphy transition office, except in the limited circumstances noted above.

2. It is also unclear whether any supervisor in the transition office was required, pursuant to existing Chapter 7 rules, to report allegations of discrimination or sexual harassment to an EEO/AA representative, as supervisors of state employees are otherwise mandated to do.

Recommendations:

1. Policymakers should consider amending the gubernatorial transition statute to make clear that the transition office is a state "agency" at least for the limited purpose of falling under the rubric of the Chapter 7 rules. If adopted, that statutory change would provide transition offices with a codified set of regulatory standards and procedures for investigating allegations of discrimination and sexual harassment, as well as provide for the designation of an EEO/AA officer or liaison.

2. As an alternative, the executive branch through its rulemaking authority should consider amending the Chapter 7 rules to have them apply directly to a gubernatorial transition office.

C. General Practices in the Murphy Transition Office. Regarding general vetting and hiring practices, the Murphy transition office followed practices that were consistent with what we would expect from such an office. That was especially so given the 70-day compressed timeframe from the day after Election Day to Inauguration Day.

For example, solicited and unsolicited résumés of candidates for jobs were entered into a database. Several transition workers were assigned the task of culling and organizing the large volume of résumés received. Once those résumés were reviewed, candidates were selected to be interviewed by members of the transition office. Successful applicants received an offer letter signed by the transition's personnel director. After the applicant accepted the offer, the transition office informed the relevant state agency of the new hire.

The transition office, through its counsel's law firm, also ran what became a form of a standard background check on those candidates under serious consideration for state service. Those checks largely consisted of a review of: (a) criminal and civil public records, (b) information found on the internet and social media and (c) other publicly available information.

What we call a "standard background check" was labeled by transition counsel in his legislative testimony as a "public records search." Counsel explained that a public records search should not be considered a criminal background check of the type that firms specializing in such

checks might undertake; rather, a public records search is, as the name implies, a search of publicly available records.

Under either label, the checks or searches focused on the three categories of information noted above. For ease of reading and uniformity, we will use the term "standard background check." We were told that the Murphy transition office made a wider use of standard background checks than many of its predecessor transition offices.

For the most senior-level candidates (i.e., cabinet officers), the transition office followed the pattern of its predecessor offices. It requested the New Jersey State Police to complete "four-way" background checks, one of the most comprehensive reviews available at the state level. It also employed standard safeguards to maintain the confidentiality of the background information contained in the four-way reports.

Finding:

In general, and without specific reference to Mr. Alvarez, the vetting and hiring practices undertaken by the Murphy transition office involving applicants for state service were adequate, especially given the abbreviated timeframe under which the office had operated.

Recommendation:

Although the transition office's general vetting practices were adequate, having major party candidates begin transition activities earlier, as recommended above, would allow more time and care for vetting candidates for positions at all levels. It would, for example, allow prospective senior transition employees and candidates for senior-level positions in state government to be vetted by having them submit, and

having the transition office evaluate, a form containing questions and answers as more fully described in Section V below.

D. Vetting of Albert J. Alvarez by the Transition Office. On or about April 9, 2017, Ms. Brennan told her friend, Justin Braz, about the allegation. Later, Mr. Braz began working at the transition office. He also knew Mr. Alvarez. According to Mr. Braz and Ms. Brennan, she allowed him to inform the transition office about the allegation on December 1, 2017, and also to inform the office that Mr. Alvarez's arrest might be imminent. Subsequently, Ms. Brennan told Mr. Braz, and Mr. Braz informed the transition office, that prosecutors had investigated the allegation and declined to file charges.

The transition office was not told which prosecutorial office had declined to file charges. Nor did Mr. Braz disclose Ms. Brennan's identity. His understanding was that, although he was authorized to alert the transition office to the allegation, he was not authorized to disclose Ms. Brennan's identity. Without naming her, Mr. Braz noted to the transition office that Ms. Brennan was associated with one of the transition advisory committees. Transition counsel apparently concluded that the then-unknown complainant and Mr. Alvarez would not be working in the same physical office space because transition advisory committee members were rarely in the transition office. Additionally, Mr. Braz informed the office that Ms. Brennan was interested in working in the administration.

To be clear, by "transition office" and "transition officials" we mean only the following three individuals who, in addition to Mr. Braz, were informed of the allegation in the relevant transition timeframe (on or about

December 1, 2017): (1) the transition office's counsel, (2) the Governor's incoming chief of staff and (3) the transition office's executive director. At that juncture, only Mr. Braz knew Ms. Brennan's identity. And sometimes, when relevant, we distinguish transition counsel from others in the transition office.

In response to what transition officials then knew:

(a) Transition counsel conferred with employment lawyers at his firm. In a detailed email to those lawyers, transition counsel sought advice on "how to deal with a situation involving an alleged sexual assault and its impact on hiring and other related issues." The email makes clear that "close to nobody internally in the transition knows about this," "they are going to do what is legally appropriate" and "are looking to [the attorneys] for guidance on what to do." The email also indicates that it was the counsel's understanding that Mr. Braz was not authorized by Ms. Brennan to inform the transition office of the allegation.

(b) Transition counsel ran a standard background check on Mr. Alvarez, the result of which was clear (meaning no negative information was identified within the relevant three categories of information).

(c) Transition officials considered investigating the allegation but chose not to do so. First, they acknowledged the difficulty in undertaking an investigation without knowing Ms. Brennan's identity, given that there were several hundred volunteers in the transition. Second, it was understood that the complainant was not a transition employee, and the alleged assault took place outside the workplace and preceded the transition. Third, in his legislative testimony, transition counsel suggested

that an investigation would have revealed what transition officials believed the then-unknown complainant did not want revealed.

(d) No one spoke with Mr. Alvarez about the allegation. First, when the transition office initially learned of the allegation, it was believed that speaking to Mr. Alvarez might interfere with his potential arrest. Second, even though transition officials did not know Ms. Brennan's identity, there was a concern that any conversation with Mr. Alvarez could lead him to identify who had made the allegation. That, in turn, could create a situation in which Mr. Alvarez, in his transition role as deputy personnel director, could retaliate against Ms. Brennan by working to deny her a job in the administration. For those reasons, transition counsel had advised the transition office to refrain from discussing the matter with Mr. Alvarez.

(e) Even without speaking with Mr. Alvarez, there was a concern about the possibility of retaliation against Ms. Brennan. In response to that concern, according to transition counsel, the transition office diminished Mr. Alvarez's role in personnel matters. While Mr. Alvarez maintained the ability to screen or separate résumés, he no longer had the ability to eliminate or make final recommendations on any candidates or make any decisions relating to the transition committees.

Transition counsel said that he implemented that remedial measure by speaking to the transition's personnel director. In her legislative testimony, the personnel director recalled things differently. She stated that transition counsel did not have any specific conversation with her related to any remedial measure. She did, however, confirm that she had a conversation with transition counsel about an unspecified problem with

Mr. Alvarez during the campaign. She said, in essence, that Mr. Alvarez's personnel duties already were reduced basically to collecting résumés in binders for others to review, although he continued to attend personnel meetings. That was so, she said, due to the lack of time remaining in the transition period, number of staffing decisions to be made and high volume of candidates to consider.

We have not seen any documentation of the restriction of Mr. Alvarez's hiring duties. In his legislative testimony, transition counsel confirmed that there was no written advice pertaining to that restriction.

The transition office also shifted Mr. Alvarez's tasks to those related to the Governor-elect's inaugural events. We were told that the office took such action in response to the allegation and to the growing need for more personnel to assist the inaugural committee.

By taking those steps, according to transition counsel, the transition office believed that it had proceeded directly to the "remedy" stage, inasmuch as the office felt constrained from undertaking an investigation or from speaking with Mr. Alvarez for the reasons already noted. Hence, this is not a situation in which transition officials did nothing.

Nor did the transition office rely exclusively on the fact that prosecutors had declined to file charges, although the office might have placed too much emphasis on that declination. Indeed, there is a distinction between the evidence necessary to pursue a criminal indictment as compared to the lesser standard necessary to satisfy a civil or administrative proceeding.

We also note the steps that were not taken. First, it does not appear that the transition office definitively asked Mr. Braz to return to Ms. Brennan to seek authorization from her to disclose more information or to assist the office in conducting an investigation. According to his legislative testimony, transition counsel did attempt, at least twice, to gain Ms. Brennan's identity by asking Mr. Braz for that information.

According to the executive director of the transition, the Governor's incoming chief of staff also might have expressed to Mr. Braz that it would be helpful to learn the complainant's identity, but Mr. Braz still did not feel that he was authorized to disclose her name. That expression to Mr. Braz, however, was not the same as definitively asking him to return to Ms. Brennan for more information or to emphasize to her why more information was needed to better address the situation.

Asking for Mr. Braz's assistance might have had no effect or he might have refused further involvement, and the same difficulties in undertaking an investigation might have remained. In addition, we note transition counsel's legislative testimony that he did not consider it an option to ask for Mr. Braz's assistance in light of the belief that Mr. Braz was not authorized to reveal the allegation to the transition office in the first instance. In other words, the transition office believed that Mr. Braz was breaking his friend's confidence and working against her directive not to disclose the situation.

Still, had the transition office gathered as much additional information as possible from all available sources, we would be in a better position to evaluate the vetting process by being able to consider the type

of information received and its potential usefulness in furthering an investigation. Put differently, going directly to the purported remedy served a certain purpose, but it did not yield additional information that could have informed an investigation into the allegation. Additional information also could have helped in assessing any potential risks in the workplace that might have been associated with Mr. Alvarez's placement at the SDA.

Second, the transition office did not interview Mr. Alvarez to gain more information for the reasons already noted. In particular, the office felt constrained from interviewing Mr. Alvarez because of a concern that the accused employee, in being alerted to the allegation, could possibly retaliate against Ms. Brennan. But once the accused employee's hiring authority was, according to transition counsel, restricted and his duties were reduced, the risk of such retaliation should have abated.

Stated differently, as described by transition counsel, the remedial measure put in place by the transition office was intended to reduce the risk of retaliation against Ms. Brennan. The reduction of that risk made it more practical and feasible to speak to Mr. Alvarez about the allegation. Given the testimony of the transition's personnel director that she was not informed of the hiring restriction placed on Mr. Alvarez, the transition office should have stated clearly, and in writing, that the restriction was to take effect.

Also, once the transition office was informed that there would be no criminal arrest, the risk of intruding upon a law enforcement investigation

also abated. This is another reason why it would have been appropriate to speak to the accused employee.

