

# MEMORANDUM

## State of Alaska Department of Law

**TO:** Al Clough  
Deputy Commissioner  
Department of Commerce, Community and  
Economic Development

**DATE:** May 31, 2006  
**FILE NO.:** 661-06-0309  
**TEL. NO.:** (907) 269-5169  
**SUBJECT:** Board of Marine  
Pilots – Remanded  
Surcharge Case

**FROM:** David T. Jones  
Senior Assistant Attorney General  
Opinions, Appeals, and Ethics Section, Anchorage

You asked for advice on two questions concerning a case remanded to the Board of Marine Pilots because of a violation of the Alaska Executive Branch Ethics Act: (1) whether the board may re-vote on the remanded case; and (2) if so, which board members may vote. We conclude that the board may reconsider the case and re-vote. Furthermore, based on the information we received, we believe that only the two pilot members of the board have conflicting interests to disqualify them from participating in reconsideration of the remanded case.

### **I. FACTUAL BACKGROUND**

The remanded case is before the board because, on our suggestion, the board first asked the superior court to remand the case to the board and then, once the case was remanded, rescinded its prior action in the case. The board's prior action was a 4-3 vote approving a pilot organization's retirement surcharge. We suggested rescinding that action based on our conclusion that, under the Ethics Act, one pilot member of the board should not have participated in the original vote because he is a member of the pilot organization seeking the surcharge.<sup>1</sup> The superior court was considering an appeal of the original vote when the board asked the court to remand the case.

In connection with the remanded case, an industry group asserts that the board has no power to re-vote on the surcharge. The industry group asserts that, instead, the board must disregard the disqualified pilot member's vote and treat the remaining original votes as the

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<sup>1</sup> 2005 Inf. Op. Att'y Gen. (July 5; 665-05-0171), 2005 WL 1845993, at \*7.

board's action on the surcharge. By disregarding the disqualified member's vote, the result would be a 3-3 tie, meaning that the board did not approve the surcharge.<sup>2</sup>

Alternatively, the industry group asserts that, if the board votes again on the retirement surcharge, neither of the two pilot members of the board should vote. The industry group asserts that the pilot member who belongs to the organization seeking the surcharge is disqualified based on our prior advice. The group asserts that the second pilot member also should not vote because – before his appointment to the board – he testified as a witness for the pilot organization during the board's original hearing on the surcharge.

For its part, the pilot organization seeks disqualification of the two industry members of the board. Through its president, the pilot organization asserts that, under both the Administrative Procedure Act and the Ethics Act, the industry members have conflicting personal interests that disqualify them from voting on the retirement surcharge.

In our prior advice memorandum, we encouraged the board to conduct a hearing to explore whether the industry members and one public member of the board have personal or financial interests that would disqualify them from participating in the board's action on the surcharge matter.<sup>3</sup> After gathering information from all board members concerning their financial interests, you requested our advice on these issues involving the remanded case.

## **II. THE BOARD MAY RECONSIDER THE SURCHARGE**

The board may reconsider the retirement surcharge. As we explained in our prior advice memorandum, the purpose of rescinding the original vote on the surcharge is to remedy the Ethics Act violation.<sup>4</sup> Under the Ethics Act, any state action taken in violation of the Act is voidable.<sup>5</sup> Here, the state action was the board's vote on the surcharge – not simply the disqualified member's vote. Accordingly, the board properly rescinded its original vote.

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<sup>2</sup> See 1988 Inf. Op. Att'y Gen. (Aug. 10; 661-87-0318), 1988 WL 249520, at \*1 (where majority vote is required for approval, tie vote is considered denial).

<sup>3</sup> 2005 Inf. Op. Att'y Gen. (July 5; 665-05-0171), 2005 WL 1845993, at \*9-\*10.

<sup>4</sup> *Id.*, 2005 WL 1845993, at \*7.

<sup>5</sup> AS 39.52.430(c) (“Any state action taken in violation of this chapter is voidable, except that the interests of third parties and the nature of the violation may be taken into account.”).

