

MEMORANDUM

State of Alaska Department of Law

TO: Designated Ethics Supervisor DATE: September 20, 2006

FILE NO.: 661-07-00--

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FROM: Judy Bockmon
Assistant Attorney General SUBJECT: Ethics Advice: Outside
Employment Disclosure

We have review the outside employment disclosure form and related information provided by e-mail by Employee and considered your concern regarding whether her employment as a consultant by Company is in conflict with the proper discharge of her state duties. As you know, I also talked to Employee regarding her disclosures prior to your forwarding them to me.

We understand that Employee is employed by Agency as a public information officer. She serves as the point of contact for inquiries from citizens, the media, other state officials, the legislature and members of the congressional delegation. She prepares the agency newsletter and may on occasion represent the agency at meetings with business or other governmental representatives and make public appearances on behalf of the agency.

My research reflects that Employee is the sole proprietor of a private business. State online licensing records indicate that the business provides administrative, support, waste management, and remediation services. Employee did not identify her business by name in her outside employment disclosure. She listed Company as a client to whom she provides these same services. She also listed Organization as a client for which she does fundraising. She further disclosed that she may do political fundraising. It is not clear from the disclosure whether she undertakes the latter for compensation. The disclosure form requires an employee to explain why no potential conflict exists between disclosed outside employment and her official duties, if the employee's outside job duties are the same as or similar to her state service or if in the outside job, the employee deals with people or entities with whom she deals as part of her official duties. Employee noted: "No conflict – not same duties, no oil & gas @ [Agency] or solid waste; no vet or animal research; no fundraising."

Finally, there is also a question regarding whether certain compensation for travel Employee received was a gift subject to disclosure under the Ethics Act.

GENERAL LEGAL STANDARDS RELEVANT TO OUTSIDE EMPLOYMENT

In enacting the Executive Branch Ethics Act, AS 39.52, the legislature recognized that public officers retain their rights to personal and financial interests and may follow independent pursuits so long as these interests and pursuits do not interfere with the public officer's full and faithful discharge of his or her state duties.¹ The Act prohibits a public employee from outside employment or service that "is incompatible or in conflict with the proper discharge of official duties."² Thus, the principal inquiry in evaluating proposed outside employment is whether the employment "is incompatible or in conflict with" an employee's state job. As suggested by this language, outside employment should not be disapproved simply because there is an appearance of possible incompatibility or conflict. You must consider whether the appearance suggests there is or could be a significant actual incompatibility or conflict.

The regulations interpreting the Act provide guidance for applying the "incompatibility or in conflict with" standard. 9 AAC 52.090 states:

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.

All of these issues are highly dependent on the specific facts of the situation and require you, as the designated ethics supervisor, to apply your judgment in determining whether the outside employment would have any of the prohibited results. There may be circumstances where the suggestion of conflict or opportunity for favoritism or personal benefit is so great that outside employment must be limited or disapproved because of

¹ AS 39.52.110(a).

² AS 39.52.170(a).

incompatibility based on appearance.³ However, the Ethics Act cautions against evaluations based on insignificant or conjectural effect.⁴ Thus, a conclusion that the outside employment must be disapproved because it is incompatible or in conflict with an employee's official position should be based on facts indicating a significant problem or a substantial impropriety.

APPLICATION OF STANDARDS TO FACTS PRESENTED

1. Gift or Compensation for Travel

We initially understood from Employee that she had traveled to an event as part of volunteer work for Organization and that the travel was paid for by Company as a contribution to Organization. Thus it appeared that she had been given the airfare instead of having to pay for it herself. I perhaps mistakenly thought that this travel might be related to her position with Agency.

We have since learned from Employee's outside employment disclosure that she provides services for compensation to both Organization and Company. My research also reveals that Company, among others, sponsored Organization's event. These additional facts tend to support Employee's assertion that she attended the event and received the travel, not as a gift, but rather as part of her work for the two entities. That is, she was not given the opportunity to attend because she is an employee of Agency.

In addressing this point in a further e-mail, Employee asserted that she did not have to report this gift, if it was a gift, because in her public position she has no power to take or withhold any action that would affect either Organization or Company. However, gifts valued in excess of \$150 must also be disclosed "if the gift is connected to the public officer's governmental status."⁵ Therefore, if she was given the opportunity to attend for a reason related to her state position, she is required to make a gift disclosure. Such receipt of the gift would be approved because it could not be inferred that it was

³ 1997 *In. Op. Att'y Gen.* (March 24, 661-97-0495); 1997 WL 1089541 at *5-6. Remember, however, that the "appearance of impropriety does not establish that a violation [of the Ethics Act] exists." 9 AAC 52.010.

⁴ AS 39.52.110(b). There is a difference between "conjectural" and "potential." Outside employment that generates a potential conflict of interest between the employee and the state would be incompatible, if the conflict, were it to actually occur, results in more than insignificant or conjectural effect. 1997 *Inf. Op. Att'y Gen.* (March 24, 661-97-0495); 1997 WL 1089541 at *3.

