



OFFICE OF THE
ARIZONA STATE TREASURER



KIMBERLY YEE
TREASURER

September 29, 2023

The Honorable Katie Hobbs
Governor, State of Arizona
1700 West Washington Street
Phoenix, AZ 85007

Hand Delivered

Governor Katie Hobbs:

I am in receipt of a letter from your Interim Director of the Department of Administration dated September 28, 2023. While I take exception to the unprofessional and juvenile rhetoric used throughout the letter, I will not respond to it here, other than to say the complete lack of respect from a member of your administration towards a duly statewide elected official is appalling. Rather, this letter will serve to briefly explain why I, as Chair of the State Board of Investment (“BOI”), did not seat the Arizona Department of Administration (“ADOA”) or the Arizona Department of Insurance and Financial Institutions (“DIFI”) employees during the September 26, 2023, BOI meeting. As you will see, I did not make this decision for political reasons, as suggested by your staff, but rather out of an abundance of caution to ensure that the actions taken by the BOI during the September 26, 2023, meeting were legitimate and lawful.

First, the BOI had a good faith belief, grounded in Title 38, that the employees were not eligible to serve on the BOI during the September 26, 2023, meeting. It is my understanding that until September 25, 2023, there were Acting Directors for ADOA and DIFI. Although they both had been nominated by you as Governor, they had not yet been confirmed by the Senate as required by A.R.S. § 41-701(C). On September 25, 2023, your office announced that you “withdrew all director nominations that remain pending before the Senate,” including the nomination of the Acting Directors for ADOA and DIFI.

Upon your withdrawal of the nominations, the position of ADOA Director and DIFI Director were vacant. See A.R.S. § 38-291(11) (“An office shall be deemed vacant from and after the occurrence of any of the following events . . . [11] failure of a person to be elected or appointed to the office”). As these positions were vacant (at least to BOI’s knowledge), it follows that the employee designees of those previous Acting Directors could not serve on BOI as the “designees”. See A.R.S. § 38-461(B) (deputies and assistants must be appointed by “the officer or body to whom they are subordinate”). Given these developments, legal counsel for the BOI was rightly concerned as were members of the BOI that any actions it took with the two employees of ADOA and DIFI as voting members might later be deemed invalid. It was for this reason, and this reason alone, that I refused to seat them.



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Your staff asserts in their letter that as of September 26, 2023, you had appointed Ben Henderson to serve as Interim ADOA Director and that, therefore, the BOI was required to seat Ms. Retsinas during the September 26 board meeting. This comes as a surprise. Neither I, nor any other BOI member, nor anyone in my office, have been informed by your staff of this appointment—and we certainly were not aware of this fact before the BOI meeting on September 26, 2023. We have also yet to receive any documents supporting the appointment of Mr. Henderson. Accordingly, and to ensure that Ms. Retsinas has been properly delegated by the ADOA to serve on the BOI in future meetings, please have your staff forward: (1) a signed Notice of Appointment and Loyalty oath of office, see A.R.S. § 38-231(F); (2) evidence that you have posted a \$100,000 bond on behalf of the ADOA Director pursuant to A.R.S. § 38-251; (3) all other evidence of your appointment of Mr. Henderson to ADOA Director and DIFI Director.

Even assuming that these prerequisites have taken place, the BOI and I still have serious concerns about the legality of your “appointment” of the “Interim Director” of ADOA and DIFI. From what we have learned, it appears that Mr. Henderson was recently named as the interim “director” of several other State agencies for the sole purpose of immediately designating all powers of the director to an “executive deputy director” and then resigning. It appears some or all of the designees are individuals that were previously nominated by you to serve in the director position, including for ADOA and DIFI. While your staff has alleged that this conferral of power is valid under A.R.S. § 28-462 because deputies may perform all of her principal’s duties, it ignores that deputies must have a principal to exercise those duties.

This appoint, designate, and resign maneuver is a transparent attempt to circumvent the Senate confirmation process, potentially in violation of A.R.S. § 38-211, A.R.S. § 41-701(C), and Article 5, Section 8, of the Arizona Constitution, among other things. See *McCall v. Cull*, 51 Ariz. 237, 245 (1938) (holding that a Governor’s “power to appoint is in conjunction with the Senate. The two must concur. The Governor cannot exercise the power alone.”). I also have serious concerns that by attempting to avoid the Senate confirmation process in this manner, you have potentially not “take[n] care that the laws be faithfully executed,” in violation of Article 5, Section 4, and has not “see[n] that all offices are filled and the duties performed” in violation of A.R.S. § 41-101(A)(2). As you and I are both former State Senators, we understand the importance of the confirmation process and understand that each Legislature has the authority to adopt rules as to how it conducts its business.

¹ In fact, my office was not aware of the appointment until September 27, 2023 — when Capitol Media Services forwarded an email from your communication director.

2. I note that under the common law, a public officer who accepts a second office which is “incompatible” with the first office vacates the first office. *Perkins v. Manning*, 59 Ariz. 60, 64-65 (1942). Two offices are incompatible where “it is physically impossible that they may be performed properly by the same person.” *Id.* at 70. It is not physically possible for Mr. Henderson to have faithfully served as the “interim director” of over 10 state agencies in a single day.



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In short, until the BOI receives: (1) the above requested documentation and (2) legal authority supporting the appointments, I cannot in good conscience seat the ADOA and DIFI employees on the BOI moving forward. I look forward to your response on these points.

Second, I disagree with your staff's position that my actions at the September 26, 2023, BOI meeting are invalid and must be re-added to next month's agenda. To be valid, legal actions taken by a public body must occur during a "public meeting." A.R.S. § 38-401.01(A). A public meeting is "a quorum of the members of the public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to that action." A.R.S. § 38-431(4). The September 26, 2023, meeting was attended by a quorum of BOI members (myself, Harry Papp, and Beth Ford) and was therefore presumptively valid. Further, Ms. Retsinas attended the full meeting via WebEx as a member of the public and at no time informed the BOI, or Treasury staff, that she had been appointed by Mr. Henderson, as interim director of ADOA. If you have any contrary authority, please send it to us. With that said, we note that the only actions that BOI took during the September 26, 2023, meeting was the unanimous approval of a monthly report.

I hope that this letter alleviates the concerns of you and your staff. Please send us all documentation supporting your appointments as soon as practicable, so that we may ensure that the appropriate designees are seated on the BOI moving forward. If you have any questions, feel free to contact my office.

Sincerely,

The Honorable Kimberly Yee
Arizona State Treasurer