The transition office held a subjective belief that the then-unknown complainant did not want the allegation revealed, presumably not even within the context of an administrative investigation. The transition office chose to honor what it believed were Ms. Brennan's wishes, rather than initiate a conversation with Mr. Alvarez in an attempt to gain more information. It is perhaps with the benefit of hindsight that we believe that, given the seriousness of the allegation, the better choice would have been to speak to the accused employee. See, e.g., Velez v. City of Jersey City, 358 N.J. Super. 224, 236-37 (App. Div. 2003) (observing in the case before the court that "the nature of the alleged harassment was so severe and offensive that one could assume that a reasonable employer would not stand by, even if requested to do so by a terrified employee").

Again, to be clear, we do not suggest that the transition office stood by and did nothing. Instead, we note that, as a matter of general practice, speaking to an accused employee is an appropriate step in an investigation of workplace harassment, and it would have been an appropriate step under the circumstances here. See Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law, BNA Books (1992) at 432 (observing that, "Interviews with alleged harassers should occur without undue delay.") (hereinafter, Lindemann & Kadue); see also N.J.A.C. 4A:7-3.2(l)1.i. (noting, under model investigative procedures, that an agency's final determination should include a summary of the parties' positions,

which presupposes speaking with the accused party or his or her representative).

Lastly, speaking with Mr. Alvarez might have yielded little information beyond him denying the allegation. Nonetheless, in some situations, "the alleged harasser will disclose the time, place, and circumstances of each incident as well as information on relevant witnesses and documents." Lindemann & Kadue, supra, at 432. Thus, even when there is a denial of wrongful conduct, an accused employee might provide facts relevant to an investigation. Ibid. (instructing, "If the alleged harasser denies that the acts claimed to be harassment were 'unwelcome,' all facts supporting that denial should be obtained.").

Findings:

1. Having obtained the advice of counsel, transition officials appeared to have acted in good faith to address the allegation at the time, albeit with the shortcomings identified below. Similarly, transition counsel appeared to take the allegation seriously.

2. Additional steps should have been taken. Namely, the transition office should have returned to the complainant's friend and should have spoken to the accused employee in an attempt to gain more information on which to base an investigation before Mr. Alvarez advanced into state service. Indeed, those two steps would have constituted the beginning of an investigation.

3. Also, the better practice would have been to memorialize, in some form, the remedial steps that transition counsel stated had been taken. This is especially so given the testimony of the transition's personnel director

that she did not have a specific conversation with transition counsel about remedial measures.

Recommendations:

1. If transition officials felt constrained from doing more than they did, then investigatory protocols should be amended to address the circumstances found here.

(a) Specifically, it should be clear in training materials that it is generally appropriate to speak with an accused employee, even without knowing a complainant's identity, in an effort to gain as much information as possible that might form the basis of an investigation.

(b) In so doing, steps should be taken to eliminate the risk of retaliation and avoid intruding upon any pending law enforcement investigation.

2. Also, a transition office should be trained to understand the boundaries of its discretion to reject a candidate for unclassified state service, or its discretion to recommend suspending any such hiring or placement decision, under circumstances as those presented here.

E. Hiring of Albert J. Alvarez as Chief of Staff for the Schools Development Authority. No witness during our interviews or before the Legislature stated that he or she hired Mr. Alvarez or recommended him for placement at the SDA. Nor did anyone identify the person who did. Additionally, there does not appear to be any documentary evidence that answers that question. Nor have we had the opportunity to interview Mr.

Alvarez. Under those circumstances, we can only surmise part of the process that resulted in his hiring as chief of staff for the SDA.

This much is clear: Before being hired, Mr. Alvarez submitted a résumé and written application to the transition office and cleared a standard background check. In early January 2018, the transition's executive director asked the then-serving CEO of the SDA to meet with Mr. Alvarez, referring to him as the CEO's "new chief of Staff." After the CEO's introductory meeting with Mr. Alvarez, text messages indicate that the transition's executive director and the CEO planned to discuss Mr. Alvarez's annual salary. That salary eventually was set at $140,000.

The remainder of the hiring process is subject to witness accounts, with only limited documentary evidence such as the offer letter noted below. According to the transition's personnel director, after hearing from Mr. Alvarez that he would be joining the SDA, she verified that information with the transition's executive director. Also according to the personnel director, she was informed of Mr. Alvarez's salary by the executive director. The offer of employment and salary were memorialized in a letter to Mr. Alvarez dated January 12, 2018, bearing the personnel director's signature. We were told that the personnel director's signature on the offer letter might have been digitally signed, presumably due to the high volume of similar letters that needed to be signed.

Separately, the transition's executive director testified that he was informed by Mr. Alvarez that he was "going" to the SDA. The executive director stated that he assumed that either the Governor's incoming chief of staff or incoming chief counsel had approved the hire. Again, there is no

documentary evidence to validate that assumption. For his part, the CEO stated that the transition office basically informed him that Mr. Alvarez was being placed at the SDA.

In both his statement to us and in his legislative testimony, the Governor's incoming chief of staff said he could not remember being involved in the hiring of Mr. Alvarez. In his statement to us, the chief of staff also said he might have signed off orally on the ultimate hiring decision but, again, that statement was in the context of him not remembering any involvement. The incoming chief counsel flatly denied having any involvement in the hiring of Mr. Alvarez.

Findings:

1. The transition's executive director seemed to be relatively more involved than others in Mr. Alvarez's placement at the SDA, notwithstanding that the executive director disclaims any substantive hiring role.

2. The Governor's incoming chief of staff might have played a role as well, although that role is not clear from the facts before us.

3. The transition's personnel director memorialized the terms of the job offer in a letter to Mr. Alvarez, but it does not appear that she otherwise played a substantive role in his hiring.

4. The then-CEO of the SDA was part of the hiring discussion but his role seemed to be limited to receiving a communication from the transition office that Mr. Alvarez was going to be placed at the SDA as chief of staff and conversing with the transition's executive director about Mr. Alvarez's salary.

5. The Governor's incoming chief counsel appeared to have had no role in the hiring of Mr. Alvarez, at least none that we have been able to discern based on available information.

6. We are left to conclude that, regardless of who made the ultimate hiring decision, Mr. Alvarez's placement at the SDA was a foregone conclusion based on his affiliation with the Murphy campaign and the transition office, and due to the fact that he was well known and presumably viewed positively within the Murphy hiring circle.

Recommendation:

A transition office should maintain clear records of the persons within the office who are responsible for either recommending a candidate for hire or making the hiring or placement decision itself. In that way, such a decision would be more readily open to subsequent review.

F. Albert J. Alvarez at the Schools Development Authority. The question whether state anti-harassment policies, those codified under the Chapter 7 rules, had applied to the specific allegation seemed to influence decisions after Mr. Alvarez assumed his state position. In March 2018, Ms. Brennan directly informed the Governor's chief counsel and deputy chief counsel, separately, of her allegation against Mr. Alvarez. Thus, at that juncture, the identities of both parties were known to the administration.

Shortly after speaking with Ms. Brennan, the chief counsel asked the chief ethics officer of the Governor's Office on March 22, 2018, to refer the matter to the Office of the state Attorney General (OAG). The Governor's chief of staff and chief counsel also discussed the matter. The Governor's chief of staff thereafter met with Mr. Alvarez on March 26, telling him that,

because of the allegation against him, he should reconsider his career in state employment. Mr. Alvarez strongly denied any wrongdoing. Notwithstanding that denial, the chief of staff encouraged Mr. Alvarez to pursue other employment.

On the next day, March 27, the chief of staff to the Attorney General, who also oversees EEO/AA issues on behalf of the OAG, responded to that March 22 referral. She said that, because the alleged incident predated the start of state service for both Ms. Brennan and Mr. Alvarez and did not occur on state property, existing Chapter 7 rules did not provide a mechanism to investigate the allegation. The chief ethics officer called Ms. Brennan on April 24 to communicate that information. The OAG also advised the Governor's Office that the state could not fund outside legal services to investigate the matter because, again, the alleged conduct predated state employment. The OAG suggested, as an alternative, that perhaps the Murphy campaign committee could initiate and fund an investigation.

The message to Mr. Alvarez was stronger in early June, when essentially he was asked to exit state government. He agreed. Almost four months had passed from early June until Mr. Alvarez ultimately resigned on October 2, 2018, the day the Wall Street Journal began inquiring about his situation. The passage of time appears to be the result of at least two factors -- the search for a successor chief of staff at the SDA and a willingness to allow Mr. Alvarez to find new employment. Prior to his resignation, Mr. Alvarez had been expected to depart state government no later than October 31, 2018.

Findings:

1. Given Mr. Alvarez's status as an at-will employee and the serious nature of the allegation against him, the Governor's Office was within its discretion in seeking his resignation.

2. The Governor's Office, however, should have moved more expeditiously in following up on Mr. Alvarez's departure from state service after it raised the issue with him in March.

3. Separately, the conclusion that the Chapter 7 rules did not extend to reviewing and redressing alleged conduct that predated state service is consistent with the explicit terms of those rules. We appreciate that an argument could be made to construe the rules differently. On balance, the advice that the Governor's Office had received from the perspective of when and where the specific allegation took place was reasonable. Had the perspective been different -- i.e., if the alleged facts had been viewed as implicating a risk to the current workplace -- then, arguably, there might have been discretion to undertake a review.

Recommendation:

The Chapter 7 rules should be clarified or revised to capture the situation that had presented itself here. Namely, the rules should allow an investigation or a review, as deemed necessary by the appropriate EEO/AA officer, of a state employee's alleged conduct that might have predated state service. In so doing, it should be emphasized that a Chapter 7 investigation is relevant not only in determining the merits of a claim as between an individual complainant and accused employee, but also in

addressing whether any remedial steps need to be implemented to protect the workplace as a whole.

G. The Governor's Involvement. Governor-elect Murphy's main involvement at the transition office was at a high level. His focus was on selecting a cabinet, sub-cabinet and members of the senior staff to be housed in the Governor's Office. He knew Mr. Alvarez prior to and during the campaign. In undertaking this review, we did not find any evidence that the Governor was personally involved in the vetting or hiring of Mr. Alvarez for his position at the transition office or the SDA.

Regarding Mr. Alvarez's hiring at the transition office, we are aware of a document (DPF-10), stating in part: "The Governor-elect has requested the captioned employee be hired as a member of the new Transition Team at the salary requested and on the effective date identified." According to the official from the Department of the Treasury who prepared and signed that document, the quoted language was "form language" that he developed in anticipation of the transition. It was not intended, he said, to mean that Phil Murphy had personally hired Mr. Alvarez. Indeed, the treasury official told us that this language was used for all other unclassified employees who worked for the transition. He checked the files of other transition employees, confirming that the same description appears in their files.

