

MEMORANDUM

State of Alaska Department of Law

TO: State Employee

DATE: December 13, 2000

FILE NO.: 663-01-0104

TEL. NO.: 465-6712

SUBJECT: Post-State Employment under
the Executive Branch Ethics Act
(AS 39.52).

FROM: Douglas D. Gardner
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Transportation Section, Juneau

Introduction

You have asked for an advisory opinion under AS 39.52.250 of the Alaska Executive Branch Ethics Act. You recently left your employment with the Alaska Housing Finance Corporation (AHFC) and want to know whether it would be a violation of AS 39.52.180(a) for you to enter into contracts to perform services for certain organizations working on certain AHFC grants.

Background

AS 39.52.180 provides:

- (a) A public officer who leaves state service may not, for two years after leaving state service, represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action. For purposes of this subsection, "matter" includes a case, proceeding, application, contract, or determination but does not include the proposal or consideration of legislative bills, resolutions and constitutional amendments, or other legislative measures; or the proposal, consideration, or adoption of administrative regulations.

.....

(c) The head of an agency may waive application of (a) of this section after determining that representation by a former public officer is not adverse to the public interest. The waiver must be in writing and a copy of the waiver must be provided to the attorney general for approval or disapproval.

If you participated personally and substantially in the administration, preparation, etc., of a contract or grant while a state employee, that contract or grant is a “matter” that you may not work on for two years after leaving state service. In accordance with the legislative history of the Ethics Act, this office has consistently given the term “matter” a narrow interpretation. *See, e.g.*, 1994 Inf. Op. Att’y Gen. (Dec. 13; 663-94-0642); 1992 Inf. Op. Att’y Gen. (Mar. 3; 663-92-0416); 1991 Inf. Op. Att’y Gen. (Nov. 18; 663-92-0050). Further, you may not use any information you obtained in state employment unless that information has been disseminated to the public. AS 39.52.140; 9 AAC 52.070. There is no expiration of this prohibition. Additional analysis under AS 39.52.180(a) is necessary to determine whether modifications or extensions of a contract constitute the same “matter” as the original contract.

With regard to modifications and extensions of contracts, we have reasoned that AS 39.52.180(a) does not necessarily prohibit a former employee from working on a modification or extension to a project even though the former employee could not seek private employment on the original project itself. 1994 Inf. Op. Att’y Gen. (Dec. 13; 663-94-0642); 1991 Inf. Op. Att’y Gen. (Feb. 25; 663-91-0291); 1991 Inf. Op. Att’y Gen. (May 14; 663-91-0390). A reason for this interpretation of AS 39.52.180 regarding modifications and extensions to projects like the contracts or grants in this case is the definition of what constitutes a “matter” under consideration.

If a grant expires and is extended or modified after independent review by the agency prior to the former employee’s departure, or after the employee’s departure, the former employee may be able to work on the extended or modified portion of the grant. Whether a former employee may perform work limited only to the extension or modification of a contract, grant, or project must be evaluated on a case-by-case basis. If, for example, a contract or grant expires, and is simply extended for an additional time period through increased funding, and the scope of work and other terms and conditions of the contract or grant remain the same, the extension of the contract or grant may be construed as materially the same as the original contract or grant, and as the same “matter” under the Ethics Act.

If, however, the contract or grant is in whole or part extended or modified to materially alter the scope of work, then in a particular case the extended or modified part of

the contract or grant may be a new matter, and the former employee may be able to work on the extended or modified portion of the contract or grant, even though the former employee may not work on the original grant. Thus, for each of the grants for which you requested advice, our analysis turns on whether the grant was extended or modified without your participation and in such a way that it is materially different than the original contract or grant and is a new “matter.”

Analysis

In your capacity as an energy specialist in AHFC’s Rural Research and Development Division (“R2D2”), you administered a number of grant programs. One of your responsibilities was the management of the State Energy Program (SEP). This program is funded by both AHFC and the United States Department of Energy (USDOE). Program funds are used to make grants for energy efficiency and weatherization purposes.

1. USDOE Building America Grant: USDOE operates the Building America grant program. USDOE uses AHFC’s SEP as a “pass through” agency to administer the funds. AHFC solicited proposals from nonprofits who were interested in applying to USDOE for the grant. The Cold Climate Housing Research Center (CCHRC) was the only nonprofit that expressed an interest in the grant. CCHRC applied for the Building America grant through AHFC under a process known as “partnering.” AHFC agreed to put up required matching funds and submitted the proposal to USDOE. You prepared the grant application using a “boilerplate” format and attached CCHRC’s proposal to it. USDOE approved the grant. As program manager, you were responsible for making sure that the grantee completes the work as proposed and spends grant funds in accordance with the terms of the grant.

