

MEMORANDUM

State of Alaska Department of Law

TO: Carl Brady
Chair, Board of the Trustees
Alaska Permanent Fund Corporation

DATE: June 18, 2007

FILE NO.: 661-07-0014

TEL. NO.: 269-5216

THRU Michael Burns
Executive Director
Alaska Permanent Fund Corporation

FAX:

FROM: Judy Bockmon
Assistant Attorney General
Opinions, Appeals and Ethics

SUBJECT: Ethics Act Procedure for
Addressing Conflicts of Interest
Disclosed at Public Meetings of
the Board of Trustees

As we recently discussed, your quarterly report for the first quarter of 2007 and another inquiry suggested that the Board of Trustees of the Alaska Permanent Fund Corporation (APFC) did not follow the procedures set out in AS 39.52.220 of the Executive Branch Ethics Act when addressing a conflict of interest you disclosed at the board's February meeting. This advisory opinion confirms in writing the required procedure and our conclusion that the board's action in the matter before it at the time was not compromised by the failure to follow the prescribed procedure.

I. ETHICS ACT PROCEDURES FOR DISCLOSING CONFLICTS

The procedural requirements for disclosures are set out in AS 39.52.220 and 9 AAC 52.120. Under the statute, APFC trustees must declare potential conflicts of interest and other matters that may violate the Ethics Act on the public record and in writing. This requirement provides to the trustees the opportunity to seek review of conflicts in advance of taking action to ensure that actions taken will be consistent with the Act.

A. Disclosure on the Public Record.

Each trustee must identify actual and potential conflicts orally at the board's public meetings in advance of participating in deliberations or taking any official action on a matter. Violations of the Ethics Act may occur when a public officer takes official action that may affect the officer's own personal or financial interests or those of an

immediate family member.¹ The definition of “official action” means more than “vote.” Under the recently passed amendments to the Ethics Act, the new definition reads: “[A]dvice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction.”²

A trustee may always choose to refrain from voting, deliberations or other participation regarding a matter, if the trustee believes he or she has a conflict.³ If a trustee is uncertain whether participation or action on a matter would result in a violation of the Ethics Act, the trustee should disclose the circumstances on the public record and seek a determination from the chair of the board. When the chair discloses a conflict, participation is addressed by the entire board.

B. Determination by the Chair or Board.

The chair of the board, as designated ethics supervisor, or the board must make a determination regarding the propriety of the disclosing trustee’s participation on the record. Alaska Statute 39.52.220 prescribes the following procedure for addressing conflicts disclosed on the public record:

- ◆ The chair states a determination whether the trustee may participate based on the disclosure.
- ◆ Any other trustee may then object to the chair’s determination.
- ◆ If an objection is made, the trustees present, excluding the trustee who made the disclosure, vote on the matter.
- ◆ Exception: A chair’s determination that is made consistent with advice provided by the Attorney General may not be overruled.
- ◆ If the chair, or the trustees by majority vote, determines that a violation will exist if the disclosing trustee participates or takes other official action on a matter, the trustee must refrain from voting, deliberating or participating in the matter.

¹ AS 39.52.120.

² AS 39.52.960(14)(2007).

³ In most, but not all, situations, refraining from participation ensures that a violation of the Ethics Act does not occur. Abstention does not cure a conflict with respect to a significant direct personal or financial interest in a state grant, contract, lease, or loan because the Ethics Act prohibition applies whether or not the public officer actually takes official action. These conflicts should be addressed with the appropriate designated ethics supervisor in advance, if possible.

When the chair of the Board of Trustees identifies a potential conflict, the trustees present, except for the chair, vote on the matter. If a majority determines that a violation of the Ethics Act will occur if the chair continues to participate, the chair shall refrain from voting, deliberating or participating in the matter.