Moreover, the Gubernatorial Transaction Act explicitly authorizes a governor-elect to request that transition employees be enrolled into state service. Thus, under those circumstances, a form document containing a hiring request in the name of the "Governor-elect" is to be expected. In our

view, the document, standing alone, is not evidence of Governor-elect Murphy's personal involvement in a particular hire.

Regarding when the Governor first learned about the allegation against Mr. Alvarez, the facts before us indicate that the date was October 2, 2018, the day the Wall Street Journal began inquiring about the situation. The Governor told us that he did not know of the allegation prior to then. Witnesses with whom we spoke confirmed his account. Notably, the Governor's communications director, who informed the Governor of the specific allegation, observed that the Governor was shocked upon learning of it. The chief of staff and chief counsel also described the Governor's reaction in similar terms. As specified under Section III, other senior staff stated that they had not spoken with the Governor about the allegation before the October 2nd date.

Although the Governor's chief counsel and others knew before that date, none forwarded the information to the Governor, as far as we have been able to discern. The chief counsel explained that he did not inform the Governor of the allegation when he (the chief counsel) learned of it in March 2018, because he considered the information to be confidential under existing Chapter 7 confidentiality rules. The chief counsel's opinion on confidentiality also was cited by the Governor's chief of staff for why he did not convey the allegation to the Governor.

In his legislative testimony, the chief counsel stated that, in hindsight, it would be "appropriate" to conclude that he had the discretion to inform the Governor of the allegation. But, he added, he was employing his best understanding of the rules when he had reached a contrary conclusion

during the relevant period. In essence, he testified that he was complying with the reporting lines, as he understood them, as outlined in the rules, internal protocols and related training materials.

Findings:

1. Based on the facts before us, it does not appear that the Governor was involved in the vetting or hiring of Mr. Alvarez for either his position in the transition office or at the SDA.

2. Moreover, we have found no evidence to suggest that the Governor knew of the allegation against Mr. Alvarez on any date earlier than October 2, 2018.

3. Separately, in our view, the Chapter 7 confidentiality rules contain sufficient leeway for a governor to be informed of allegations involving a senior member of the executive branch.

Recommendation:

Persons serving as a governor's chief of staff or chief counsel are frequently called on to make discretionary calls on whether information rises to the level of gubernatorial attention. Within that context, additional training under the Chapter 7 rules would be appropriate to clarify the reach and extent of existing confidentiality protocols.

III.
Factual Summary

We derive the following facts from a number of sources, including witness statements given to our interviewers or to the Legislature, news accounts and various documents. Before focusing on the vetting or hiring

of Mr. Alvarez, some general background on the transition process is in order.

A.
Governor-elect Murphy's Transition Office

With candidates singularly focused on winning on Election Day, gubernatorial transition offices are not usually a priority until after one candidate has been elected. See, e.g., "From Candidate to Governor-Elect, Recommendations for Gubernatorial Transitions," Report of the Eagleton Institute of Politics (Rutgers 2017) (chronicling several previous New Jersey transitions) (hereinafter, the Rutgers Report). That said, it is not unusual for some advance planning to take place. In his legislative testimony, Jose Lozano stated that, sometime after Labor Day in 2017, he was asked by then-candidate Murphy to head the transition in the event the campaign succeeded. The transition statute noted in Sections II and IV makes clear that no official funds for a gubernatorial transition may be expended, "before the day following the date of the general elections." N.J.S.A. 52:15A-3(b).

The state budget for the 2017-18 Murphy transition office appropriated $250,000 in total funding. As a comparison, according to figures compiled by the Council of State Governments, $250,000 allocated to a gubernatorial transition is more than the amount appropriated by legislatures in many states, but far less than others. As an example, Michigan budgets $1.5 million for its chief executive transitions, whereas the figure in California is $450,000. On the low end of the scale, $5,000 is available to the governor-elect of Maine.

The budget for the Murphy transition office explains why numerous transition workers were unpaid or had salaries paid for by a political committee. About a dozen, including Mr. Alvarez, were salaried employees, paid for by state funds; the rest of the transition staff consisted of individuals whose salaries were paid for by entities such as the New Jersey Democratic State Committee or who volunteered their time. (Our charge does not include an evaluation of the practice of having non-governmental entities subsidize the compensation of gubernatorial transition staff.) The total number of individuals who worked in the transition's physical office space ranged, approximately, from thirty to seventy in any given period.

In addition, there were a number of policy and departmental transition committees collectively comprised of more than 600 volunteer members. Those members generally operated offsite, although sometimes they might have met in the transition office. They were asked to review and sign a code of conduct as part of their service. Ms. Brennan served as an unpaid director of the transition's housing committee, having volunteered as a policy advisor on an economic working group and assisted in other roles during the Murphy campaign.

Regarding leaders or senior members of the transition, Jose Lozano was the executive director of the transition team. He shared a small conference table in his office in the transition's suite of offices with Rajiv Parikh, a partner at the law firm of Genova Burns, which was the transition team's primary outside counsel. That outside counsel regularly worked in the transition office space suggests that transition officials placed an

emphasis on legal compliance. The transition office conferred with outside counsel on an ongoing basis.

The Governor-elect's incoming chief of staff, Pete Cammarano, and the incoming chief counsel, Matt Platkin, each occupied an office in the transition's suite of offices; each also worked to fill positions on their respective staffs by interviewing various candidates to serve in the Governor's Office. Neither had formal transition titles, but both reasonably could have been considered senior transition aides. Also, the Governor-elect, and the incoming First Lady, Tammy Murphy, each had an office. Other transition office personnel included former Murphy campaign aides.

According to transition counsel, the first group of vetting occurred on Election Day for transition committee chairs. Subsequently, there was another vetting done of the members of the transition committees. However, former campaign aides generally did not undergo separate vetting when they joined the transition office.

Like many before it, the Murphy transition office operated at a rapid pace, with workers putting in long hours. Generally, résumés of job applicants would be entered into a database called iCIMS. Lynn Haynes, who later became the Governor's deputy chief of staff for cabinet affairs and operations, held the title of personnel director in the transition office. She told us that the office was inundated with résumés. At one point there were several transition workers who sorted through the résumés. Mr. Alvarez served as deputy personnel director, but his tenure predated the arrival of Ms. Haynes. While Mr. Alvarez worked frequently with Ms.

Haynes, he appeared to have had direct access to senior members of the transition team.

Ms. Haynes and Mr. Alvarez set up the interviews for certain positions such as sub-cabinet positions, chiefs of staff to commissioners and communications officials. Ms. Haynes and Mr. Alvarez usually brought names to Mr. Lozano, who would approve a candidate for the interview stage. (Candidates for employment who were associated with the transition did not necessarily have to interview because they already were known to those authorized to recommend hires or placements.) In general, Ms. Haynes and Mr. Alvarez would interview the candidate and report back to Mr. Lozano who, in turn, would consult with others. Depending on the hire, Mr. Lozano would speak with the incoming chief of staff, chief counsel or with the Governor-elect. Candidates who advanced in the process were asked to complete a "Transition2018 Employment Screening Questionnaire," as described below. As a matter of course, successful candidates received an offer letter from Ms. Haynes.

The transition office ran standard background checks on those candidates under serious consideration for state service. As noted earlier, those checks largely consisted of a review of: (a) criminal and civil public records, (b) information found on the internet and social media and (c) other publicly available information. The checks were performed later in the hiring process, consistent with the "Ban the Box Law," discussed below.

Mr. Parikh oversaw the standard checks, which were run through his law firm using a commercial service available from Westlaw. If the checks

resulted in negative information about a person, Mr. Parikh would typically alert Mr. Lozano or the incoming chief of staff or chief counsel. At one juncture, because of the high volume of checks, a chart of the results was created. It contained names of numerous candidates, including Mr. Alvarez, and was color-coded to match the results. For example, if there was an issue of concern, the name of the relevant candidate might have appeared in yellow or red. Mr. Alvarez's name was coded yellow, with an accompanying note that stated, "Braz discussion; background check clear."

For the most senior-level candidates (i.e., cabinet officers), the transition office performed enhanced vetting. At a certain stage of consideration, selected candidates were required to complete a 24-item "Candidate Questionnaire" that sought financial disclosures, political contributions and criminal history information, among other things. Specifically, the questionnaire asked whether the candidates had been "arrested, charged with a crime, or indicted" and what they viewed as their "greatest vulnerabilities."

Cabinet-level candidates who advanced in the process received additional vetting, including an interview. The transition office also would request that the New Jersey State Police complete what are informally known as "four-way" background checks. Those are some of the most comprehensive reviews performed by a state agency. The term "four-way" refers to the different layers or components of the check, including public record searches and personal interviews with references and other individuals. See Nero v. Hyland, 76 N.J. 213, 217 n.1 (1978).

As a safeguarding measure, only Mr. Lozano was authorized to request four-way background checks. Mr. Lozano also was authorized to receive the results of the checks. Although the State Police typically memorializes the results of a four-way check in a written report, Mr. Lozano never received anything in writing -- presumably, again, as a security measure. Instead, he would meet with representatives of the State Police to discuss any information of concern.

Although it is unclear whether the Chapter 7 rules apply to a transition office as a stand-alone agency, a representative of the state division of EEO/AA briefed a number of Murphy transition employees on the basic elements of the rules. Mr. Alvarez signed an acknowledgment form, indicating that he had received the state's anti-discrimination policies. Mr. Alvarez also received information on the state's ethics rules and attended ethics training during the transition, along with other compensated transition office staff.

Mr. Lozano told us that the transition office's goal was to hire twenty or so cabinet-level officials (his main focus of hiring), 100 individuals for the Governor's Office and senior staff positions throughout the administration. All in seventy days.

B.
Albert J. Alvarez

1. Before the Transition. Mr. Alvarez's service in state government predated the Murphy administration. He served in the Office of Governor Jon Corzine as a cabinet liaison and as a policy advisor, eventually becoming deputy chief of staff. He also was appointed by Governor

Corzine to serve as a member of the state Lottery Commission, and practiced law for many years at a private law firm.

Mr. Alvarez's professional relationship with the Murphy organization began sometime in 2015. He worked as a consultant to New Way New Jersey, an entity associated with then-private citizen Phil Murphy before the start of the gubernatorial campaign. Mr. Alvarez joined the Murphy campaign in 2016, serving as a director of community outreach. Following the Governor's election in November 2017, Mr. Alvarez served as the transition team's deputy personnel director.

