BEFORE THE STATE OF ALASKA PERSONNEL BOARD

IN THE MATTER OF:

INVESTIGATION OF
ETHICS COMPLAINT
DATED AUGUST 3, 2005,
SUPPLEMENTED
OCTOBER 11, 2005

FINAL DECISION
Redacted to Maintain Confidentiality

I. Introduction

On August 4, 2005, a complaint was filed against Pubic Officer alleging that his participation in negotiations pertaining to a proposed natural gas pipeline on behalf of the State of Alaska violates the Alaska Executive Branch Ethics Act ("Ethics Act" or "Act") prohibition against taking or withholding official action "in order to affect a matter in which the public officer has a personal or financial interest." [1] The complainant bases his complaint on three general factual allegations: (1) Public Officer "has a one to two million dollar investment in BP and ConocoPhillips;"[2] (2) Public Officer is an employee of BP and/or ConocoPhillips[3] and (3) Public Officer's action may "increase, decrease, or just maintain" the value of his deferred compensation plans.[4] The allegations are set forth in greater detail below. The complainant requests that Public Officer "recuse himself from all Alaska gas line negotiations or contracts."[5]

On November 22, 2005, we issued a preliminary decision requesting additional documentation and indicating that, subject to submission and review of the additional documentary information, the complaint should be dismissed because Public Officer's financial interest in the matter appeared non-existent or too speculative to give rise to a violation of the Act.[6] In response, Public Officer has submitted information relating to his participation in the

[1] AS 39.52.120(b)(4).
[2] Complaint received August 4, 2005, cover letter and memorandum at p.2. Complainant's complaint includes a cover letter of one page with an attached memorandum of 11 pages. References to the complaint are to the "cover letter" and/or to a specific page number of the memorandum. Complainant supplemented his complaint with a two page letter on October 11, 2005. The Complaint materials are attached as Exhibit A.
[3] See, Complaint, p.2
[4] See, Complaint, p.7 (internal quotes omitted).
[5] See, Complaint, cover letter.
[6] AS 39.52.110 (b)(1); our preliminary decision is attached as Exhibit B.

BP and ConocoPhillips deferred compensation plans.[7] This information confirms that Public Officer does not have a financial interest which precludes his participation in the gas pipeline negotiations under the Ethics Act. There being no probable cause to believe that a violation of the Act has occurred, the complaint is dismissed pursuant to AS 39.52.320. Our analysis follows.

II. The Ethics Act

The Legislature created the Ethics Act to provide standards of appropriate behavior for public officials and a way for citizens to enforce those standards. In order to avoid unnecessary interference with legitimate governmental decision-making, the Ethics Act distinguishes between minor and inconsequential conflicts of interest, which do not violate the Act, and material and substantial conflicts of interest, which do.[8]

The Ethics Act supersedes the "common law" on conflicts of interest.[9] Instead, the Ethics Act itself defines "ethical" behavior for the purposes of the Ethics Act. The Legislature chose to not rely on what Governor Sheffield termed "the relatively unknown and unworkable aspects of the common law on conflict of interest" and replaced those aspects with what it believed were "concrete standards of conduct."[10]

III. The Role of Independent Counsel in Determining Whether and How to Investigate an Ethics Complaint

The Personnel Board, Attorney General's office, and designated ethics supervisors generally are responsible for applying the Ethics Act. When an ethics complaint is filed against the governor, lieutenant governor or attorney general, the complaint is referred to the Personnel Board, which retains Independent Counsel to perform the duties ordinarily performed by the attorney general.[11] Independent Counsel reviews the complaint to determine whether it contains factual allegations which, if true, would constitute a violation of the Act.[12] If so, Independent Counsel is charged with investigating the complaint to determine whether there is probable cause to believe that a violation of the chapter has occurred.[13]

The Act does not specify how an investigation is to be conducted or whether all complaints must or should be investigated in the same manner. Independent Counsel must exercise independent judgment to determine whether an investigation should be opened and, if so, how to investigate. In making this decision, Independent Counsel must carefully balance the obligation to enforce the Act with the need to evaluate complaints in a manner that does not unnecessarily interfere with ongoing government business.

---

[7] Public Officer's responses are attached as Exhibit C, collectively.
[8] AS 39.52.110(a)(3).
[9] AS 39.52.910(b).
[10] See, 1986 Senate Journal 2204 (Governor's transmittal letter and sectional analysis regarding the Ethics Act).
[11] AS 39.52.310 (c).
[12] AS 39.52.310 (d).
[13] AS 39.52.310 (g); AS 39.52.320.

