

April 18, 2009

Jerry Gallagher
Legislative Director
Office of the Governor
P.O. Box 110001
Juneau, AK 99811-0001

Issued for Printing: April 20, 2009

Re: Senate District B Appointment Process

Dear Mr. Gallagher:

You have asked for our views regarding Governor Palin's appointment of Mr. Grussendorf to fill the Senate vacancy for Senate District B.

The Senate District B vacancy was created when Senator Elton resigned on March 2, 2009. On March 30, Governor Palin appointed Mr. Tim Grussendorf to the vacancy as required by AS 15.40.320. At some point thereafter, at a closed-door meeting that was not preceded by notice of its time or place, the Senate Democrats met to consider the appointment of Mr. Grussendorf. In an unsigned memo dated April 1, the Alaska Senate Democrats advised Senate President Stevens "that Mr. Grussendorf did not achieve the needed support to be seated."

Governor Palin responded on April 2, requesting that the "Senate consider my nomination of Mr. Grussendorf in open session, in the same fashion as the legislature would consider any other appointment subject to confirmation." On April 6, seven of the nine Senate Democrats sent Governor Palin a letter stating that Mr. Grussendorf had not been confirmed.

On April 6, Governor Palin appointed Mr. Joe Nelson under AS 15.40.320. At some point thereafter, at a closed-door meeting that was not preceded by notice of its time or place, the Senate Democrats met to consider the appointment of Mr. Nelson. On April 10, 2009, Sen. Ellis sent Governor Palin a letter stating that Mr. Nelson had not been confirmed.

On April 14, Governor Palin submitted three names (Mr. Grussendorf, Mr. Nelson,¹ and Mr. Alan Wilson) for the Senate to consider for confirmation to fill the vacancy in Senate District B. Legislative Affairs Legal Services opined on April 15 that the governor's submission of a list three names did not comply with the statute's requirement that for an appointment only one name may be submitted for confirmation. Legislative Affairs stated that a second appointment of Mr. Grussendorf "would also be improper" under AS 15.40.350.² Later on April 15, Governor Palin clarified that she intended for the three names to be considered in order: first Mr. Grussendorf; if Mr. Grussendorf is rejected, then Mr. Nelson; if Mr. Nelson is rejected, then Mr. Wilson.

The question is whether the Governor's appointment of Mr. Grussendorf is valid. We think it is.

The Department of Law has long had concerns about the confirmation procedure used by the legislature with respect to vacancy appointments. While we recognize that there is a tradition for confirming such appointments in private, we have never agreed with this procedure and have doubts as to its constitutionality.

In 1963, then Assistant Attorney General Avrum Gross opined that it was "clear from the cases reviewed that 'confirmation' suggests formal action by the legislative body or, in this case, part of it. . . . An informal indication of how the legislature would vote in open session would seem to be insufficient as a rejection of the nomination." 1963 Inf. Op. Att'y Gen. (Feb. 12). Consequently, in a dispute rather similar to this one, the Senate consented to Governor Egan's request for an open vote on his Senate appointments.³

¹ Mr. Nelson withdrew from consideration on April 15.

² We understand that Mr. Grussendorf has obtained a legal opinion suggesting that his re-appointment may have been proper.

³ The 1963 Senate Journal reflects five separate roll call votes on the appointments that Governor Egan submitted for the vacancy created by the death of Sen. Elton Engstrom, Sr. 1963 Senate Journal 85, 177, 194, 256, 353. These pages are attached hereto, along with the correspondence between the Senate and Governor Egan regarding the dispute and how it was resolved.

We reiterated our view in 1987 and observed that Mason's Manual of Legislative Procedure, which is adopted by the Legislature's Uniform Rules, requires the taking of a vote at a meeting. 1987 Inf. Op. Att'y Gen. (Sept. 21; 663-88-0107). Mason's describes this requirement as "indispensable" and a principle that is "so fundamental as to be required to give validity to the decisions of a group." Mason's Manual of Legislative Procedure, sec. 42, 43(7) (2000).

Further, the Alaska Supreme Court has held that the Legislature is required by the Constitution to give notice of the time and location of its meetings. *Malone v. Meekins*, 650 P.2d 351, 358 n.14 (Alaska 1982). Legislative meetings must be "legal in the constitutional sense." *Id.*

While the course of this dispute is somewhat complicated, in our view the Senate has yet to take proper action on any of Governor Palin's appointments. For none of the meetings in which Governor Palin's appointments were considered was the constitutionally required notice of a legislative meeting given. The meetings have apparently happened behind closed doors. The meetings have not complied with the long-standing opinions of the Department of Law, nor have they complied with Mason's Manual of Legislative Procedure, which the legislature has adopted under Rule 55(a) of the Uniform Rules of the Alaska Legislature.

Our view has been and continues to be that regardless of legislative tradition, the law requires confirmation of vacancy appointments by vote in open session.⁴ Accordingly, we think the issue as to whether AS 15.40.350 permits Governor Palin to re-appoint Mr. Grussendorf is not relevant, and will not become so until proper action is taken by the Senate to reject Mr. Grussendorf.

⁴ A quorum would need to be present, but to comply with AS 15.40.330, only the members of the same political party which nominated the predecessor would vote. The attached pages from the 1963 Senate Journal describe the procedure for taking a roll call vote for members of one party. We acknowledge that our 1987 opinion called this aspect of the statute into question. 1987 Inf. Op. Att'y Gen. at 3 (Sept. 21; 663-88-0107). We do not address that issue herein.

Jerry Gallagher
Re: Senate District B Appointment Process

April 18, 2009
Page 4

In our view, the Senate has not considered or rejected Governor Palin's appointment of Mr. Grussendorf at a meeting that was legal in a constitutional sense. Until it does so and takes a vote in open session, Governor Palin is free to appoint him under AS 15.40.320. AS 15.40.350 is not triggered until such time as the Senate properly rejects an appointment. That has yet to happen.

Sincerely,

RICHARD A. SVOBODNY
ACTING ATTORNEY GENERAL

By:

Michael A. Barnhill
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MAB/ajh

[Attachments](#)