

Designated Ethics Supervisor

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Board member's potential
conflict of interest
arising from membership
in an organization
Executive Branch Ethics
Act (AS 39.52)

Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act, (hereafter the "Ethics Act"), you have requested advice concerning a possible conflict of interest posed by a State Board member's membership on two private corporation boards (hereafter, Board "A" and Board "B"). In accordance with AS 39.52.240(a), we write to respond to your request for advice.

In short, we believe that the State Board member (hereinafter "Member"), does not possess a conflict of interest due to membership in B, should the Member participate on the State Board in implementing a new state law regulating an industry. With respect to matters that could specifically benefit A in a manner different from the rest of the industry, we believe that the Member possesses an impermissible conflict of interest. Hypothetically, should the Member choose to resign from B's or A's board, the Member would be permitted to participate on the State Board in all matters relating to B or A.

BACKGROUND

The following is our understanding of the facts, based on information provided by you in a letter dated January 13, 1993, and by our conversations with and material provided by the Member and by the Executive Assistant at B.

Presently, the Member is an officer and board member of A, a regional for-profit corporation. The Member states that A is not presently involved in any lobbying activities seeking to influence the State Board on matters before it. Moreover, the Member states that A is not involved in any litigation against and has not submitted any proposals to the State Board.

As part of the Member's duties for A, the Member is A's representative to B. B is a nonprofit corporation with a board composed of representatives from for-profit corporations, nonprofit associations, and communities, representing these groups' special interests. Each B board member, of which there are over 30, has an equal vote on B board matters. B board

members are not paid for their services to the board.¹

At B's last Convention in 1992, the Member was appointed to serve as the vice-chair of B's board. Both the Member and B's Executive Assistant state that the position of vice-chair effects no substantive change in the Member's position or power on B's board, except that if the chairman is absent, the Member then assumes the chairman's duties.² B's bylaws do not indicate that the vice-chair possesses any special authority or power on B's board greater than that possessed by other B directors, except that under B's bylaws the vice-chair is deemed to be a "principal officer" of B.³

¹ Article IV, section 11, of B's bylaws provides that directors

shall not receive any stated salaries for their services, but by Resolution of the Board of Directors a fixed sum and expense of attendance, if any, may be allowed for attendance at each regular or Special Meeting of the Board; but nothing contained in this Section shall be construed in any other capacity and receiving compensation therefore.

² Article V, section 6, of B's bylaws provide:

In the absence of the Chairman of the Board, the Vice Chairman shall perform the duties of the Chairman and when so acting shall have all powers of and be subject to all restrictions upon the Chairman. He shall perform such other duties as may be prescribed by the Board of Directors from time to time.

Additionally, article V, section 5, of B's bylaws state that the chairman (including the vice-chair when acting in his place) has no vote on board matters.

³ Article V, section 1, states:

The Officers of the Corporation shall be a Chairman of the Board, a Vice-Chairman of the Board, a President, a Secretary, and a Treasurer, which are the principal officers.

B's general mission is to promote the cultural, economic, and political interests of the community statewide. To this end, B is involved in lobbying, advocacy, and educational activities on behalf of its members of the community. Generally speaking, B is involved in a variety of policy issues statewide that at times puts B in an adversarial position against state government, and the State Board. There also are times, however, when B intervenes in matters in support of state government and the State Board. B's Executive Assistant states that B presently has no proposals before, and is not involved in any litigation against, the State Board.

B submitted a letter dated August 18, 1992, to the Chair of the State Board and a second State Board meeting jointly. Attached to the letter was a position paper detailing B's legal views regarding the requirements of a 1992 law and explicit instructions setting forth the steps B believes the State Board should take in implementing the 1992 law (hereafter, B's "Position Paper"). Based on the Member's interests in B and B's effort to influence the State Board in the implementation of the 1992 law, you have appropriately raised the issue of whether it would be a violation of the Ethics Act for the Member to participate as a State Board member on these matters. Specifically, you have requested advice on two issues, which are set forth below.

ISSUES

1. Whether the Member's personal or financial interests arising from membership on the boards of B or A give rise to an impermissible conflict of interest with the duties of the State Board on matters relating to the implementation of the 1992 law.
2. Whether the Member's resignation from either A or B would cure a conflict-of-interest problem should one exist.

ANALYSIS

I. THE ACT APPLIES TO MEMBERS OF STATE BOARD

The State Board is an entity created by statute whose members are appointed by the governor subject to confirmation by a majority of the members of the legislature in joint session. The Ethics Act states that, except as specifically provided, it "applies to all public officers within executive-branch agencies,

including members of boards or commissions." AS 39.52.910(a). "Board or commission" is defined to include any "board, commission, authority or board of directors of a public or quasi-public corporation, established by statute in the executive branch, but excluding the Alaska Railroad." AS 39.52.960(4). Clearly, the State Board is "established by statute within the executive branch" and therefore its members are public officers subject to the provisions of the Act.

II. STATE BOARD MEMBER'S POSITIONS IN B DO NOT AUTOMATICALLY GIVE HIM AN IMPERMISSIBLE CONFLICT OF INTEREST FOR MATTERS RELATING TO THE IMPLEMENTATION OF THE 1992 LAW.

The Act provides that "a public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person." AS 39.52.120(a). Furthermore, the Act prohibits a public officer from using his official position to "take or withhold official action, in order to affect a matter in which the public officer has a personal or financial interest." AS 39.52.120(b)(4).

The Act defines "personal interest" to mean

an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which, or as a result of which, a person or organization receives a benefit.⁴

AS 39.52.960(18). The Act defines a "financial interest" to

⁴ The Ethics Act defines "benefit" to mean

anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value.

