

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Ethics Supervisor
Department

DATE: October 8, 1998

FILE No.: 663-99-0006

TEL. NO.: (907) 465-3600

FROM: Craig Wm. Black
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SUBJECT: Regional Director as Chair of
Board of Corporation and Ethics
Act (AS 39.52)

Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act ("Ethics Act"), you have requested our advice concerning whether X, the board chair of a regional for-profit corporation, may serve as a regional director for your department. The corporation's interests reside primarily within the region managed by the director. We conclude that, in this instance, the Ethics Act does not preclude the chair's employment.

Background

The following is our understanding of the facts, based primarily on information provided by you and X.

In April, X was appointed director of one of the department's regions. X also chairs the board of directors of a for-profit corporation. The corporation owns many large parcels of undeveloped land located within the region. The corporation has logged some of these parcels by helicopter and is interested in enhancing the value of these parcels through additional road access. X is also a shareholder in the corporation.

The corporation is based in the region and many of the corporation's business activities are located there. As chair, X does not receive a salary or other compensation for X's efforts. However, the corporation does cover expenses related to X's work as chair. Except for an annual meeting, two days of which occur during the week and for which X takes personal leave, X performs the work as chair during off-hours.

You provided us a position description questionnaire for the particular region's director. The questionnaire describes the main purpose of the job as to "manage the operational arm" for the department in the region. Position description questionnaire at 3. The questionnaire also describes the regular duties for the position. Approximately 15 percent of work time is devoted to administering "the planning, design, construction,

maintenance, and operation of the department's activities in the region." *Id.* You informed us that since the questionnaire was revised, the design duties have been transferred to the headquarters division.

Another 15 percent of the job requires X to monitor "work progress and quality and take appropriate action to ensure compliance with applicable requirements and to ensure commitments are met." *Id.* Another 10 percent of the job involves implementing "policies established by the executive arm of government [and] establish[ing] policy for management of the region." *Id.* Since the current questionnaire was last revised, the position has been expanded to include supervision of the entire state network.

One of the core responsibilities for each of the department's three regional directors is to help the department plan for department projects. Each regional director is responsible for identifying the region's needs and then proposing projects that will serve those needs. The projects are analyzed on a statewide basis by the Project Evaluation Board (PEB), which meets periodically during the year. Its members consist of the three regional directors, the state network director, the director of statewide planning, and one deputy commissioner.¹

The PEB's planning decisions, consisting largely of a priority ranking of all statewide projects, are compiled into a document known as the State Plan (SP). The PEB transmits the SP to Division A, a division outside the regional offices. Division A's function is to prepare the plans necessary to actually accomplish the work on each listed project. Once the plan is finished, it is turned over to the appropriate regional office for implementation.

In practice, X's role appears to be weighted more toward implementation and administration than planning. For example, X played no role in developing the new Regional Plan, which identifies long-term needs and solutions for department activities in X's region. That work was performed by Division B, another division not located within the regional offices.

We have identified two general areas where the interests of the corporation and the state may intersect. First, the corporation is known for having expressed an interest in seeing the state take action that would likely enhance the value of some of the corporation's lands.

Second, the corporation operates a seasonal network that could be said to compete with the state network. The corporation has contemplated expanding its

¹ The state network director is supervised by the director at issue.

network to other areas in the region, but the idea remains merely conceptual and no plans are being prepared for such service. Additionally, the department may soon consider whether to contract with the corporation to access the corporation's network.

Questions Presented

Based on the foregoing facts, we address the following questions:

1. Do X's personal or financial interests arising from X's role as chair of the board of directors of the corporation give rise to an unavoidable conflict of interest with X's duties as regional director?
2. If no unavoidable conflict exists, what should X do to ensure that X does not misuse X's official position with regard to X's personal or financial interest in the corporation?

Analysis

A. The Ethics Act and Outside Employment

The Ethics Act restricts a public employee's ability to engage in outside activities that conflict with the employee's official responsibilities. "A public employee may not render services to benefit a personal or financial interest or engage in or accept employment outside the agency which the employee serves, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties." AS 39.52.170(a).

The Ethics 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." AS 39.52.960(18).

The Ethics Act defines "financial interest" two ways. First, it means "an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including property ownership, or a professional or private relationship that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit." AS 39.52.960(9)(A). "Financial interest" also means "holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management." AS 39.52.960(9)(B). We have previously found that a matter of "financial interest" to a corporation is also a "financial interest" to the persons who serve on the corporation's board. 1987 Inf. Op. Att'y Gen. (Oct. 16; 663-88-0145).