2. The Transition. As reported, Ms. Brennan has alleged that Mr. Alvarez sexually assaulted her following an event in April 2017 during the timeframe of the Murphy campaign. According to the Wall Street Journal account, Ms. Brennan had later "allowed a friend that worked on the [transition] team to warn transition counsel that Mr. Alvarez might be charged" with sexually assaulting her. Mr. Braz, now serving as the Governor's deputy chief of staff for legislative affairs, confirmed to us that he was the friend who informed the transition office of the allegation.

Mr. Braz further stated that, although he was authorized to alert the transition office to the allegation, he did not feel authorized to disclose Ms. Brennan's identity. Transition officials were informed that she was serving in a role associated with one of the transition's policy committees. They also were told that she was interested in working in the Murphy administration and that her preferred place of employment within the executive branch was not the same as Mr. Alvarez's.

Mr. Braz, then an aide to the incoming chief of staff, first contacted Mr. Parikh on the latter's cellphone, saying he needed to talk and get some advice. According to Mr. Parikh, the call took place on the morning of December 1, 2017. The two spoke later that day, along with Mr. Cammarano, and they discussed the allegation. Mr. Lozano was one of the persons told of the accusation as well. Thus, at or around that time, four individuals at the transition office knew of the allegation: two senior transition aides (Mr. Lozano and Mr. Cammarano), transition counsel (Mr. Parikh) and Ms. Brennan's friend (Mr. Braz).

There is an inconsistency in witness statements concerning whether Ms. Brennan had authorized Mr. Braz to inform the transition office of the allegation. Mr. Braz told us (and the legislative committee) that he was so authorized, a statement Ms. Brennan herself confirmed in her legislative testimony. In contrast, Mr. Cammarano and Mr. Parikh stated to us that each understood Mr. Braz to say that he was not authorized to relay the allegation on Ms. Brennan's behalf. Mr. Lozano told us he had a similar understanding based on what Mr. Cammarano told him. Also, as he emphasized in his legislative testimony, Mr. Parikh noted his understanding regarding Mr. Braz's purported lack of authorization in his email to his law firm colleagues, written shortly after he had spoken to Mr. Braz.

We are not able to discern whether the inconsistency is attributable to miscommunication, differing recollections or the like. Accordingly, we have noted each version when relevant to the understanding of facts of particular witnesses.

It also appears that Mr. Platkin did not become aware of the allegation during the transition. Mr. Platkin told us he does not recall being informed at that time. And no witness has said otherwise. For example, according to his legislative testimony, Mr. Cammarano did not remember whether Mr. Platkin was involved in the discussion regarding the allegation. Also, Ms. Brennan testified that Mr. Platkin seemed like he first learned of the allegation when she told him in March 2018.

What happened next is outlined under Section II and need not be repeated here. Suffice it to say that transition officials sought and obtained legal advice on how to proceed. They undertook remedies that, in their view, would reduce the risk of retaliation against Ms. Brennan. More specifically, according to transition counsel, he told Lynn Haynes, the transition's personnel director, that Mr. Alvarez would no longer have the ability to eliminate or make final recommendations on any candidates for state service. In his legislative testimony, transition counsel noted that by the time he (the counsel) had spoken to Ms. Haynes, Mr. Alvarez's hiring role was already diminished. In her testimony, Ms. Haynes confirmed that Mr. Alvarez's role was already diminished, but stated that she was not informed of the need to restrict his hiring duties.

The transition office also ran a background check on Mr. Alvarez in December 2017 upon learning of the then-anonymous allegation. In his legislative testimony, Mr. Cammarano called this background check "special" -- a reference, in our view, to the fact that it was done in response to the allegation rather than as part of the standard job application process. (In his legislative testimony, transition counsel essentially expressed the

same view.) The result of that check was clear. As for undertaking an investigation, transition counsel told us that the topic was considered but rejected for the reasons noted under Section II.

3. The Schools Development Authority. Mr. Alvarez eventually was hired for the SDA as chief of staff, with an unclassified (i.e., at-will) status. Before that hire was allowed to move forward, Mr. Alvarez completed a Transition2018 Employment Screening Questionnaire on January 2, 2018, effectively applying for the position of CEO of the SDA. (He later joined the SDA as chief of staff, not CEO.) The form required him to answer thirteen questions and certify, among other things, that he "disclosed all information that is relevant and should be considered applicable to [his] candidacy for employment." Consistent with the "Ban the Box Law" discussed below, the screening questionnaire completed by Mr. Alvarez did not ask applicants to disclose any criminal, illegal or illicit conduct.

In connection with his application, the transition office ran its standard background check on Mr. Alvarez. (This was the second such check.) The result of that check indicated no issues of concern. Specifically, Mr. Alvarez had no criminal, civil or tax issues of public record. Nor did a background search reveal any negative news or social media information about him.

On January 17, 2018, the day after Inauguration Day, Mr. Alvarez started in his position as chief of staff at the SDA. According to Ms. Haynes, Mr. Alvarez told her toward the end of the transition that he would be working in that position, information she says was verified by

Mr. Lozano. She also stated to us that she was informed by Mr. Lozano that Mr. Alvarez's salary would be $140,000. Ms. Haynes and her transition team then facilitated the processing of Mr. Alvarez's hiring along with over 100 other new hires in the same tranche of names.

According to Mr. Lozano's legislative testimony, he was also told by Mr. Alvarez that Mr. Alvarez was "going" to the SDA. That conversation, according to Mr. Lozano, took place in the beginning of January. Mr. Lozano testified that although he does not recall verifying the placement with Mr. Cammarano or Mr. Platkin, Mr. Lozano had assumed that at least one of them had approved the hire or placement because Mr. Lozano did not have such approval authority. Additionally, Mr. Lozano testified that he did not "set salaries" during the transition, nor did he discuss "a Chief of Staff's salary."

Mr. Alvarez's offer of employment was memorialized by letter dated January 12, 2018, from Ms. Haynes. Mr. Alvarez signed and accepted the offer on that same date. The letter resembled the standard letter that, as noted above, was sent to successful candidates as a matter of course. The letter confirms that Mr. Alvarez's employment status would be "at will." (Generally, an at-will employee may be discharged for any reason or no reason, so long as it is not a discriminatory reason. Witkowski v. Lipton, 136 N.J. 385, 397-98 (1994).) It does not appear from the facts before us that Ms. Haynes was otherwise involved in the decision to hire Mr. Alvarez.

Charles McKenna, the then-CEO of the SDA, served as Mr. Alvarez's supervisor. Prior to Mr. Alvarez's start date, Mr. Lozano contacted Mr. McKenna by text message on January 9, 2018, asking whether he (Mr.

McKenna) could meet with Mr. Alvarez before the latter formally started as chief of staff. Mr. Lozano texted Mr. McKenna, "Can you meet w al Alvarez. Your new chief of Staff, ha :)." Mr. Lozano indicated that his text to Mr. McKenna was intended to introduce Mr. Alvarez to Mr. McKenna. Mr. Lozano stated in his legislative testimony that he assumed that someone had notified Mr. McKenna that Mr. Alvarez had been hired for a position at the SDA prior to Mr. Lozano reaching out to Mr. McKenna to set up the meeting with Mr. Alvarez.

The meeting took place the next day at a Starbucks coffeehouse. After the meeting, Mr. McKenna texted Mr. Lozano, "Met with Al. Nice guy. We'll work together well. You and I need to talk salary." Following that discussion, Mr. Alvarez's salary was set at $140,000. (As for his text message with Mr. McKenna regarding Mr. Alvarez's salary, Mr. Lozano could not recall having that conversation with Mr. McKenna but acknowledged, "that doesn't mean we didn't have one. I just don't recall it.") That salary was later raised to $170,000 in August 2018, due to increases given to a certain category of employees under the terms of a new pay regulation.

Mr. McKenna explained to us that he had no role in the hiring other than what is described above. He was basically informed by the transition office to place Mr. Alvarez in the chief of staff position. In that respect, Mr. Alvarez was a so-called "political" hire, but that alone is not unusual, especially at the start of an administration. Mr. McKenna was not aware of the allegation against Mr. Alvarez at the time of the hire. Mr. McKenna

testified that he does not know whether anyone besides Mr. Lozano was involved in the process to place Mr. Alvarez at the SDA.

As a state authority, according to its website, the SDA is "responsible for fully funding and managing the new construction, modernization and renovation of school facilities projects in 31 school districts known as the SDA Districts." The authority was created as part of legislative and executive branch efforts to comply with the Abbott v. Burke line of school funding decisions. Its active projects are currently valued at approximately $2 billion.

According to its enabling statute, the SDA is an "in but not of" authority of the Department of the Treasury. It is managed by a board of several members appointed by the Governor with the advice and consent of the state Senate. Included on the board are four ex-officio members -- the CEO of the New Jersey Economic Development Authority, the commissioner of the Department of Education, the commissioner of the Department of Community Affairs and the state Treasurer.

As chief of staff, Mr. Alvarez attended SDA "front office" meetings and was in charge of the internal auditing group as well as the records department, among other duties. Mr. McKenna's successor at the SDA told us that Mr. Alvarez's responsibilities eventually were expanded and that he was engaged in a number of tasks. Regarding Mr. Alvarez's workplace demeanor, Mr. McKenna noted, "I didn't see him act inappropriately." He added, "When I heard the allegations from the [Wall Street] Journal, I was somewhat shocked."

4. March and April 2018. In March 2018, Ms. Brennan directly informed the Governor's chief counsel and deputy chief counsel, Parimal Garg, of her allegation against Mr. Alvarez. They recall being told separately on March 21 and March 22, respectively. (Ms. Brennan testified that she told Mr. Platkin on March 20, a slight inconsistency that need not be resolved for our purposes here.) According to Mr. Garg, Ms. Brennan had previously wanted to talk to him on Inauguration Day about a matter of serious wrongdoing by a senior administration official but decided not to do so at that juncture.

On March 22, the chief counsel, after speaking with Ms. Brennan on or about March 21, asked the chief ethics officer of the Governor's Office, Heather Taylor, to refer the allegation to the Office of the state Attorney General (OAG). According to Ms. Taylor and her notes, she specifically described the allegation to the OAG as one involving sexual assault.

Meanwhile, the Governor's Office had decided that Mr. Alvarez should be asked to consider resigning. As we understand the chronology, Mr. Cammarano was the first person in the Governor's Office to speak directly with Mr. Alvarez about the situation. Mr. Alvarez strongly denied any wrongdoing. According to his legislative testimony, Mr. Cammarano expressed his view to Mr. Alvarez that he (Mr. Alvarez) should leave state employment, believing that Mr. Alvarez "fully understood" that he should resign his position. That conversation occurred on March 26, 2018.