Having rescinded its original vote, the board should reconsider the surcharge. The board's statutory duties include deciding whether contested pilotage rates are reasonable.<sup>6</sup> Because the board rescinded its original vote on the surcharge, the board has not resolved whether the surcharge is reasonable. Accordingly, unless the parties settle the matter, the board should reconsider the surcharge.

As the board's chair and the board members' designated ethics supervisor, you should consider whether it is necessary to hold an entirely new hearing when the board reconsiders the surcharge. If, for example, the disqualified member questioned witnesses extensively on substantive matters during the original hearing, you might decide that the disqualified member's participation in the original hearing sufficiently affected the process to warrant holding an entirely new hearing. On the other hand, if the disqualified member actively participated only in deliberations and voting at the original hearing, you might decide that holding an entirely new hearing is unnecessary. If you determine that an entirely new hearing is unnecessary, we recommend that the board – without any disqualified members – at least deliberate and vote again when it reconsiders the surcharge.

### **III. THE INFORMATION RECEIVED SUPPORTS DISQUALIFICATION OF THE PILOT MEMBERS, BUT NOT OTHERS**

Based on the information we received, we believe the pilot members of the board have conflicting interests to disqualify them from participating in the reconsideration, but the industry members and the questioned public member do not. By design, the board includes members with interests related to pilotage services. The board consists of “two pilots licensed under [AS 08.62] who have been actively engaged in piloting on vessels subject to [AS 08.62]” and “two registered agents or managers of vessels subject to [AS 08.62] who are actively engaged in the procurement of pilotage services,” as well as two public members and the commissioner or the commissioner's designee.<sup>7</sup> The legislature presumably contemplated that each pilot or industry member of the board would, “to some degree, promote the interest of the group that he or she represents”.<sup>8</sup>

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<sup>6</sup> AS 08.62.040(a)(10) (board shall approve or disapprove pilotage rates as provided under AS 08.62.046); AS 08.62.046(c) (board shall hold hearing to determine whether proposed rate is reasonable if authorized party files timely notice of objection to pilot organization's proposed rate and pilot organization files timely response to objection).

<sup>7</sup> AS 08.62.010.

<sup>8</sup> 1992 Inf. Op. Att'y Gen. (Nov. 25, 1991; 663-92-0180), 1991 WL 561443, at \*3.

In each case, whether it be the industry or the professional member, the interests of the group and the personal interest of the member will coincide to some degree. Of course, the members have a duty to consider more than naked self-interest; this duty compels the members to recognize that self-interest will ultimately be served by promoting the health of the industry as a whole. The net effect of including both professional members and industry members on the board should be neutral.<sup>9</sup>

Furthermore, courts apply a presumption that public officers conduct their official duties honestly and impartially.<sup>10</sup> However, an officer's personal interests in a matter may be so significant that they overcome that presumption. Accordingly, we previously concluded that a member's interests in a matter are not disqualifying under the Ethics Act if the matter affects the member's profession or industry generally, but may be disqualifying if the matter affects only the member's particular region or organization.<sup>11</sup>

Based on that analysis, the pilot who belongs to the organization seeking the surcharge is disqualified for the reasons we described in our prior advice memorandum to you.<sup>12</sup> As a member of that pilot organization, he has significant personal and financial interests in the retirement surcharge matter. Furthermore, his vote on the surcharge can significantly affect the value of those interests. Therefore, he may not participate in official action on the surcharge matter.<sup>13</sup>

The other pilot member of the board may be disqualified from voting because he testified for the pilot organization at the hearing on the surcharge. To our knowledge, this

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<sup>9</sup> *Id.*

<sup>10</sup> *See Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) (agency personnel and procedures presumed to be honest and impartial absent showing of actual bias or prejudice); *Earth Resources Co. of Alaska v. State, Dep't of Rev.*, 665 P.2d 960, 962 n.1 (Alaska 1983) (same) (citing *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975)).