Regarding public employees, courts have defined a “conflict of interest” as a situation in which an employee is required to serve two masters in a way that presents a potential for wrongdoing. *Glazer v. Commissioner on Ethics for Public Employees*, 431 So. 2d 752, 756 (La. 1983). It is a situation in which a person's regard for one duty tends to lead to his or her disregard of another duty. *United States v. Miller*, 463 F.2d 600, 602 (1st Cir. 1972). In a typical conflict of interest scenario, an employee's actions to promote his or her private interest could be detrimental to the public interest that the employee is bound to serve.

Not every apparent conflict is prohibited. The Ethics Act acknowledges that employees may have outside business interests which may appear to conflict with the employee's responsibilities to the state. AS 39.52.110 (a).

Whenever there is a conflict, the Ethics Act requires that a determination be made as to whether the conflict is minor and inconsequential (“conflicts that are unavoidable in a free society”) or “substantial and material.” AS 39.52.110(a)(3). The Act provides that there is no violation where (1) the “personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or, (2) [the] action or influence would have insignificant or conjectural effect on the matter.” AS 39.52.110(b)(1) and (2).

Additional guidance is provided by regulation:

For purposes of AS 39.52.170, a public employee’s outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the employee’s designated supervisor reasonably determines that the outside employment or service (1) takes time away from the employee’s official duties; (2) limits the scope of the employee’s official duties; or (3) is otherwise incompatible or in conflict with the proper discharge of the employee’s official duties.

9 AAC 52.090. Note that, under this regulation, an employee’s designated supervisor, not the attorney general, is charged with reaching the final determination of whether an employee’s outside interests unavoidably conflict with the employee’s official duties.

B. No Unavoidable Conflict

As noted above, you have asked for our advice under AS 39.52.240(a) as to whether an unavoidable conflict exists. Based on our understanding of the facts, we do not believe such a conflict exists.

Our investigation revealed that X's position as regional director is not likely to encounter issues involving X's interests in the corporation that cannot be resolved so as to avoid conflicts. Although X certainly makes significant policy decisions as regional director, it does not appear that X's routine decisions tend to have a particular impact on the corporation. Nor are they likely to in the foreseeable future. The mere fact that a public official is also a member of an organization that advocates a certain public policy does not, without more, mean that the public official may not take official action that advances or negates that policy. 1993 Inf. Op. Att'y Gen. (Feb. 17; 663-93-1257). For instance, that the corporation may generally favor economic development in the region does not necessarily mean that X may not take official action that may affect such development.

We note two issues where the interests of the state and the corporation intersect: the corporation's lands and its network. At present, no decision to invest state resources in a way that affects the corporation's lands has been made. X has not taken official action on such a project. At present, we find that the constraint imposed on X concerning this possible investment is not so significant that it unavoidably conflicts with X's ability to perform the duties of regional director.

Likewise, we find that X has not taken official action affecting the state network's overlap with the corporation's competing network. Other than in the overlapping area, the two networks operate in different markets. The possibility that the state might contract with the corporation to provide some network services will, if it occurs, require further analysis, but appears very speculative at this point. At present, we believe that X should not take official action affecting the state network in the overlapping area (discussed below). However, based on the facts you provided, we also find that this inability does not affect such a significant part of X's duties as regional director that, with that duty removed X cannot properly perform those official duties. Therefore, we conclude that X's service with the corporation is not incompatible or in conflict with the proper discharge of X's official duties within the meaning of AS 39.52.170(a).

As noted above, the Ethics Act recognizes that public officials cannot be expected to be entirely free of interests in the decisions and policies of government and that minor and inconsequential conflicts are unavoidable. AS 39.52.110(a). With this concept in mind, we believe that the Ethics Act does not prohibit X's service as regional director simultaneous with X's current position as the corporation's chair.

C. Heightened Risk of Misuse of Official Position

Although we do not believe that X's service with the corporation creates an unavoidable conflict with X's official duties under AS 39.52.170(a), we do believe the situation poses an enhanced risk of action that might be a misuse of official position. Therefore, you should keep this additional guidance in mind in advising X and monitoring X's activities. We note that, in our discussions with X, X was quite aware of this risk and indicated a particular desire to avoid the risk.

All public officers must be careful not to misuse their official positions. "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). The Ethics Act further defines this concept as follows:

A public officer may not (1) seek other employment or contracts through the use or attempted use of official position; (2) accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state; (3) use state time, property, equipment, or other facilities to benefit personal or financial interests; (4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest; or (5) attempt to benefit a personal or financial interest through coercion of a subordinate.

AS 39.52.120(b).