One day later, Melissa Liebermann, the chief of staff to the Attorney General, who also oversees EEO/AA issues on behalf of the OAG, responded to the March 22nd referral from the Governor's Office. Ms.

Liebermann told us that she understood from the referral that Ms. Brennan was allegedly mistreated or harassed (rather than, more specifically, sexually assaulted) by Mr. Alvarez during the campaign timeframe. Although Ms. Liebermann knew Mr. Alvarez from the Corzine administration, she described him merely as an acquaintance.

Ms. Liebermann explained to Ms. Taylor that, because the alleged incident predated the start of state service for both Ms. Brennan and Mr. Alvarez, existing Chapter 7 rules did not provide a mechanism to investigate the allegation. Ms. Taylor briefed Mr. Platkin, who expressed to us disappointment in that conclusion, namely, that the Chapter 7 rules contained no explicit protocol for investigating conduct of an employee that predated state service. (Our charge does not include any issue surrounding the extent to which Mr. Platkin might have recused himself from the matter.)

Ms. Taylor informed Ms. Brennan of that conclusion on April 24, 2018. Ms. Taylor, whose handwritten notes describe the telephone call with Ms. Brennan, explained that the matter was referred to the OAG and it was determined that the Chapter 7 rules were not implicated because she and Mr. Alvarez were not state employees at the time of the alleged incident, nor did the alleged incident occur on state property. According to Ms. Taylor, Ms. Brennan understood the conclusion but was disappointed.

5. June 2018 and Departure From Government. With Mr. Alvarez still on the job in June 2018, Ms. Brennan sent an email directly to the Governor requesting to speak with either the Governor or First Lady Tammy Murphy. The email's subject line stated: "Sensitive Matter-Meeting

Request." In her legislative testimony, Ms. Brennan explained that she reached out directly to the Governor after hearing nothing further from the administration.

The email did not describe the nature of the matter, except that it was related to the gubernatorial campaign. Specifically, Ms. Brennan wrote, "Reluctantly, I am coming to you today to discuss something that happened during the campaign." Less than an hour later, the Governor responded by email, saying, in part: "Hang in" and "We are on it."

We interviewed the Governor. He reviewed the email with us, indicating that he had understood it to be related to the campaign and thus had forwarded it to his campaign counsel, Jonathan Berkon, with a copy to Mr. Platkin. The Governor explained that his use of the phrases, "Hang in" and "We are on it," is his common way to suggest that he is forwarding a topic to an appropriate staff person to review. Those words did not suggest any awareness of the substance of the matter, he explained. At least one witness, Mr. Cammarano, told us that such phrases are typical in the Governor's lexicon.

As for the vetting and hiring of candidates for his administration, the Governor stated that his focus was on the cabinet, sub-cabinet and members of the senior staff. He indicated that he knows Mr. Alvarez and had worked with him prior to and during the campaign. To the best of his recollection, the Governor added that he was not involved with the vetting or hiring of Mr. Alvarez relating to either a position in the transition office or his eventual hiring at the SDA.

In June 2018, presumably after Ms. Brennan's June 1st email, Mr. McKenna received a call from the Governor's Office, asking him to meet with the Governor's chief counsel. That meeting took place on June 6, 2018. Mr. Platkin then informed Mr. McKenna that he (Mr. McKenna) needed to speak with Mr. Alvarez about, as Mr. McKenna paraphrased, "step[ping] away from government." In speaking with Mr. McKenna, Mr. Platkin did not disclose the allegation against Mr. Alvarez.

The next day, Mr. McKenna spoke to Mr. Alvarez along the lines just described. Mr. McKenna told us that Mr. Alvarez appeared to understand the situation. Mr. McKenna confirmed to us that he still was unaware of the allegation at that juncture. When Mr. Alvarez asked whether there was anyone else in the administration with whom he could speak about the matter, Mr. McKenna replied that Mr. Alvarez could call Mr. Platkin. Mr. Platkin and Mr. Alvarez spoke later that day. Following that conversation, Mr. Platkin texted Mr. McKenna that he had spoken to Mr. Alvarez and that Mr. Alvarez "will look for other employment."

After Ms. Brennan's June 1st email was forwarded to Mr. Platkin and Mr. Berkon, they discussed the email and decided that Mr. Berkon should contact Ms. Brennan. Mr. Berkon confirmed to us that he had several follow-up conversations with Ms. Brennan, who testified that they spoke on June 10, 2018, and thereafter. Over the course of those conversations, he informed Ms. Brennan that Mr. Alvarez was going to leave state service. He reported the substance of his conversations with Ms. Brennan to Mr. Platkin, who had informed Mr. Berkon of the allegation prior to Mr.

Berkon's call to Ms. Brennan. Mr. Berkon told us that at no time did he inform the Governor of the allegation.

The Governor stated to us, as he has done publicly, that he did not learn about the allegation or that they involved Mr. Alvarez until October 2, 2018, the date on which the Governor's communications director, Mahen Gunaratna, received an email from the Wall Street Journal asking for comment on a number of topics, including the Alvarez matter. Several witnesses -- Mr. Berkon, Mr. Braz, Mr. Cammarano, Mr. Gunaratna, Mr. Lozano, Mr. Platkin and Ms. Taylor -- have corroborated the Governor's public statement on when he first learned of the allegation against Mr. Alvarez. We have found no evidence to contradict it.

When we asked why he did not inform the Governor when he learned of the allegation in March 2018, the Governor's chief counsel expressed his belief that confidentiality rules prevented him from doing so. Mr. Platkin was referring to the Chapter 7 rules governing administrative investigations, which provide in part: "To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigative process." N.J.A.C. 4A:7-3.1(j). Breaching those rules can subject a state employee to discipline, including discharge. Ibid.

As noted above, during his legislative testimony, Mr. Platkin reconsidered his initial view on confidentiality, allowing for the conclusion that the rules had contained sufficient leeway for him to have informed the Governor. He had not done so, he said, based on his best understanding at the time of the rules and related training materials.

After asking Mr. Alvarez in June 2018 to exit the administration, Mr. McKenna saw no change in Mr. Alvarez's employment status. When Mr. McKenna himself left the SDA two months later in August, Mr. Alvarez remained on the job. Mr. McKenna did not have any discussions about Mr. Alvarez with the successor CEO, Lizette Delgado Polanco, assuming that she had been briefed about Mr. Alvarez's anticipated departure as chief of staff.

Ms. Delgado Polanco told us that, when she joined the SDA, she was aware that Mr. Alvarez was leaving to find a new job closer to his home; she had not been informed of the allegation against Mr. Alvarez and knew nothing about it until Mr. Alvarez alerted her to the inquiries from the Wall Street Journal on October 2.

Ms. Delgado Polanco began her service at the SDA in August 2018. At that time, Mr. Alvarez told Ms. Delgado Polanco that he had an offer of employment. Mr. Alvarez was scheduled to depart the SDA no later than October 31, 2018. In September, Ms. Delgado Polanco conveyed to Mr. Platkin that there was a firm date for Mr. Alvarez's departure. Around that time, Mr. Platkin spoke to Mr. Alvarez, who confirmed that he was leaving state employment and finalizing his next employment.

Mr. Alvarez's departure date apparently was set in coordination with the start date of his new employment and the start of the new SDA chief of staff, who was expected to begin work on October 29. In September, the SDA identified the candidate to replace Mr. Alvarez, subject to approval from the Governor's Office to hire him. Ms. Delgado Polanco told us the plan was for Mr. Alvarez's tenure to overlap by one week with that of his

replacement to allow for a transition. According to Ms. Delgado Polanco, Mr. Alvarez accelerated his resignation to October 2, the date on which he was contacted by the Wall Street Journal.

On that day, a journalist from the Wall Street Journal began asking the administration about Ms. Brennan's allegation against Mr. Alvarez. Mr. Gunaratna was responsible for responding to the journalist, Kate King. Mr. Gunaratna reached out to individuals from both the campaign and transition period, as well as existing Governor's Office personnel, with relevant knowledge.

On that same day, while he was gathering information, Mr. Gunaratna spoke with the Governor and First Lady, in person, about the questions posed by the Wall Street Journal. According to Mr. Gunaratna, the Governor seemed concerned that he was hearing about the allegation for the first time, and both the Governor and First Lady appeared quite shocked.

IV.
Statutory and Regulatory Law

We reviewed several statutes and other sources of law to inform our analysis. We note them here in no particular order of importance.

A.
The Gubernatorial Transition Act

There is not much law on the structure or legal status of a transition office beyond "The Gubernatorial Transition Act," N.J.S.A. 52:15A-1 to 15A-5 (the Act). Enacted in 1969, the Act's purpose is "to promote the orderly transfer of the executive power in connection with the expiration of

the term of office of a Governor and the inauguration of a new Governor." N.J.S.A. 52:15A-2.

The Act's only provision providing any substantive guidance is N.J.S.A. 52:15A-3. The statute authorizes the Department of the Treasury to provide a governor-elect with suitable office space, payment of compensation to transition staff, as well as payment of other expenses.

The statutory text providing for payment of transition staff is most relevant. It allows for the governor-elect to draw on the services of existing state employees who would be "detailed" to the transition office, providing that such employees "shall be responsible only to the Governor-elect for the performance of his duties." N.J.S.A. 52:15A-3(a)(2). The statute also provides that such existing employees "shall continue to receive the compensation provided pursuant to law for [their] regular employment, and shall retain the rights and privileges of such employment without interruption." Ibid.

The statute also authorizes the governor-elect to request payment for salaries of a second group of transition employees, namely, those who are not existing state employees but rather workers hired directly by the transition office. Such employees, according to the Act, "shall **not** be held or considered to be employees of the State Government," except for defined purposes. Ibid. (emphasis added).

For example, such employees are considered state employees for purposes of accruing benefits under the state pension system. Under the statute, they also receive a paycheck drawn from the state treasury. To the

extent that transition workers are state employees, they receive employee advisory materials through the Department of the Treasury.

Another defined purpose is that, like their state employee counterparts, transition workers are specifically bound by the state's conflicts of interest statute. This conflicts provision was added to the transition statute as part of a larger set of amendments to the state ethics statute that became effective in 2006. See L. 2005, c. 382. The ethics amendment further requires such employees to complete the ethics training program required of state officers and employees and to receive (and acknowledge receipt of) "all ethics materials, forms, codes, guides, orders and notices required to be distributed to State employees." N.J.S.A. 52:15A-3(g).

The transition statute makes no mention of the Chapter 7 EEO/AA rules. Nor does it refer to individuals who might be volunteering their services to a transition office or having their salaries paid by a source other than the state treasury. We take notice of the fact that modern transition offices frequently benefit from volunteer workers, including members of policy committees and departmental transition committees. See Rutgers Report at 13.