<sup>11</sup> 2005 Inf. Op. Att'y Gen. (July 5; 665-05-0171), 2005 WL 1845993, at \*4.

<sup>12</sup> *Id.*, 2005 WL 1845993, at \*5-\*6.

<sup>13</sup> *See* AS 39.52.120(b)(4) (public officer may not take or withhold official action in order to affect matter in which officer has personal or financial interest); AS 39.52.110(b) (no substantial impropriety if public officer's personal or financial interest in matter is insignificant, or if action or influence would have insignificant or conjectural effect on matter).

pilot member – who is not a member of the pilot organization seeking the surcharge – does not have a personal or financial interest in the surcharge matter that would disqualify him under the Ethics Act. However, this member or the board may decide that his participation as a witness for the pilot organization in the surcharge hearing disqualifies him under the Administrative Procedure Act.

Under the Administrative Procedure Act, a party to a proceeding may request disqualification of a board's member on the ground that the member "cannot accord a fair and impartial hearing or consideration."<sup>14</sup> A board member may also voluntarily seek disqualification and withdraw from a case, but if the member does not, a party to the case may seek the member's disqualification by filing an affidavit, before evidence is taken, describing the grounds for disqualification.<sup>15</sup> The other members of the board must then determine whether to disqualify the member.<sup>16</sup> However, a member may not withdraw or be disqualified if it would prevent the board from having a quorum to act.<sup>17</sup>

The Administrative Procedure Act applies to the Board of Marine Pilots' hearings.<sup>18</sup> Here, however, the new pilot member was not a member of the board when it heard evidence on the retirement surcharge. Consequently, there was no opportunity before the board took evidence for the new pilot member to disqualify himself or for a party to seek his disqualification. To conclude that the new pilot member therefore may not withdraw or be disqualified would defeat the statute's purpose of ensuring fair and impartial hearings. Moreover, disqualifying the new pilot member likely would not prevent the board from having a quorum to reconsider the surcharge, since five of the seven board members would presumably be available to vote and only four members are necessary to establish a quorum.<sup>19</sup> Therefore, the new pilot member may seek disqualification from the remanded case. Likewise, if a party files an affidavit seeking his disqualification, the board should determine whether to disqualify him.

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<sup>14</sup> AS 44.62.450(c).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> AS 44.62.330(a)(19).

<sup>19</sup> 12 AAC 56.930(b) (majority of board constitutes quorum for meetings and hearings).

Disqualification of the new pilot member would be appropriate under the Administrative Procedure Act because he testified for the pilot organization at the surcharge hearing. The new pilot member testified that there was “general interest and excitement” among the pilots in his organization about the proposed statewide retirement plan, that his pilot organization experienced recruitment difficulties, and that the retirement program was a valuable tool for retention and recruitment.<sup>20</sup> If the new pilot member were to participate in reconsideration of the surcharge, he would undoubtedly make every effort to consider the surcharge objectively. However, it may be unreasonable to require parties to an administrative proceeding to trust that someone who served as a witness in the proceeding would also serve as a fair and impartial decision maker in considering that matter.<sup>21</sup> An impartial decision maker is fundamental to fairness and due process in administrative proceedings.<sup>22</sup> Accordingly, we recommend that the new pilot member carefully consider whether to seek disqualification and withdraw from the remanded case. If he does not and a party files a timely affidavit seeking his disqualification, the board must decide whether to disqualify him.

We do not believe, however, that disqualification is warranted for the board’s two industry members or the questioned public member. We reviewed the financial interest disclosures that these members provided in response to your request, as well as the information provided by attorneys for the pilot organization and industry group participating

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<sup>20</sup> Transcript of Board of Marine Pilots Hearing in Case No. 1950-04-001, at 260-66 (Apr. 14, 2004).