This office has previously determined that a person who serves as a corporate director has both a "personal interest" as well as a "financial interest" in state grants to that corporation. 1990 Inf. Op. Att'y Gen. (Aug. 21; 663-90-0410).

We have consistently advised public officers to recuse themselves from considering proposals to the state in which the officers have a personal or financial interest. Given the speculative but quite real possibility that the corporation and the state may need to discuss matters related to the proposed state investment or state contract for network services, X should avoid taking action that affects the corporation's interests.

Note that "official action" within the meaning of AS 39.52.120(b)(4) does not just mean final decision-making. It is broadly defined to mean a "recommendation, decision, approval, disapproval, vote, or other similar action, including inaction. . . ." AS 39.52.960(14).

If the corporation stands to benefit from a decision or recommendation by X acting in the role as regional director, X must not participate in the decision or recommendation. Should such a matter arise, X must immediately disclose the matter to you and refrain from taking action on the matter until you have advised X of the ethical implications. AS 39.52.210(a), (b). If you find X's participation would not be a violation, you may advise X to participate. If, however, you find that X's participation would constitute a violation, you must either reassign X's duties regarding the matter or direct X to resign from the corporation's board. AS 39.52.210(c).

As an example of how this limitation can affect X's work, we find that AS 39.52.120(b) prevents X from participating in the PEB's consideration of projects that significantly affect the corporation. If the corporation may benefit from a project, X may not assist the region in analyzing the project or in recommending it to the PEB for inclusion in the SP. Nor may X participate in the PEB's consideration of the project, including prioritizing it among other projects. As a second example, we find that AS 39.52.120(b) also prevents X from taking official action that affects the state network in the overlapping area, as the state network competes with the corporation's network in this market.

You should take steps to ensure that X does not participate in either the consideration of projects by either X's region or the PEB that relate to the corporation, or in decisions affecting the state network in the overlapping area. These steps may include a standing delegation of these duties to others in your department. If you wish, we will help you draft such a delegation.

D. Grants, Contracts, Leases, and Loans

The Ethics Act also contains a more specific provision for conflicts involving state grants, contracts, leases, and loans. AS 39.52.150(a). This provision is more strict than the general ban on misuse of official position in AS 39.52.120. We have consistently interpreted AS 39.52.150(a) to mean that a public officer cannot cure a conflict by merely avoiding all involvement with the grant, contract, lease, or loan. 1997 Inf. Op. Att'y Gen. (May 30; 663-97-0400). If the official merely has the power to affect the award, execution, or administration of the grant, contract, lease, or loan, the officer must give up the forbidden personal or financial interest. For X, this would mean resigning from the corporation's board.

The Ethics Act does provide for two exceptions to AS 39.52.150(a). This first exception allows the officer to retain the personal or financial interest if the grant, contract, or lease (not loan) is "competitively solicited" and the officer neither (1) is employed by the administrative unit that awards the grant, contract, or lease or the administrative unit for which the grant, contract, or lease is let, nor (2) takes official action with respect to the award, execution, or administration of the grant, contract, or

lease. AS 39.52.150(b). Our regulations limit this exception to circumstances where strict objective award procedures such as the sealed bid procedures in the procurement code are used. 9 AAC 50.080(a). The second exception applies to state loans and is unlikely to arise with respect to the corporation. AS 39.52.150(c).

We believe that under AS 39.52.150, X's region may not enter into a grant, contract, or lease agreement with the corporation while X serves as both director of the region and chair of the corporation. This section also prevents X from taking any official action, including administrative action, on a grant, contract, or lease with the corporation even if the grant, contract, or lease was formally arranged by a different administrative unit. For instance, this section would not permit an administrative unit to award even a competitively solicited grant, contract, or lease to the corporation if the X's region assisted in preparing the request for proposals.

E. Undisseminated and Confidential Information

As a final matter, we draw your attention to the Ethics Act's limitation on the improper use or disclosure of information. This prohibition, which applies to all public officials, is especially relevant to X in light of X's important role with the corporation.

“A current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.” AS 39.52.140(a). You should advise X that as regional director, X will have access to information before it is available to the general public. X must be careful not to disclose or use that information if it may benefit X's interest in the corporation.

Note that our regulations do not consider information to have been “disseminated to the public” until “it has been published through newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a non-confidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission.” 9 AAC 52.070(a). The mere fact that information is available to the public does not satisfy this standard. 9 AAC 52.070(b).

A public officer also may not “disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.” AS 39.52.140(b). As regional director, X has access to confidential information. X must also be certain not to disclose such information.

We would be pleased to help you with any further questions you have regarding this matter.

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