B.
The Presidential Transition Act

The Presidential Transition Act of 1963, as amended, authorizes certain transition resources to be available to eligible presidential candidates well before a general election. See 3 U.S.C. § 102 note. In 2016, President Barack Obama facilitated the law by issuing an executive order,

which, among other things, established a White House Transition Coordinating Counsel "[t]o facilitate the Presidential transition, including assisting and supporting the transition efforts of the transition teams of eligible candidates." 81 Fed. Reg. 91 (May 11, 2016). The order also recognized the importance of having transitions that "are well-coordinated and effective, without regard to party affiliation." Ibid.

C.

The Ban the Box Law and Related Guidance

New Jersey's "Opportunity to Compete Act," N.J.S.A. 34:6B-11 to -19, became effective in 2015. It is frequently referred to as the "Ban the Box Law," as we will sometimes refer to it here. Among other things, the statute forbids employers with fifteen or more employees from asking about a job applicant's criminal history as part of "the initial employment application process." N.J.S.A. 34:6B-14a.(1).

The statute was amended in 2017 to clarify that its prohibitions apply to online job applications (previously, it had applied to "any oral or written inquiry") and to expunged criminal records. See L. 2017, c. 243. The statute's laudable aim is to allow applicants with criminal records to compete for the opportunity for an initial job interview, in essence to give otherwise qualified applicants a chance at employment.

Applicants can waive the Ban the Box Law by volunteering information about their criminal records at the initial application stage. N.J.S.A. 34:6B-14b. In addition, the statute does not apply to certain employment positions, such as law enforcement, and it contains other

exceptions that are not relevant here. N.J.S.A. 34:6B-16a. Moreover, the law applies only to the initial application process. N.J.S.A. 34:6B-14c.

For example, the statute would apply to the initial job interview, but not to later stages in the process. As an applicant advances in the hiring process, an employer properly may inquire about an applicant's criminal record and rely on the disclosed information in making hiring decisions (except an employer cannot rely on an expunged record or one erased by executive pardon, and all other applicable employment laws also would apply). Ibid.

Somewhat related to New Jersey's Ban the Box Law is enforcement guidance published by the United States Equal Opportunity Commission (EEOC) regarding Title VII of the Civil Rights Act of 1964. In notice number 915.002 (April 25, 2012), the Commission addressed the extent to which arrest records may be used in making employment decisions. The EEOC stated, in part:

> The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

The guidance goes on to provide examples of how an employer's practice of using arrest information could be proper or improper. In demonstrating a proper use of such information, employers typically must show that seeking such information is a business necessity and related to the underlying job. Specifically, the information must "bear a demonstrable

relationship to successful performance of the jobs for which it was used," and the practice must measure "the person for the job and not the person in the abstract."

D.
Chapter 7 Equal Employment Opportunity/ Affirmative Action Rules

New Jersey's rules pertaining to equal employment opportunity and affirmative action (EEO/AA) derive from N.J.S.A. 11A:7-1 to 11A:7-13 (the Chapter 7 statute). The rules are codified in regulations found under N.J.A.C. 4A:7-1.1 to 7-3.3 (the Chapter 7 rules). They apply to all employees and applicants for employment in each "State agency" in New Jersey. Each "State agency" is responsible for implementing model procedures customized to the structure of that organization and for filing its completed procedure with the Civil Service Commission.

Although the Chapter 7 statute does not define "State agency," the Chapter 7 rules do. For purposes of implementing the state anti-harassment policy, the rules refer to state agencies as "State departments, commissions, State colleges or universities, agencies, and authorities." N.J.A.C. 4A:7-3.1(a)1. That language mirrors language found under Governor Christine Todd Whitman's Executive Order 106 (1999), which requires "[a]ll State departments, commissions, State colleges, and authorities" to comply with the state policy and model procedures.

No source of law -- the Chapter 7 statute, the Chapter 7 rules or the executive order -- specifies whether a gubernatorial transition office is a state agency in the defined or traditional sense. When a statute or

regulation is specific or clear in delineating its reach, that delineation should not be expanded or limited. That is a role reserved to the applicable policymakers.

Thus, considering the plain language of the transition statute, together with the language of the Chapter 7 rules, it is clear that the rules apply to existing state employees as well as applicants for state employment, who have a right to a hiring process free of discrimination and other wrongful conduct. See N.J.A.C. 4A:7-1.1(a). The rules also apply to vendors of the state, see N.J.A.C. 4A:7-1.1(f), a situation not at issue here.

As for transition employees hired specifically by a transition office, the rules are silent. By our reading, the rules would apply to transition workers to the extent that an existing state employee would be interacting with transition employees or with transition volunteers. The protections under the Chapter 7 rules also would apply if a transition employee or volunteer were an applicant for state service. Under those circumstances, as limited state employees, transition workers may avail themselves of the EEO/AA procedures found under the Department of the Treasury.

In nearly all other respects, because the transition statute explicitly limits the status of transition employees, it is unclear whether the Chapter 7 rules include a transition office within their purview. It is for that reason, we surmise, that the Murphy transition office did not have its own EEO/AA officer, an omission we suggest be corrected by amending the transition statute or otherwise tethering the Chapter 7 rules directly to future transition offices.

Turning to other provisions, the Chapter 7 rules set forth a "zero tolerance" for workplace discrimination, including sexual harassment:

> To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

[N.J.A.C. 4A:7-3.1(a)]

The rules describe in detail the prohibition against discrimination, including the prohibition against sexual harassment. As to the latter, the rule explicitly provides: "Sexual harassment is a form of prohibited gender discrimination that will not be tolerated." N.J.A.C. 4A:7-1.1(e). Among the examples of prohibited conduct contained in the rules is "[u]nwanted physical contact," N.J.A.C. 4A:7-3.1(c)2.ii., which, by any fair reading, would include sexual assault.

The rule also states:

> This policy also applies to both conduct that occurs in the workplace and conduct that occurs at any location which can be reasonably regarded as an extension of the workplace (any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed).

[N.J.A.C. 4A:7-3.1(a)1.]

Hence, alleged conduct occurring outside the boundaries of state property still can be actionable under the rule so long as the conduct's location "can be reasonably regarded as an extension of the workplace[.]" Ibid.

The rules contain a process for investigating allegations of wrongful conduct, guided by a policy of confidentiality. In that respect, the rules require that:

> All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigative process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or **who have a legitimate need to know about the matter.** All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interest of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.
>
> [N.J.A.C. 4A:7-3.1(j) (emphasis added)]

We understand the reasons why Mr. Platkin initially construed the confidentiality language to bar him from informing the Governor of the allegation against Mr. Alvarez. But, as noted above, the chief counsel reconsidered that interpretation in his legislative testimony. In our view, as head of the executive branch, the Governor could "have a legitimate need to know" about a serious allegation involving a senior member of his or administration. That said, the Chapter 7 language does not **require** that

a governor be told of every complaint, but rather it provides sufficient leeway for the chief executive to be informed of a complaint in the appropriate circumstances.

Chapter 7 contains model procedures for internal complaints and for investigating such complaints. Employees "are encouraged to immediately report suspected violations" of state policies. N.J.A.C. 4A:7-3.2(a). The rules observe, "Delays in reporting may not only hinder a proper investigation, but may also unnecessarily subject the victim to continued prohibited conduct." N.J.A.C. 4A:7-3.2(c). Supervisors of state employees are required under the rules to "immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment." N.J.A.C. 4A:7-3.1(e).

In addition, the model procedures authorize the applicable EEO/AA officer to "determine if interim corrective measures are necessary to prevent continued violations" of state policy. N.J.A.C. 4A:7-3.2(h). The rules also provide that, "At the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place." N.J.A.C. 4A:7-3.2(i). The rules then go on to describe the content of a resulting investigative report, including a summary of the parties' positions, the preparation of a final letter of recommendation, the procedures for appeal and other related components.

V.
Analysis

Our analysis is reflected in the executive summary contained under Section II. We emphasize the following:

A.
Governor-elect Murphy's Transition Office

A gubernatorial transition is sui generis. It has the official imprimatur of New Jersey because transition aides are housed in a temporary state office and for limited purposes fall under the ambit of the Department of the Treasury. Because the responsibilities and appointing authority of an incoming New Jersey governor are so vast in scope, most transitions require resources beyond the available $250,000 appropriation. Hence, there was a heavy reliance in the Murphy transition office on volunteers and employees whose salaries were absorbed by the New Jersey Democratic State Committee.

Perhaps the most unique feature of a transition office is its limited lifespan. By law, it cannot officially open its doors until the day after Election Day, and then it essentially goes out of business ten weeks later on Inauguration Day. With limited paid staff and a wide use of volunteers, the transition office must vet and recommend for hire scores of individuals for positions of public trust, many involving significant responsibilities.

New Jersey should consider adopting an approach similar to the federal model used for presidential candidates, who are analogues to state gubernatorial candidates. At the federal level, for example, major party nominees are expected to name transition directors several weeks before

the general election. See 3 U.S.C. § 102 note § 4. This allows vetting and other planning activities to begin in a systematic way, without the stress of a compressed timeframe.

The scope of the presidential office outweighs its state gubernatorial analogue. Still, the scope of the New Jersey Governor's Office is considered one of the largest of any such state office in the United States. We see no reason why a gubernatorial nominee, after winning his or her respective party nomination, cannot begin to prepare for transition in a structured way. Veterans of previous gubernatorial transitions have expressed similar views. See Rutgers Report at 6 (quoting Dick Leone, transition aide to Governors Brendan Byrne and Jon Corzine, as saying, "I don't think [starting early] jinxes you; I think it is smart and healthy to do it.").

If state policymakers prefer not to codify or fund an early start to a gubernatorial transition, then we suggest that our election laws encourage candidates to begin a process of early planning on their own. By this we mean that individuals and entities who might provide transition services should be encouraged to volunteer their time or services without concern that such services constitute an in-kind contribution or that they trigger pay-to-play prohibitions.

Planning for an orderly gubernatorial transition should be seen as a non-partisan act. Requiring or encouraging gubernatorial candidates to begin planning the transition well before Election Day also would allow for more time to vet and hire individuals before advancing them into transition roles.

Likewise, the financing of gubernatorial transitions should be free of partisanship. While we leave the selection of any reform to policymakers, we note for discussion that some proposals could include: (a) automatic quadrennial adjustments by the Department of the Treasury or other suitable state entity, (b) the establishment of a cost index such as the one employed by the Gubernatorial Public Financing Program and (c) the dedication of public funds.