Following the correct procedures is important. A trustee who takes action in accordance with a determination of the chair or vote of the board is not liable if the action is later found to violate the Ethics Act. There must be full disclosure of the facts reasonably necessary to the determination and the attorney general must not have previously advised that the action violates the Act.⁴

C. Disclosure in Writing.

In addition to an oral disclosure on the public record at a board meeting, the Ethics Act requires that a disclosure also be in writing.⁵ However, if the meeting is recorded, a tape or transcript of the meeting is preserved and there is a method for identifying the declaration in the record, an oral disclosure may serve as the written disclosure.⁶ It appears that the APFC procedures for making a record of its meetings meet these requirements. Alternatively, the disclosing trustee should note the conflict on a Notice of Potential Violation disclosure form and the chair must record the determination.⁷

The chair will report all disclosures and determinations in the board's quarterly ethics report, attaching the notice of potential violation and determination forms, if used. In the case of a disclosure by the chair, the written notice with note of the board's vote or copy of the public record reflecting the oral disclosure and board's determination should be forwarded to the Office of the Governor for review by the chair's designated ethics supervisor as well.

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⁴ 9 AAC 52.120(b).

⁵ AS 39.52.220.

⁶ 9 AAC 52.120(a).

⁷ The Notice of Potential Violation form and a sample determination form are found on the ethics web page at the Department of Law website (<http://www.law.state.ak.us/doclibrary/ethics.html>).

II. CONFLICT DISCLOSURE AT FEBRUARY 2007 BOARD MEETING

Your quarterly ethics report for the Board of Trustees reported that the agenda for the board's February 28, 2007 meeting included consideration of a management contract with Crestline Investors, Inc.⁸ You advised that at the meeting, you notified the other trustees that you are a customer of Crestline, including an investment in a product like the one the board was considering, Trustee Bill Hudson objected to your recusing yourself, and you participated in the vote on the Crestline contract.

In addition to discussing this circumstance with you and the APFC executive director, we have reviewed the February meeting minutes and the Crestline proposal. The minutes confirm that you stated that you were recusing yourself because you were an investor with Crestline, as you have in the past when the board considered matters relating to Crestline. The executive director clarified that you were a customer of the firm, not an investor in the firm. Trustee Hudson objected to your recusal and you expressed uncertainty about participating in view of the conflict. No other trustee voiced an opinion. Discussion of the Crestline matter ensued and the board, including you, voted 5-0 to proceed with the Crestline contract.⁹

The meeting minutes reflect that earlier in the meeting, the board had received a briefing on the statutory public officers' disclosure requirements and the Ethics Act and discussed the board's own disclosure policy. Although the Ethics Act procedures for addressing conflicts were reviewed, they were also compared to those used by the Alaska Legislature.¹⁰ The legislature's procedures require a legislator to vote unless the body unanimously permits the legislator to refrain. That is, if one objection to recusal is voiced, the legislator must vote.¹¹ We understand that two trustees, including Trustee Hudson, are former legislators.

Thus, you disclosed your conflict appropriately, but the Ethics Act procedures for determining participation were not followed. The lack of a vote of the entire board and your subsequent participation in the vote on the Crestline contract seems to have occurred

⁸ This contract related to the allocation of additional APFC funds with Crestline for an investment product and strategy different from that of an existing management contract.

⁹ February 28-March 1, 2007 Minutes, pp. 60-62.

¹⁰ *Id.* at pp. 13-20.

¹¹ See Alaska State Legislature 2006 Standards of Conduct Handbook, pp. 12-13, and Uniform Rule 34(b).

because of a misunderstanding or confusion with the legislature's procedure. The meeting minutes confirm that the APFC staff strongly recommended approval of the contract and the matter was carefully considered. All other trustees voted in favor and therefore the matter would have been approved had you not voted. In addition, Mr. Burns has reported that at the board's May 31, 2007 meeting, the board considered and approved the subsequently negotiated contract terms and you declared your conflict and refrained from participating in the action.

Based on our review, we have found nothing to suggest that the board's decision was compromised by the failure to have the entire board vote on whether you should participate in view of the declared conflict as required by the Ethics Act and your participation.

Finally, we recommend review of the board's own disclosure policy, which appear to impose stricter conflict disclosure requirements, to ensure that the trustees are aware of their obligations under that policy.

If you have further questions about the Ethics Act procedures or the above advice, please do not hesitate to contact us.

cc: Linda Perez, Designated Ethics Supervisor, Office of the Governor
Michael Barnhill, Assistant Attorney General
James Baldwin, Esq.