

MEMORANDUM

STATE OF ALASKA

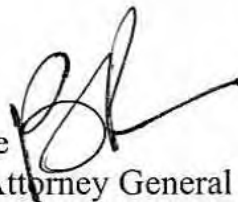
DEPARTMENT OF LAW

TO: State Official

DATE: May 25, 2005

FILE NO:

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FROM: Barbara J. Ritchie 
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Opinions, Appeals & Ethics

SUBJECT: Ethics Act Considerations:
Seeking Other Employment

This is to provide you with general advice concerning restrictions or other issues under the Executive Branch Ethics Act with regard to seeking other employment while you are in state service.

There are several sections of the Ethics Act that should be considered: AS 39.52.120(a), AS 39.52.120(b)(1), AS 39.52.120(b)(3), AS 39.52.140, AS 39.52.210, and AS 39.52.180.

1. AS 39.52.120(a): Use of Official Position for Personal Gain
AS 39.52.120(b)(1): Seeking Other Employment through the Use or Attempted Use of Official Position

The Ethics Act prohibits a public official from using his or her official position to seek other employment or contracts. However, seeking post-state employment with private companies that a public officer interacts with as part of his official duties is not, in and of itself, an "attempt to use official position for personal gain" in violation of AS 39.52.120(a), or "seeking other employment or contracts through the use or attempted use of official position" in violation of AS 39.52.120(b)(1). In past opinions we have concluded that

[s]kills, knowledge, experiences, and contacts gained while serving in government cannot be totally ignored or made unusable when seeking employment after leaving government. The representatives drawn from society will often return, and to place an unreasonable restriction on the ability to return would hurt the public interest by discouraging potential state officials from accepting public

employment. State employment can be a valuable educational experience, and the potential personal growth while serving the state is a prime recruitment factor for luring qualified private citizens to state employment. To totally eliminate the value of that experience for two years after state service would significantly deter those contemplating state service.

...

Of course, regardless of whether employment is in the public or private sector, the expertise and knowledge one gains in a job are transferable skills that employees rightfully take with them and that enable the employees to seek more responsible positions.

1986 *Inf. Op. Att'y Gen.* (Sept. 24; 663-87-0109), 1986 WL 81207 at *3 (Alaska A.G. 1986), quoting the sectional analysis of the bill enacted as AS 39.52.180.

Thus, merely seeking employment with an entity with which one interacts as a state employee without any action that could constitute "use" of one's official position in that effort would not violate the Ethics Act. This conclusion is supported by testimony before the House Finance Committee on the section of the ethics bill that was enacted as AS 39.52.120:

For example, before the Senate State Affairs Committee on April 3, 1986, Assistant Attorney General Susan Cox testified:

[T]he intent of [AS 39.52.120(b)(1)] ... seeking other employment or contracts through the use of your official position would be where you made a deal that, you know, I'll send a lot of sweet contracts your way while I am the contracting officer in this department and when I am ready to quit you'll hire me.

Later, before the May 12, 1986, meeting of the House Finance Committee, Randall Burns, special assistant to the Attorney General testified:

[W]e state that a public officer may not use or attempt to use an official position for personal gain . . . [a]nd then there's a list of prohibitions. One that you would not seek employment or contracts through the use of your job. A simple example would be if you were a contracting officer you would be prohibited from

saying I'll get this contract through this department for you but you make sure that I have this job when I leave state service. Things of that nature.

1990 *Inf. Op. Att'y Gen.* (April 23; 663-90-0378), 1990 WL 517997 (Alaska A.G.) at *2. The legislature did not intend AS 39.52.120(a) and .120(b)(1) to categorically prohibit state employees from seeking jobs with companies with which they interact while in state employment. Rather, the key is whether the employee *uses or attempts to use his state position* in seeking other employment.

In your state position, you may interact with many firms and companies in Alaska and elsewhere. If you talk to a firm or company about employment, you may do things like explain your experience, skills and knowledge, including that which you have gained in your state service. You are allowed to put the "transferable skills that employees rightfully take with them" to use for a new employer in the private sector. 1986 *Inf. Op.*, 1986 WL 81207 at *3. However, you should not do or say anything in making such contacts that could constitute or imply that you are offering, or have the ability to offer, grant or ensure, state benefits or action that you may have influence over as a public official in return for promised employment. That type of action would constitute use or attempted use of official position for personal gain and is prohibited under the Ethics Act.

In discussing employment with a prospective employer, you should also avoid implying that, if hired, you would be able to influence the issues the company may have with the state because of your personal contacts with state officials. Statements to that effect may be viewed as an attempt to use your official position to obtain the job.