As for the general vetting and hiring practices of the Murphy transition office, they generally comported with what we would expect from a transition office, especially one with a short lifespan. In many respects, the Murphy team acted in accord with suggestions offered by the National Governor's Association and by Rutgers University. See NGA Consulting, "Critical Lessons for Governors-Elect," 2018 ed. at 14, 33 (suggesting as transition steps the naming of a transition director and deciding on "what process will be used to vet candidates"); Rutgers Report at 15 (suggesting as a hiring goal the selection of "most if not all cabinet members and upper level department leaders").

Mr. Lozano stated that the transition office recommended individuals for state service but expressed the view that the office had lacked the authority to hire them. That might be true in a technical sense, but we need not resolve whether the transition office had actual authority to hire incoming state employees.

For our purposes, it is enough to conclude that the transition office had the apparent authority to drive the process in nearly all respects. (Ms. Haynes testified that, in her view, Messrs. Lozano, Cammarano and Platkin

had hiring authority.) Interviews of candidates were typically initiated and conducted by the transition office. The transition office extended employment offers, the terms of which were memorialized on the Governor-elect's letterhead. After a candidate accepted the offer, the transition office informed the applicable state agency of the new hire, which agency then processed the necessary paperwork to add the individual to its payroll.

As noted, prospective cabinet members were the subject of a four-way investigation. As part of that investigatory process, candidates for the cabinet are generally required to complete a detailed questionnaire furnished and processed by the State Police. In addition to that questionnaire, it appears that prospective cabinet officials in the Murphy administration also were asked to complete a questionnaire containing twenty-four questions, including, "Have you been arrested, charged with a crime, or indicted?" and, "What do you view as your greatest vulnerabilities?"

We do not suggest that the four-way investigatory process be extended beyond existing protocols, which typically include prospective cabinet members, judges and prosecutors. (Such a proposal would require extended consideration of various factors, including the level of resources necessary to adopt it.) We do suggest, however, that future transition offices consider, as a standard vetting practice, requiring all prospective senior transition employees and candidates for senior-level positions in state government to answer questions similar to the twenty-four questions that the Murphy transition office asked of prospective cabinet candidates.

As part of that consideration, an analysis would need to be completed as to whether a blanket vetting practice of asking such questions would be permissible under the Ban the Box Law and EEOC rules referenced under Section III. If so, the questions could include whether a candidate for employment (1) has ever been arrested or (2) questioned by law enforcement but not arrested. That latter question, if it had been asked in the matter before us, would have prompted Mr. Alvarez to disclose that he was questioned about the allegation. In her legislative testimony, Ms. Brennan confirmed that prosecutors had questioned Mr. Alvarez.

B.
Albert J. Alvarez

1. The Transition. Turning to Mr. Alvarez, we note, at the outset, that his early placement in the transition office seemed like a foregone conclusion. That he moved from the gubernatorial campaign to the transition to state government is not, standing alone, unusual. See Rutgers Report at 36 (quoting Judy Shaw, regarding the transition of Governor Christine Todd Whitman, as saying, "[W]e said to everybody who had been in the campaign, 'Every one of you will have a role in the transition and will have an opportunity to work in the administration.'").

As noted above, the DPF-10 document regarding Mr. Alvarez's hiring at the transition office states in part: "The Governor-elect has requested the captioned employee be hired as a member of the new Transition Team at the salary requested and on the effective date identified." According to the treasury official who prepared and signed that document, Douglas Ianni, the quoted language was "form language"

that he developed in anticipation of the transition. It was not intended, he said, to mean that Phil Murphy had personally hired Mr. Alvarez. Indeed, the treasury official told us that this language was used for all other unclassified employees who worked for the transition. He checked the files of other transition employees, confirming that the same description appears in their files.

In addition, the Gubernatorial Transaction Act explicitly authorizes a governor-elect to request that transition employees be enrolled into state service. Thus, under those circumstances, a form document containing a hiring request in the name of the "Governor-elect" is to be expected. In our view, that document, by itself, is not evidence of Governor-elect Murphy's personal involvement in a particular hire.

Without the opportunity to interview Mr. Alvarez, we can only surmise part of the process, which occurred during the transition, that resulted in his subsequent hiring at the SDA. As far as we can tell, he was hired after he submitted a written application in the form of the Transition2018 Employment Screening Questionnaire. He also submitted a résumé and met with the then-serving CEO of the SDA and, further, cleared a standard background check. In turn, Mr. Alvarez received what appears to be a standard offer letter issued by Ms. Haynes.

Although no witness has recalled definitively that he or she was the person who decided to hire or place Mr. Alvarez into state service, Mr. Lozano appeared to have been relatively more involved than others in that process. Mr. Lozano texted the SDA's CEO, asking him to meet with Mr. Alvarez whom Mr. Lozano described as the CEO's "new chief of Staff."

Text messages indicate that Mr. Lozano and the CEO planned to discuss Mr. Alvarez's salary after that meeting. Additionally, according to Ms. Haynes, Mr. Lozano confirmed to her that Mr. Alvarez would be placed at the SDA in the chief of staff position and informed her of Mr. Alvarez's salary.

As noted earlier, Mr. Lozano testified that he did not "set salaries" during the transition, nor did he discuss chiefs of staff salaries. As for his text message with Mr. McKenna in which the latter noted the need to discuss Mr. Alvarez's salary, Mr. Lozano testified that he did not recall the discussion but appeared open to the possibility it might have taken place, qualifying his lack of remembering with "that doesn't mean we didn't have one [a discussion about Mr. Alvarez's salary]. I just don't recall it." Given the explicit reference to Mr. Alvarez's salary in the Lozano-McKenna text message exchange, together with Mr. Lozano being open to the possibility that he had discussed the subject with Mr. McKenna without specifically recalling it, we are left to surmise that some discussion about Mr. Alvarez's salary took place between the transition's executive director and the then-serving CEO of SDA.

For his part, Mr. Cammarano stated to us that he might have signed off orally on the ultimate hiring decision. This is consistent with what he told us and the Legislature, namely, that he could not remember definitively.

As for the vetting process as it related to Mr. Alvarez, transition officials had to address a situation in which they did not know Ms. Brennan's identity. According to Mr. Lozano, they did not know any

details regarding the alleged sexual assault. They also believed, perhaps mistakenly, that Mr. Braz was acting on his own in informing them of the allegation, meaning that Ms. Brennan did not want the matter discussed at the transition office or might not have wanted an investigation separate from the one then being handled by law enforcement. See Lindemann & Kadue, supra, (1999 supp.) at 183 (observing as to an employer's duties when informed of allegations, "The employer's responsibility may be limited by the scope of what it is told."). In addition, referring to the March timeframe, Mr. Cammarano suggested in his legislative testimony that the possibility of being sued for firing Mr. Alvarez over an accusation was a concern.

According to one employment law treatise, in reviewing an employer's response to allegations, a complainant's request that no investigation be undertaken is a relevant factor when "the reported incidents [are] relatively few and minor and there [is] no imminent threat of further harm to the complainant or others." Id. at 184 (citations omitted). The allegation being addressed by the Murphy transition office, however, was not minor. Just the opposite. See ibid. (noting that on the list of alleged incidents at issue in a particular case, "rape . . . clearly was the most severe conduct."). Thus, the transition office, upon learning the allegation, was required to take some action, even if it held a subjective belief that Mr. Braz was acting contrary to Ms. Brennan's request. See Lindemann & Kadue, supra, at 426 ("Courts have held that the duty to investigate exists without regard to whether the complainant has agreed that the employer need not investigate certain reported incidents of harassment.").

The transition office did take some action. It consulted counsel, conducted a background check on Mr. Alvarez and, according to transition counsel, put a remedy in place to guard against possible retaliation against Ms. Brennan. Relying on counsel, the transition office felt constrained from speaking to Mr. Alvarez about the allegation. The office also did not appear to ask Mr. Braz definitively to return to Ms. Brennan in an attempt to gain more information.

It is on those two latter points that additional steps should have been taken. Namely, the transition office should have returned to Mr. Braz and should have spoken to Mr. Alvarez in an attempt to gain more information on which to base at least a limited investigation or review before Mr. Alvarez advanced into state service. Mr. Lozano properly acknowledged in his legislative testimony that, in hindsight, more should have been done in transition with regard to the allegation. See also Lindemann & Kadue, supra, at 427 ("Some form of responsive action . . . is not necessarily a substitute for an investigation.").

Stated differently, with respect to Mr. Alvarez, the transition office had a legitimate business reason to discuss the allegation with him. There was also an appropriate interval to do so, namely, after the office purportedly had taken a measure to reduce the risk of retaliation against Ms. Brennan and the office had been informed that no arrest of the accused employee was going to occur. At that juncture, a conversation with Mr. Alvarez could have been initiated in an attempt to obtain additional information.

Speaking to Mr. Alvarez might have put the transition office in no better a position to investigate the facts. Nonetheless, protocols should be made clear that such an interview of an accused employee is generally appropriate and may be undertaken within the discretion of an EEO/AA officer (assuming a transition office has its own such officer or liaison as recommended above), unless there is an unmistakable risk of impeding law enforcement action that appears imminent. And the interview should be timed and done in a manner to eliminate any risk of retaliation against the complainant. Such a protocol would serve as a systemic reform to enhance investigatory efforts or administrative reviews in future cases.

We note that during her legislative testimony, Ms. Brennan suggested that she would have been receptive to such a request for more information and was surprised that no one had asked. Returning to Mr. Braz was a step that could have put the transition office in a better position to gain additional facts necessary for an informed decision on how to address the allegation against Mr. Alvarez.

We also note transition counsel's legislative testimony in which he stated his view that returning to Mr. Braz to ask for his assistance was not an option in light of the belief that Mr. Braz was not authorized to reveal the allegation to the transition office in the first instance. Also, transition officials believed that any discussion with Mr. Alvarez about the allegation against him would have furthered a discussion that Ms. Brennan did not want anyone to have or potentially would have placed Ms. Brennan at risk of retribution. What transition officials knew, and what they might have

understood, are relevant to our finding that they acted in good faith, albeit with the shortcomings we have identified.

That said, for the reasons already noted, we adhere to our view that attempting to collect additional information from Mr. Braz and inquiring of Mr. Alvarez directly would have been appropriate steps as a matter of process, even if they might have yielded little additional information. Such steps could have been taken while protecting to the greatest extent possible the confidentiality of the allegation and the privacy concerns of the complainant. As suggested earlier, "in most cases, a supervisor has a duty to investigate reported instances of sexual harassment, with or without an employee's consent[.]" Hollis v. Fleetguard, 668 F. Supp. 631, 637 n.14, (M.D. Tenn. 1987), aff'd, 848 F.2d 191 (6th Cir. 1988); see also Lindemann & Kadue, supra, at 426 ("This duty [to investigate] may arise without regard to whether the complaint is made formally through a [pre-established] grievance procedure, or made informally outside of the established procedures.").