<sup>21</sup> See *Stallworth v. City of Evergreen*, 680 So.2d 229, 234 (Ala. 1996) (“[it] clearly offends the most basic traditional notions of due process to have a person serve as a hearing officer in a case in which he or she testifies as a material witness”); *Bitman v. Fla. Dep’t of Corr.*, 662 So.2d 1030, 1031 (Fla. Dist. Ct. App. 1995) (having witness serve as member of disciplinary team infringed on inmate’s entitlement to impartial disciplinary fact-finder); *Royal v. Police and Fire Comm’n*, 75 N.W.2d 841, 845 (Mich. 1956) (where two commissioners also served as accusing witnesses there was no fair and impartial judgment); cf. *Storrs v. Lutheran Hosps. and Homes Soc’y of Am., Inc.*, 609 P.2d 24, 28 n.12 (Alaska 1980) (if appellant had not waived point, court would have found due process violation where chief of staff who suspended physician, presented case against him, and was witness against him also served as voting member of decision-making committee, along with member who admitted prejudgment); *deKoevend v. Bd. of Educ.*, 688 P.2d 219, 228 (Col. 1984) (superintendent and principal who testified against teacher in dismissal hearing were present during school board’s deliberations, violating due process right to fair and impartial determination).

<sup>22</sup> *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 266 (Alaska 2000); *Voigt v. Snowden*, 923 P.2d 778, 781 (Alaska 1996); *State v. Lundgren Pac. Constr. Co.*, 603 P.2d 889, 895-96 (Alaska 1979).

in the remanded case. We also telephonically interviewed these members. Based on the information we received, we do not believe they have significant personal or financial interests in the surcharge matter that they could affect by their official action on the matter.

One of the board's industry members disclosed that he is an employee of a shipping agency, as well as a minority shareholder in both his employer's parent corporation and a related company that provides various port services for vessels in Alaska. The member reported that his vote on the retirement surcharge would not affect his salary or benefits, his employment status, or the value of his financial interests in the parent corporation and the port services company. He reported that his salary is based on his supervisor's assessment of his job performance. He also reported that changes in pilotage rates do not affect his employer's receipts or the rates his employer charges shippers or cruise lines. He said he has no reason to believe his vote on the surcharge would affect his employer's business and feels no pressure concerning his service on the board except to do a good job. He reported that he has no investments or ownership interests in any shipping company or cruise line.

The other industry member disclosed that he is an employee of a different shipping agency. He reported that he has no investments or ownership interests in any shipping company, cruise line, or other venture involving pilotage services, except to the extent they may be part of mutual funds in which he has invested. He reported that pilotage rates do not affect his salary or his employer's income. He said he has no concern about losing his job based on how he votes on the retirement surcharge and that, even if shippers or cruise lines stopped using his employer because of his vote, it would not affect his compensation. He reported that the surcharge would not affect his personal or financial interests at all.

The questioned public member disclosed that his employer sells fuel and provides port services, primarily to fishing vessels. He estimated that less than one percent of his employer's gross revenue comes from shipping companies (and none from cruise lines). He reported that his compensation would not be affected if the shipping companies were to take their business elsewhere. In fact, it was unclear to him that his employer would suffer any loss at all if the shipping companies were to go elsewhere, because fishing vessels might take their place. He reported that he has no ownership interest and holds no office in his employer's corporation and has no investments or ownership interests in any shipping company or cruise line.

The information we received indicates that disqualification of the industry members and questioned public member is unwarranted under the Ethics Act and the Administrative Procedure Act. The information received reveals no significant personal or financial interests in the remanded surcharge matter for these three members. Likewise, the information received indicates that their participation in the remanded case is unlikely to have any effect on their personal and financial interests. The information received also offers no basis for

doubting that these members can fairly and impartially consider the remanded case. Accordingly, based on the information we received, we do not recommend disqualification of the industry members or the questioned public member.

The pilot organization urges disqualification of one of the industry members because, when the board held the surcharge hearing, the state's corporations database listed him as a director of the industry group opposing the surcharge. The industry member reported that he resigned from that directorship upon his appointment to the board, and the state's corporations database no longer lists him as a director of the industry group.