AS 39.52.960(3).

include the holding of a position as a director and an officer in a nonprofit corporation. AS 39.52.960(9)(B) and 39.52.960(5). Thus, in accordance with the definitions of the Act, State Board member possesses both a personal and financial interest in B by virtue of his positions as a B director and officer.

For purposes of analyzing the Member's potential conflict of interest, and not to imply any improper motive on the Member's part, the pertinent inquiry is to examine how the Member could use an official position on the State Board to benefit the Member and B with respect to the "matter" that is the subject of your request for advice; namely, all matters relating to the implementation of the 1992 law. In this regard, it is important to recognize that under the Ethics Act a public officer is not expected to be free of every personal or financial interest that might give rise to a conflict of interest. The Act prohibits conflicts of interest arising from personal or financial interests in "matters" that are "substantial" and "material," AS 39.52.110(a), as opposed to those that are "insignificant or of a type possessed generally by the public or a large class of persons to which the public officer belongs." AS 39.52.110(a)(3).

Although the Member possesses both a financial and a personal interest in B under the Ethics Act, and B has attempted to influence the board on how to implement the 1992 law via its Position Paper, we nonetheless conclude that the Member does not possess an impermissible conflict of interest regarding such matters. We reach this conclusion based on the following two reasons.

First, although B espouses its views on the 1992 law in order to influence the State Board, as may any interested citizen, B does not appear to have a financial stake in any particular matter before the State Board. Even if the State Board is persuaded to implement the 1992 law in accordance with B's views, B does not itself derive any tangible, financial benefit from such action. If B does not possess a significant financial interest in the implementation of the 1992 law, then we believe that the Member does not possess an impermissible conflict of interest based on his financial interest in B. 1991 Inf. Op. Att'y Gen. (May 21; 663-91-0464) (board member's position as a director with a corporation would not give rise to a conflict of interest in violation of the Act for matters in which the organization has only an insignificant financial interest).

Second, even if the State Board takes action in

conformance with B's advice on how to implement the 1992 law, any benefits that might flow from such action inure to the benefit of all users across the state, not just the community whom B represents. Because neither B nor the Member would enjoy a benefit not enjoyed by all users across the state, on these facts we believe that any conflict of interest the Member might possess in matters relating to the implementation of the 1992 law is minor, and one based on an interest "possessed generally by the public or a large class of persons to which the public officer belongs." AS 39.52.130(b)(1). 1991 Inf. Op. Att'y Gen. (Nov. 25; 663-91-0180) (board member's conflict of interest held to be permissible where board member's personal and financial interest are the same as that possessed generally by the industry group to which the board member belongs); see also Carney v. State, 785 P.2d. 544, 548 (Alaska 1990) (holding under common-law conflict-of-interest rules that a board member's conflict of interest is not impermissible when the board member's interests in a matter are not significantly different from the fishing industry as a whole).

Based on the foregoing, we believe the Member does not possess a significant financial interest in the implementation of the 1992 law, nor an interest in matters significantly different from the large class of users across the state. For these reasons, we conclude that the Member's personal and financial interests in B do not give rise to an impermissible conflict of interest in violation of the Act for matters relating to the implementation of the 1992 law.

III. WHERE THE STATE BOARD CONSIDERS TAKING ACTION THAT COULD UNIQUELY BENEFIT A, THE MEMBER WOULD POSSESS AN IMPERMISSIBLE CONFLICT OF INTEREST IN VIOLATION OF THE ACT.

Should A, a for-profit corporation, seek to influence and direct the State Board's actions on a proposal or any other matter, a different conflict-of-interest situation arises for the Member. If the State Board takes official action on a proposal that could result in a benefit specifically being given to A, as opposed to a larger statewide class of persons, the Member's interests, as an officer and director of A, would be significantly different from others in the community. As a result, the Member would have an impermissible conflict of interest. See, e.g., 1993 Inf. Op. Att'y Gen. (Jan. 15; 663-93-0259) (board member's personal and financial interests under a federal contract to perform studies and assist users in a specific region gave the board member an impermissible conflict of interest in matters relating to that particular region).

IV. **HYPOTHETICALLY, SHOULD THE MEMBER RESIGN FROM HIS POSITIONS WITH B OR A HE WOULD BE PERMITTED TO PARTICIPATE ON THE STATE BOARD IN MATTERS RELATING TO B OR A WITH LIMITED EXCEPTIONS.**

The Ethics Act, at present, does not directly set forth any restrictions on a public officer's ability to serve based on conflicts of interest that might arise from the officer's prior employment with or involvement in a private organization. The absence of a direct provision on this point should be contrasted with the Act's restrictions relating to a public officer's private employment after leaving state service. AS 39.52.180.

However, proposed regulations by the Department of Law, recently circulated for public comment, attempt to fill this void. The proposed regulations in pertinent part state:

If the public officer has held a position of responsibility in a large organization within the two years preceding the officer's action on a matter in an official state capacity, the officer's action may be an ethical violation if, at the time the officer held the position, the organization was involved in the same matter pending before the administrative unit that the officer serves.

(To be codified at 9 AAC 52.110(c)) (proposed Dec. 22, 1992).

If we use the proposed rules for guidance, the Member would not have any restriction on the ability to serve as a member on the State Board subsequent to the Member's resignation from B or A, since it appears that neither B nor A presently have or have had within the past two years any matter pending before the State Board with which the Member was involved on behalf of these organizations.

Unless other personal or financial interests in a particular matter become apparent that might trigger one of the Act's other prohibitions, (e.g., a misuse of official position, AS 39.52.120), it would not be a violation of the Act for the Member to resign from B or A and then deliberate as a board member on matters relating to these organizations.