Because you participated personally and substantially in the administration of this grant, you may not work for compensation on this grant unless you obtain a waiver under AS 39.52.180(c).

2. Housing Research Grant: The grant to the Cold Climate Housing Research Center was drafted for the executive office by staff in R2D2 and reviewed by others in the planning department. The grant is now managed by an employee within R2D2. This grant is rather unusual. It has a two-part scope of work. The first provides for an economic analysis of proposed changes to the building energy efficiency standard (BEES) administered by AHFC. The scope of work for the other part defines no specific tasks for the grantee. The intent is to allow AHFC and the grantee to negotiate future projects as the need arises. The specific language for the second scope of work is “other work activities to be added by

addendum to this agreement.” You were not involved in any way in the award or administration of this grant. However, because of your familiarity with the BEES program, you were asked to prepare the scope of work for the BEES portion of the grant. You want to know if AS 39.52.180(a) prohibits you from working on the grant and, if so, whether the prohibition applies to the entire grant or just the BEES project.

Although the Housing Research grant was administered by a different administrative unit, your department was asked to draft the scope of work for the BEES economic analysis and it is currently managed by R2D2. Therefore, that portion of the grant was a matter that was under consideration by your department and in which you personally and substantially participated by drafting the scope of work. You may not work for compensation on the BEES project for two years.

Projects carried out under future as yet unknown modifications, extensions, or addenda to the original grant are new “matters” under the Ethics Act given the facts as you have described them. Since these new matters were not matters you participated in personally and substantially while you were employed at AHFC, you may work on these future proposed projects, even though you may not work on the BEES part of the original contract for two years pursuant to AS 39.52.180(a).

3. Low-Income Weatherization Grants: R2D2 administers a grant program that provides funds to nonprofits and municipalities to provide weatherization services to low-income persons. These grants are competitively awarded for three years with funding on a year-to-year basis. This program is managed by others in R2D2.

Among your duties at AHFC, you were the manager of the State Energy Program (SEP), which made grants to a number of organizations to promote energy efficiency. During this fiscal year, AHFC decided to use some SEP funds to increase the scope of the weatherization program. You participated in staff discussions that resulted in a policy change on the use of SEP funds, and you obtained approval from USDOE to use SEP funds to supplement low-income weatherization grants. Although the weatherization managers are responsible for the day-to-day management of the funds, USDOE considered them as part of the SEP program, and you were required to report to USDOE on the use of the funds as part of your job.

Since you participated personally in the decision to transfer funds to the weatherization program during this fiscal year and the funds were managed through your program, the low-income weatherization grant program was a matter under consideration that you participated in personally and substantially. You may not accept employment on projects

funded with this grant for the current fiscal year since you participated personally and substantially in the above-described process of using SEP funds to augment the low-income weatherization grant. However, since SEP funds were transferred only for the current fiscal year, the question presented is whether you may work on a new grant or an extension of a grant for a subsequent fiscal year?

Since your only involvement in this grant was to approve the funding from SEP funds, and you had no other involvement in the preparation of the work plan, or administration of the contract, you may work on an extension or modification of the contract in a subsequent fiscal year. In our view, an extension or modification of this grant independently reviewed and approved by the agency is a different matter. The reasons for concluding a modification or extension of this grant is a different matter are that you were only involved in approving funding from SEP for the previous grant, and you were not involved in any other aspect of the original grant, or the modification or extension.

4. Health House Grant: Last fiscal year the SEP made a grant to the Alaska chapter of the American Lung Association for its Health House program, which promotes health-conscious construction techniques. The grant you worked on as SEP manager expired in July 2000. A new contract between AHFC and the American Lung Association was entered into for the 2001 fiscal year with a revised scope of work. You were not involved in the 2001 fiscal year grant or preparation of the scope of work. Accordingly, this was not a matter you participated in personally and substantially. You may work on the 2001 grant or grants issued thereafter.

5. Builder Education Grant: The Alaska Building Science Network (ABSN) has two grants with AHFC to provide technical assistance to builders, consumers, and energy raters. You were the program manager for the Builder Education grant during the last fiscal year. That grant has expired. AHFC will soon be issuing a request for proposals for the current fiscal year, with a revised proposed work plan. You have not been involved in the development of the RFP for this new grant. You have asked whether you can provide training for ABSN under the new grant if it is the successful proposer. The answer is yes, since the new grant is a different matter that you did not participate in at all during your tenure at AHFC. This memorandum confirms the oral advice this office provided to you on December 1, 2000, that allowed you to participate in this grant.

If you have further questions regarding any of the advice provided in this memorandum, we will be happy to assist you with them.