This member's former service as a director is not a basis for disqualification under the Ethics Act. If he were still a director, his involvement in the industry group might – but would not necessarily – require his disqualification under the Ethics Act as having a significant personal or financial interest in the surcharge matter. In such a circumstance, we would consider the fact that the industry group represents the interests of the industry statewide and the fact that, as we noted, the industry members of the board are expected to promote to some degree the industry's interests.<sup>23</sup> For that reason, we held that a member's interests in a matter are not disqualifying under the Ethics Act if the matter affects the member's profession or industry generally, but may be disqualifying if the matter affects only the member's particular region or organization.<sup>24</sup>

Under the Administrative Procedure Act, on the other hand, disqualification of this industry member might have been a closer question if he had still been a director when he participated in the original surcharge hearing. However, given that he resigned the directorship upon joining the board, and in light of the legislature's decision to include active pilots and industry representatives on the board, we do not believe his association with the industry group warrants his disqualification under the Administrative Procedure Act.

We recognize that our conclusions may cause an imbalance between pilot and industry interests when the board reconsiders the surcharge, and that fact troubles us. As we noted, the board's statutory composition should produce a neutral net effect by including both pilot and industry representatives.<sup>25</sup> Disqualifying both of the board's pilot members without disqualifying any others may disrupt this net neutrality. Nonetheless, given these facts, the applicable law directs us to these conclusions.

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<sup>23</sup> 1992 Inf. Op. Att'y Gen. (Nov. 25, 1991; 663-92-0180), 1991 WL 561443, at \*3.

<sup>24</sup> 2005 Inf. Op. Att'y Gen. (July 5; 665-05-0171), 2005 WL 1845993, at \*4.

<sup>25</sup> 1992 Inf. Op. Att'y Gen. (Nov. 25, 1991; 663-92-0180), 1991 WL 561443, at \*3.



#### IV. DISQUALIFICATION PROCEDURES

When the board meets to reconsider the surcharge, the board will need to address the parties' objections to various board members' participation. The procedures for addressing those objections vary according to whether the objections are based on the Ethics Act or the Administrative Procedure Act.

For objections based on the Ethics Act against a board member other than the chair, the chair must initially determine whether the board member's participation would violate the Ethics Act.<sup>26</sup> You should make that determination in writing, preferably before the board meets, and provide copies to the board, the member involved, and the attorney general.<sup>27</sup> If a board member objects to your determination, the members attending the meeting, excluding the involved member, must vote on whether the involved member may participate.<sup>28</sup> "However, if the Attorney General has advised the chair or issued an opinion concluding that a conflict exists, the board member cannot take official action on the matter regardless of the board's vote on the conflict issue."<sup>29</sup>

For objections based on the Administrative Procedure Act, the chair does not make an initial determination. Rather, the other members of the board determine whether a challenged member should participate.<sup>30</sup> A board member may voluntarily disqualify himself or herself from participating in a matter, but the Administrative Procedure Act bars a member's disqualification, whether voluntary or not, if the disqualification would prevent the existence of a quorum qualified to act on the matter.<sup>31</sup>

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<sup>26</sup> AS 39.52.220(a), AS 39.52.230.

<sup>27</sup> AS 39.52.220(a). While this provision does not expressly require board chairs to provide copies of their determinations to all board members, it does provide that other board members may object to the chairs' rulings. Their rights to object would be substantially less meaningful if the other board members did not receive copies of the determinations.

<sup>28</sup> *Id.*

<sup>29</sup> 2005 Inf. Op. Att'y Gen. (July 5; 665-05-0171), 2005 WL 1845993, at \*6 (citing 9 AAC 52.120(b)(3)).

<sup>30</sup> AS 44.62.450(c).

<sup>31</sup> *Id.*

Of course, we remain available to provide additional assistance if you have questions about these procedures.

cc: Assistant Attorney General David Brower