⁵ AS 39.52.130(b)(2).

given to influence official action, if she is not in a position to take official action regarding the giver.

2. Political Fundraiser

State employees are permitted to engage in political activities subject to certain restrictions.⁶ Based on the limited information provided, it does not appear that the disclosed political fundraising activity, whether for compensation or not, was in conflict or incompatible with Employee's state position.

3. Fundraising for Organization

Given the nature of Organization's work and my understanding of Employee's state position, it does not appear that this outside employment either limits Employee's ability to perform her official duties or is otherwise incompatible with them. Therefore, absent other considerations and so long as these activities do not interfere with her work day, you should approve this outside employment.

4. Consulting for Company

You asked Employee to provide more detail regarding her work for Company. She responded:

Business services for [Company]: Act as a consultant/agent for the President/owner client during business transition 2006.

Detailed jobs: Repossession and reclamation of business, particularly solid waste, quality assurance oversight on tax issues, personnel decisions, artistic needs and advise on oil, gas, fuel issues, hospitality and business development, act as liaison and confidant for President, as necessary, do research and investigations, training/mentoring of staff occasionally, political liaison and fundraising, safety and health audits.

She also reported providing these services since June 2006 and spending 0-10 hours per week, "mostly weekends and after business hours."

The website for Company reflects that it is a service company for the North Slope oil fields. Company is the parent company for other businesses that provide supplies and services to the North Slope region, including the supply and delivery of fuel, solid waste

⁶ See AS 39.25.160; AS 39.25.178; AS 39.52.120(b)(6).

management services, industrial supplies, hardware, parts, tools, contract services and general store supplies.

Based on her disclosure, application of the first standard in the regulation does not support disapproval of Employee's outside employment. She provided a sworn statement that she is not using state facilities, equipment or time for her outside activities. The amount of time she states she devotes to Company's activities does not in and of itself suggest the possibility that her outside employment interferes with or takes time away from her state position as a practical matter. As with any employee involved in outside activities that may require time during the regular state work day, Employee must use her lunch hour or with her supervisor's approval, adjust her work schedule or take leave.

The description of Employee's work for Company does not directly suggest that this work limits the scope of her official duties, the second standard. The type of activity that would be of concern would include participation in a matter for Company that may compromise Employee's objectivity in performing her state duties or that may come before your agency where she would have to refrain from participating because of her involvement with Company. Another example may be if her state position involves activities at times other than the regular state work day and she would be unavailable because of Company duties. The appropriate way to address the latter would be to specify that she must be available to perform her state duties, not to disapprove the outside activity in its entirety.

The third standard in the regulation, that Employee's outside employment not be otherwise incompatible or in conflict with her state service, is broad and incompatibility or conflict could arise in many circumstances. Based on the information in Employee's disclosure, any potential or actual conflict between her consulting work with Company and her state position seems conjectural. It is not evident that she interacts with others on behalf of Company that in any way overlaps with her Agency duties or Agency's mission.

You should consider whether Employee is in a position to take official action, including recommendations, which may affect her own interests with respect to Company or Company's interests.⁷ Consider whether the Company work involves the same or similar tasks, issues or persons served. For example, if Employee interacts with someone in both her state position and her private business, is she in a position to act favorably or adversely in her state job based on personal interests? On the other hand, if she has

⁷ AS 39.52.120. "Official action" includes "a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer." AS 39.52.960(14).

contact with the same individual or entity on behalf of Agency and Company on unrelated matters, then there is no Ethics Act bar. Employee's obligation would be to ensure that the contact clearly understood which hat she was wearing, that of Agency representative or private consultant.

There is one additional Ethics Act concern to consider. A state officer may not use information gained in the course of her state duties that could in any way result in a benefit to her or an immediate family member, if the information has not also been disseminated to the public or is confidential by law. For purposes of this restriction, "information has been disseminated to the public if 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."⁸ Based on the information disclosed and our discussion regarding the nature of Employee's position, we have no reason to think that this is a concern. We simply bring it to your attention.

Approval of Employee's outside employment disclosure does not equate to blanket approval of every activity she may undertake for Company or another client. If there is some feature to Employee's state job that links it with her private consulting business, and assuming no identified actual or potential conflict, you could consider approving her disclosure with an express reminder of the prohibitions in AS 39.52.120 and AS 39.52.140 as well as the requirement that all potential violations be disclosed so that they may be addressed before they occur. Awareness of the Ethics Act requirements is her obligation in any case.

You may also want to refer to our March 24, 1997 opinion describing a number of different situations involving particular outside employment activities that have been approved or disapproved.⁹ If you have questions regarding this advice or learn additional information that raise other concerns, please do not hesitate to call.

⁸ 9 AAC 52.070.

⁹ 1997 Inf. Op. Gen. (March 24; File No. 661-97-04951997); 1997 WL 1089541.