

MEMORANDUM

State of Alaska Department of Law

TO: Gary M. Bader, Chair
Alaska State Pension
Investment Board

DATE: March 22, 1996

FILE NO: 663-96-0186

TEL. NO.: 465-2127

SUBJECT: Whether a Trustee of the ASPIB May Sit as a
Director of a Company in Which ASPIB Has
an Equity Share

FROM: John B. Gaguine
Assistant Attorney General
Governmental Affairs - Juneau

You have asked for an advisory opinion, under the Alaska Executive Branch Ethics Act (AS 39.52), as to whether a trustee of the Alaska State Pension Investment Board (ASPIB) may, without violating that act, sit as a director of a company in which the ASPIB has an equity or other participation share. You have described the possible role of the trustee/director as follows:

It is envisioned that a trustee member of ASPIB because of ASPIB's position as an investor, might be given a seat on a board of directors in a company in which ASPIB has an interest. We would envision such a role respecting a real estate investment trust or perhaps a publicly-traded corporation. The ASPIB trustee would represent ASPIB's interests in governance of the company. ASPIB would undoubtedly need to draft "written policies" as referenced in AS 39.52.920 regarding the trustee's receipt and use of stipends or other benefits from the company. It would be anticipated that any monetary stipend would be passed through by the trustee to ASPIB with the trustee receiving the ASPIB honorarium provided in AS 37.20.250. To the extent possible ASPIB could develop rules limiting receipt by the trustee of per them and expense to those allowed under the State's administrative rules; otherwise, the argument could certainly follow that such receipts are simply reimbursement of actual costs. The trustee serving as a board member would agree with ASPIB to serve on the company's board only as long as he or she was on the ASPIB.

You have also expressed the view that allowing this participation would benefit the retirement fund or funds holding an interest in the company and the beneficiaries of the fund(s).

We believe that the ASPIB trustee may sit as a director in the manner you describe, as long as he or she does not receive compensation from the private entity (other than reimbursement for expenses or a reasonable per them allowance). However, in our opinion, one

section of the ethics act so extensively limits what the trustee/director may do as to negate the value to the ASPIB of having representation on the private entity's board.

As you note, the section of the ethics act that might prohibit the trustee from serving as a director of the private entity is AS 39.52-120. Subsection (b)(1) prohibits a public officer from seeking other employment through the use of his or her official position.¹ This subsection presents no problems as long as the ASPIB trustee receives no compensation for his or her service as a director. We reach this conclusion because we construe "employment" as used in subsection (b)(1) as excluding a position where the holder does not expect to receive compensation. *See* 1986 Inf. Op. Att'y Gen. (Sept. 25; 661-86-0576). We believe that the trustee/director could be reimbursed for actual expenses incurred while serving on the board, or could receive a per them payment for expenses, as long as that payment bears some reasonable resemblance to the actual expenses that the trustee/director might incur. in this circumstance, as you suggest, this payment would be in lieu of expenses that would normally be paid by the state.

AS 39.52.120(b)(2) also precludes the trustee/director from receiving compensation from the private entity. That provision prohibits a public officer from accepting, receiving, or soliciting compensation for the performance of official duties or responsibilities from a person other than the state. Because the ASPIB trustee is sitting as a director of the private entity in order to further ASPIB's interests, the trustee is performing official duties even while acting in the director's role. For the reasons discussed above, though, we do not believe that AS 39.52.120(b)(2) would preclude the reimbursement for expenses or the payment of a reasonable per diem allowance.

You suggest in your letter that the ASPIB could adopt policies, under AS 39.52.920, providing that the compensation (other than expense reimbursement) paid to a trustee/director would be transmitted to the ASPIB, with the ASPIB then paying the trustee/director the honorarium provided in AS 37.10.250 (currently \$150 per day). We do not believe that this approach would work. First, AS 39.52.920 limits the subjects on which an agency can adopt policies, and this proposed policy does not fit into the statutory framework. Second, AS 37.10.250 limits the honorarium to days during which a trustee attends a meeting of the ASPIB or of an ASPIB subcommittee, or a public meeting as an ASPIB representative. A meeting of the entity of which the trustee is a director would not qualify under this statute. In short, we do not believe that, under the law as it currently exists, a trustee/director can receive any salary, honorarium, or the like from the outside entity on whose board the trustee/director serves.

¹ We construe the word "seek" in this paragraph broadly, to encompass all situations where a public officer accepts employment solely because he or she is a public officer, even if the officer did not actively solicit the employment. Here, the directorship would be offered only because of the officer's status as an ASPIB trustee.

Moreover, we believe, as noted above, that another provision of the ethics act would pose limitations on the trustee/director that would make having a directorship of little value to the ASPIB. AS 39.52.120(b)(4) provides that public officers may not "take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest." "Financial interest" is defined in AS 39.52.960(9)(B) as "holding a position in a business, such as an officer, *director*, trustee, partner, employee, or the like, or holding a position of management." (Emphasis added.) AS 39.52.120(b)(4) would not prohibit a trustee from being appointed as a director of an entity in which the ASPIB has an interest. It would, though, prohibit the trustee, once he or she is appointed to be a director, from taking or withholding action with regard to the entity. Because "official action" is defined in AS 39.52.960(14) as including a recommendation, subsection (b)(4) would seem to largely defeat the purpose of having an ASPIB representative on the entity's board.²

² Thus, for instance, if the trustee/director was excited about something that the entity was proposing and felt that a pension fund should increase its investment in the entity, he or she would be unable to make that recommendation to the ASPIB, unless he or she resigned from the entity's board.

We agree that the type of ASPIB representation you propose appears to be desirable.³ However, in our opinion a legislative change to AS 39.52 would be necessary before this representation can effectively occur.⁴

Please feel free to contact us if you have any questions about this matter.

JBG:jn

cc: Robert Johnson, Esq.

³ We must, though, note another possible ethical danger that such representation would entail. AS 39.52.120(a) provides in part that a public officer “may not intentionally secure or grant unwarranted benefits or treatment for any person.” If a situation arose where the trustee’s duties as a public officer clashed with his or her fiduciary obligations as a director, that statute would require the trustee’s duties as a public officer to take priority. Resignation from the directorship would seem to be mandatory in this situation.

⁴ In your opinion request you suggest that AS 39.52.010 and 39.52.110 may “trump” the literal language of other sections of the ethics act and allow conduct that might otherwise be prohibited, because the trustee/director is acting wholly in the interests of the ASPIB. We, however, believe that the language of AS 39.52.120 is too clear to allow its negation by invoking the general principles of AS 39.52.010 and 39.52.110.