

March 5, 1992

Commission Member

RE: Conflicts of interest for
Commission member;
Executive Ethics Act
(AS 39.52)
Our File #661-92-0388

Dear Commission Member:

You have requested a response from this office on certain questions regarding the Ethics Act. I understand your questions were prompted by your recent appointment to the XXXX Commission.

The questions you have raised are as follows:

1. Do the requirements of the ethics act apply to me as a member of a commission whose decisions are merely advisory?

2. Should I refrain from voting on matters that concern a facility operated under a lease by the same corporate subsidiary that owns the facility in which I am employed and in which I have a direct financial interest?

3. Should I refrain from voting on matters that concern facilities that are managed, though not owned, by another subsidiary of the corporation that owns the facility in which I am employed and in which I have a direct financial interest?

In brief, the answers to your questions are, first, the requirements of the Ethics Act apply to you as a member of the Commission even though it renders merely advisory decisions. Second, it would be most prudent for you to refrain from voting on matters concerning the facility operated by the same subsidiary that owns the facility in which you are employed. Third, you probably need not refrain from voting on matters concerning those facilities that are managed by the other subsidiary of the corporation. These responses are discussed herein.

As a Commissioner, you are a public officer under AS 39.52.960(21)(B), which provides: "'public officer' . . .

means

. . . (B) a member of a board or commission[.]" Your actions therefore fall under AS 39.52.120(b)(4), which states:

(b) A public officer may not

. . . .

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest.

Also, AS 39.52.150(a) may apply to you to the extent that state payments to the facility may be considered a state grant. That section provides:

A public officer . . . may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant . . . if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant

Both provisions require the presence of "official action," which is defined in AS 39.52.960(14) as follows:

"[O]fficial action" means a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction by a public officer.

According to subsection (14), even a recommendation may be considered to be official action. Thus, the advisory decisions of the Commission qualify as a type of official action that is within the purview of the Ethics Act. The Act therefore applies to your official actions as a member of that commission.

When the Department sets a rate, it is required to consider the recommendations of the Commission. See 7 AAC 43.701(e). Your recommendations may, then, influence a rate set by the Department. Your official action, therefore, requires a consideration of AS 39.52.120(e)(4) quoted above, and AS 39.52.150(e), also quoted above. Both provisions also refer to the term "financial interest," which is defined at AS 39.52.960(9)(a), in part, as follows:

(9) "financial interest" means

. . .

(A) an interest held by a public officer . . . which includes an involvement . . . of an interest in a business . . . that is a source of income, or from which, or as a result of which, a person . . . expects to receive a financial benefit.

Your actions will also require consideration of AS 39.52.120(a), which states:

A public officer may not use, or attempt to use an official position for personal gain

"Gain" is defined at AS 39.52.960(10) as including "benefit, profit, or compensation."

It is my understanding that you have raised questions numbered 2 and 3 because of your financial relationship to the subsidiary that owns the facility in which you are employed, and your financial relationship to the parent corporation, respectively. It is also my understanding that the salary you receive from your employer facility may vary from year to year, depending on how well the facility does financially. Further, it is my understanding that the Commission also advises on the rate for the other facility operated by the subsidiary.

AS 39.52.110(a)(1) acknowledges that public officials are drawn from society and are not expected to be without personal or financial interests in the decisions of government. That subsection also states that minor and inconsequential conflicts are unavoidable and must be distinguished from those that are substantial and material. Further, under AS 39.52.110(b)(1), no ethical conflict will exist where the official action taken would have a conjectural effect on the matter in question or where the interest of the public official is of a type generally possessed by the public or by a large class of persons to which the public officer belongs.

With those guidelines in mind, it would be prudent for you to refrain from voting on matters pertaining to the facility operated by the subsidiary that owns your employer facility. While the impact of your vote on that facility's rate cannot be determined with specificity, the common financial interest in the health of the common subsidiary is beyond conjecture. That is, the rate received by the other facility would probably have a material impact on the finances of the subsidiary, which, in turn, would have an impact on your salary. Further, your relationship

to that facility is not of a type possessed by many other members of the public. It would be prudent, therefore, to refrain from voting on rate matters concerning the other facility.

On the other hand, matters pertaining to rates received by facilities that are managed by another subsidiary of the same parent corporation of the subsidiary that owns the facility in which you are employed warrant a different conclusion. In this case, there is no direct financial relationship between those facilities and your financial interests. Further, because of the indirectness of the relationship, any recommendations you may make as to those facilities' rates would have a conjectural impact upon your financial interests. Thus, you need not refrain from voting on matters pertaining to those facilities' rates.

This opinion is based solely on the facts referenced herein. Thus, if these facts are incorrect or if you think they should be supplemented, please let me know. If you have any questions concerning this opinion, I would be happy to discuss them with you.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Lawrence C. Delay
Assistant Attorney General

LCD/rw