As for remedies, "When the employer's investigation cannot determine whether harassment occurred, it still is prudent to minimize contact between the complainant and the alleged harasser." Lindemann & Kadue, supra, (1999 supp.) at 188. The same prudence might be warranted when, as here, there has been no investigative determination one way or the other. Because the transition office did not know Ms. Brennan's identity, it imposed a remedy, according to transition counsel, similar to minimizing contact. Namely, it reduced Mr. Alvarez's ability to prevent Ms. Brennan from being hired by the administration.

We take special note of the testimony of the transition's personnel director, Ms. Haynes, that she did not have a specific conversation with transition counsel about remedial measures. She further stated that Mr. Alvarez could have, in theory, discarded Ms. Brennan's résumé before it reached any hiring official. (We know that this did not occur, or at least that Ms. Brennan's hiring was not adversely affected, due to the fact that she was hired, apparently with the support of Mr. Platkin, for her current state position.) In any event, for our purposes, we need not reconcile transition counsel's testimony with that of the personnel director because either version reinforces our view that the transition office should have documented the purported remedy in some form. See id. at 187, 190 (discussing remedial actions and the value of putting them in writing).

We also note that Ms. Brennan testified to the fact that, sometime during the transition, her attorney sent Mr. Alvarez a letter requesting that he recuse himself from any hiring decisions relating to Ms. Brennan. Because the transition statute explicitly requires transition workers to comply with state ethics rules, the question whether Mr. Alvarez needed to file a formal recusal is implicated. The state Uniform Ethics Code provides, in part: "A State employee . . . is required to recuse him/herself on an official matter if he or she has a . . . personal interest that it is incompatible with the proper discharge of his/her public duties."

Our charge does not include an analysis of whether Mr. Alvarez violated state recusal policy. We mention the recusal letter only from the perspective of whether the transition office was aware of it and if so, whether it influenced the decision by the office to diminish Mr. Alvarez's

hiring role. According to transition counsel, Mr. Parikh, he never saw the letter and thus had no discussions about it in the transition office. Instead, as noted above, the transition office addressed the possibility of retaliation against Ms. Brennan by restricting Mr. Alvarez's hiring role and shifting his focus to the inaugural committee.

The fact that Ms. Brennan sent the letter at all is consistent with her indicated level of discomfort in seeking employment with the administration while Mr. Alvarez might have held hiring authority at the transition office. It also underscores the need for workplaces to be free of discriminatory or improper influences and highlights that the need for recusal can arise not only under financial circumstances but also when a state employee's personal circumstances are at issue.

2. The Schools Development Authority. When the sexual assault allegation resurfaced after the start of the administration in a more direct way, namely, by Ms. Brennan so informing the Governor's chief counsel and deputy counsel, the chief counsel asked that the matter be referred to the Office of the state Attorney General (OAG). Under protocols applicable to the Governor's Office at the time, the OAG's EEO/AA representative was one of the persons specifically designated as a point of contact for personnel within the Governor's Office.

As already stated, the conclusion was reached that an investigation could not be undertaken because the alleged conduct took place exclusively during the campaign timeframe and at a location that was not an extension of a state workplace. If the OAG had understood that the alleged incident involved sexual assault rather than harassment, we

question whether the Chapter 7 rules would have required a different result. Under the Chapter 7 rules, unwanted physical contact is an example of sexual harassment, meaning that sexual assault and sexual harassment are both prohibited. See N.J.A.C. 4A:7-3.1(b). The description of the alleged conduct would not have altered the fact of when or where it took place.

In other words, the matter referred to the OAG did not explicitly encompass prohibited conduct that might have occurred during state employment. That distinction could have affected the conclusion that the Chapter 7 rules were not implicated. Had the perspective been different, i.e., if the alleged facts had been viewed as implicating a risk to the current workplace, then, arguably, there might have been discretion to undertake an investigation or a review. In her legislative testimony, the OAG representative, Ms. Liebermann, suggested that, in hindsight, the analysis might have been different under that perspective.

In late March, Mr. Alvarez, who denied any wrongdoing, was encouraged to leave state employment. But the message to him was stronger in early June, when essentially he was asked to exit state government. That progression appears to reflect Ms. Brennan's increasing and sustained efforts to raise her allegation. The Governor's Office, on its own, should have moved more expeditiously in following up on Mr. Alvarez's departure from state service after it raised the issue with him in March. In his legislative testimony on December 18, 2018, Mr. Cammarano appeared to express regret over the lack of follow-up efforts.

Almost four months passed from June 7 until Mr. Alvarez ultimately resigned on October 2, 2018. Aside from insufficient follow-up efforts, that

passage of time appears to be the result of at least two factors -- the search for a successor chief of staff at the SDA and a willingness to allow Mr. Alvarez to find new employment. During this extended period of time, Mr. Alvarez's planned departure was known to Ms. Delgado Polanco, as of August, and Mr. Platkin, as of September. Mr. Alvarez had been expected to depart no later than October 31, 2018. Yet, Ms. Brennan was not updated and understandably felt that no action was being taken.

To this day, Ms. Brennan's allegation against Mr. Alvarez has not been evaluated, reviewed or investigated by any administrative arm of the executive branch. Again, we understand why the determination was made that the state could not initiate an EEO/AA investigation of alleged conduct that predated the state employment of both employees and that allegedly occurred at a location that could not reasonably be regarded as an extension of a state workplace.

That said, in addition to protecting complainants from retaliation and providing an avenue to redress wrongs and to allow an accused employee to respond to allegations, laws governing workplace conduct exist for other reasons. Prospective victims of harm, for example, deserve a system or set of rules to reduce the risk of discriminatory or harassing conduct in the first instance. See N.J.A.C. 4A:7-3.1(a) ("The State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment.").

A state employee accused of serious misconduct, even misconduct alleged to have occurred prior to state service, arguably poses a risk to the

current workplace. That is one of the reasons why we recommend revising the Chapter 7 rules to allow EEO/AA officers the discretion to undertake an administrative review or investigation in this setting, including during a transition period, even when the alleged wrongful conduct predates an employee's state service or the identity of the complainant is unknown.

The same reasons why the transition office should have returned to Mr. Braz and spoken to Mr. Alvarez to obtain additional information arguably applied to the period in March. In other words, the administration could have interviewed Ms. Brennan to obtain more details surrounding the allegation, and it also could have obtained Mr. Alvarez's response, from the perspective of evaluating the then-current workplace. One major distinction, however, is that in the March timeframe the Governor's Office thought Mr. Alvarez would be departing state government altogether, perhaps obviating in its view the need for such further inquiry. That is all the more reason why the Governor's Office should have more closely followed-up on Mr. Alvarez's departure date.

* * * * *

A brief word about the Ban the Box Law. The Murphy transition represented the first gubernatorial transition following the adoption of the Ban the Box Law. Although the law might have necessitated delaying certain background checks until after an initial application period had expired, that delay did not seem to unduly hamper any vetting efforts.

The law, for example, had no effect on Mr. Alvarez's situation because transition officials knew of the allegation, albeit in a limited way. Because Mr. Alvarez was neither arrested nor charged by law enforcement

at the time of his hiring, there would have been no criminal history to disclose or discover about him.

Still, the Ban the Box Law, as well as relevant EEOC rules, would need to be analyzed in the event a future transition office wanted to undertake blanket criminal history screening, including investigative or arrest history, for transition employees or prospective senior-level candidates for state service.

VI.
Conclusions

Our conclusions in the form of findings and recommendations are contained in the executive summary found under Section II and need not be repeated here. In addition, we offer these closing thoughts. The chronology of facts shows an alleged victim of sexual assault asserting her allegation at different levels only to be informed that her allegation could not be evaluated or addressed in an administrative capacity. The lack of an administrative review denied both the complainant and the accused employee an avenue to determine the facts and a process for evaluating a serious allegation.

Whether the decision not to conduct an investigation was made during the transition period, or after the start of the administration, decision-makers appear to have been acting, with the advice of counsel, under their best judgment and understanding of existing law. Nonetheless, to the extent that transition or governmental officials felt unable to act either because the identity of the alleged victim was unknown or the

alleged conduct predated state service, the system failed and is in need of reform.

Those reforms should spell out more clearly that an administrative investigation or review can be authorized, as deemed necessary by the appropriate EEO/AA officer, even when a complainant is unknown or the alleged conduct predates state employment. To the extent they are unclear, the rules should be clarified to provide that an accused unclassified employee may be suspended by a public employer, in the face of serious allegations pending an investigation or a review.

Why didn't the transition office simply hold off advancing Mr. Alvarez for any state position while the allegation remained unresolved? The office believed it was unable to investigate what it had been told in December 2017. And perhaps it felt that, without an investigation, it lacked a basis to suspend the hiring or it could be sued by Mr. Alvarez. Or perhaps it relied too heavily on the decision of prosecutors not to file criminal charges. Still, as we have stated, additional steps should have been taken, including the beginnings of an investigation in the form of interviewing Mr. Alvarez and returning to Mr. Braz in the hope of obtaining additional information from Ms. Brennan.

Who made the decision to hire Mr. Alvarez into state service? As noted in the executive summary under Section II, the precise answer to that question is unclear. We are left to surmise that, similar to his joining the transition office, Mr. Alvarez's hiring into state service was a foregone conclusion given his involvement in the Murphy campaign and association with the transition office.

Under usual circumstances, that seamless progression would not raise questions. In the case of Mr. Alvarez, however, that progression should have been halted, or at least slowed, to allow the transition office to take the additional steps noted in this Report. In the future, we recommend a transition office maintain clear records regarding its hiring decisions, including the persons who are responsible within the office for either recommending a candidate or making the hiring decision itself.

Our review of the vetting and hiring practices of the Murphy transition office did not occur in a vacuum. Our country is in the midst of a national dialogue about instances of deplorable treatment of women in the workplace -- and the hurdles they must overcome simply to gain access to a fair process by which serious allegations of wrongdoing can be addressed. It is a topic long overdue for action and reform.

It is New Jersey's challenge to design or improve workplace procedures for both a gubernatorial transition office and the whole of state government that can be used to evaluate allegations of sexual assault and harassment in an impartial manner, under a system that does not lose sight of alleged victims. It is our hope that our findings and recommendations will help in addressing that challenge.