On the other hand, once you leave state service, the Ethics Act would not bar you from acting on behalf of your new employer to discuss matters with state officials with whom you served, so long as you are not otherwise precluded from doing so under the Ethics Act provisions on post-state employment (AS 39.52.180).

2. AS 39.52.120(b)(3): Use of state equipment

Under AS 39.52.120(b)(3), a public official may not "use state time, property, equipment, or other facilities to benefit personal or financial interests." Given this provision, we recommend that, if you decide to seek other employment, you not use state time, state telephones, state facsimile machines, state e-mail, or other state resources in that effort.

AS 39.52.110 generally requires a public official's actions to cross a "significance threshold" in order for a violation to be actionable. Section .110 requires designated ethics supervisors and the attorney general to distinguish between "minor and inconsequential conflicts" and those that are "substantial and material." AS 39.52.110(a)(3); AS 39.52.110(c)(requiring ethics supervisors and the attorney general to be guided by section .110 when interpreting and enforcing the Ethics Act).

Thus, while *de minimus* use of state equipment for personal or financial benefit is generally not actionable, it should be avoided. However, you could make limited use of state telephones or state e-mail, for example, with the prior approval of your DES. 9 AAC 52.050.

3. AS 39.52.140: Disclosure of information gained during state service

AS 39.52.140(a) prohibits a current or former public officer from using or disclosing information gained in the course of, or by reason of, the officer's official duties that could in any way result the receipt of any benefit to the officer, "if the information has not also been disseminated to the public." "Disseminated to the public" is defined in 9 AAC 52.070 to mean information that has been published through a newspaper, broadcast media, a press release, and other similar public arenas. Information that is available to the public but has not been published as described in the regulation has not been "disseminated to the public."

AS 39.52.140(b) prohibits a current or former public official from disclosing information that is confidential by law without authorization.

You undoubtedly have had access to information in the course of your state duties that has not been disseminated to the public or that is confidential by law. You should ensure that section .140 is observed if you decide to seek or accept other employment. Please note that the section .140 requirements are not limited to two years, as are the post-state employment restrictions in AS 39.52.180.

4. AS 39.52.210: Declaration of potential violation

If you wish to enter into employment discussions with a firm or company concerning which you could take official action in your state capacity, or if you encounter any other situation where you are not sure of your ethical obligations given your state position, you should immediately submit a "Notification of Potential Violation" to your designated ethics supervisor. AS 39.52.210.

If this circumstance arises, you should refrain from taking any official action relating to the matter (*i.e.*, any matter in which the company is involved) until your ethics supervisor makes a determination.

The notice of potential violation process does not mean that you cannot ultimately discuss or accept employment with the company. Rather, if your ethics supervisor determines that a violation could or will exist, preventative action would be taken to address the situation and avoid any conflict. For example, duties could be reassigned so that any official action on the matter involving the company would not go to you for decision, review, consideration or supervision. Reassignment of duties is one of the remedies expressly authorized under the Ethics Act. AS 39.52.210(b)(1).

5. AS 39.52.180: Post-state employment restrictions

For two years after leaving state service, AS 39.52.180(a) precludes a former public officer from (1) representing a person (2) for compensation (3) with regard to any matter that (4) was under consideration by the administrative unit of state government in which the officer served and (5) in which the officer participated personally and substantially, (6) through the exercise of official action.

The term “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.” AS 39.52.180(a). “The Department of Law has consistently read this subsection in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.” 1997 *Inf. Op. Att’y Gen.* (Apr. 30; 663-97-0328)(citation omitted).

AS 39.52.180 does not prohibit an agency from contracting with a former public officer to act on a matter on behalf of the state. AS 39.52.180(b). In addition, the head of an agency may waive the post-state employment restrictions if he or she determines that it is “not adverse to the public interest.” The attorney general must also approve the waiver. AS 39.52.180(c).

If a state official is the head of a principal department, he or she is also subject to the restrictions set out in AS 39.52.180(d). Subsection .180(d) provides that you “may not engage in activity as a lobbyist under AS 24.45 (Regulation of Lobbying) for a period of one year after leaving state service....” This subsection does not prohibit service as a volunteer lobbyist or a representational lobbyist as those terms are defined in state law and regulations.

If you decide to accept other employment, you should request advice from the Department of Law concerning post-state employment issues. I recommend that you request the advice before you accept the employment.

I hope this memorandum is of assistance to you. Please let me know if you have questions.