On one hand, it seems wholly appropriate to read complaints broadly to effectuate the purposes of the Ethics Act and investigate complaints which may state a claim, even if the claim appears unlikely to succeed. On the other hand, those responsible for interpreting and applying the Ethics Act should guard against frivolous complaints and attempts to use the Act as a political or strategic tool to attack policy decisions with which they disagree, but which are not unethical. This is especially so at the highest levels of government. If not administered carefully, the Ethics Act could create a system that harms the public by distracting government officials from their public duties in order to respond to complaints and investigations.

This latter point warrants additional comment as it relates to this complaint. Ethical allegations must be considered independent of politics, policy, and strategy. Here, the complainant has alleged that Public Officer has violated the Ethics Act as a result of his participation in the natural gas line negotiations under the Alaska Stranded Gas Development Act (ASGDA). The complaint itself leaves little doubt that the complainant disagrees with the policy and strategy of the Administration in the pipeline negotiations. However, not every political disagreement can be the seed of an ethics complaint. The resolution of this complaint cannot be and is not related to the high-stakes politics of the natural gas pipeline negotiations; the public policy issues raised by competing pipeline proposals simply are immaterial to this decision. Similarly, whether the Administration appoints individuals with prior oil experience (e.g. previously employed by oil interests), such as Public Officer, to negotiate and advise regarding negotiations also is immaterial absent an independent violation of the Act. These comments in no way constitute support for any political proposal relating to natural gas pipeline issues. The Ethics Act is not and ought not to be the substitute battleground for such public policy debates. Nor should the Act be used, in this case, to stop any on-going negotiations.[14]

Once a complaint is accepted, a decision must be reached as to how to investigate the complaint. If every case that, viewed broadly and accepting all factual allegations as true, can be interpreted to state a violation were investigated with a leave-no-stone-unturned approach, the Personnel Board would risk becoming a political tool for complainants unhappy with political and policy decisions of government. On the other hand, once a complaint is accepted, sufficient facts must be determined to confirm whether an ethical violation has occurred.

[14] In a letter dated November 8, 2005, the complainant urged the Personnel Board and Independent Counsel to require that Public Officer cease any action relating to the matter pending resolution of complainant's ethics complaint. Such action is neither required nor recommended with regard to this complaint. As noted elsewhere in this discussion, there is no dispute that Public Officer disclosed his deferred compensation plans and that the Department of Law determined that he could retain the plans prior to his participation in natural gas pipeline negotiations. This is what the Act requires. AS 39.52.210(a). Once a determination is made that no violation of the Act exists, the official is able to carry out the official actions and duties assigned. The public official is allowed to rely on a determination, here the Department of Law memorandum, that is currently in effect. AS 39.52.240(f). The mere filing of a complaint does not constitute revocation or modification of the Department of Law memorandum. AS 39.52.240(e). To conclude otherwise would, in essence, provide each Alaskan the ability to single-handedly and without investigation stop governmental operations which he/she does not support by merely filing a complaint. The Ethics Act need not be viewed in so draconian a manner to accomplish its legitimate ends.

Without direction in the statutes or regulations as to how to conduct an investigation, we have applied a type of sliding scale approach. The result of this approach, in this case, is that we decided to provide Public Officer our preliminary decision, subject to and conditioned upon submission of additional documentation and our review of that documentation. We chose this approach for the following reasons:

1. The complainant does not allege any personal knowledge of the facts. The more an ethics complaint is based on hearsay, speculation, and innuendo, the more appropriate it is to hold off an intrusive investigation pending a careful threshold review. Moreover, the facts at issue are narrow and discrete and are susceptible of clear documentary proof. In this case, depositions, witness examinations, and vast document review were not necessary to clarify the key facts.

2. Both the complainant and target of the investigation admit that Public Officer disclosed the interest at issue in this complaint (his deferred compensation plans) prior to participating in the natural gas pipeline negotiations. There is no allegation of fraud or deceit. Timely disclosure is and must be the cornerstone of an effective and efficient Ethics Act. In light of this, the nature of the charges, timely initial disclosure and response to the complaint, we had no reason to proceed with investigative methods based on the presumption that the target of the investigation had not been and would not be forthcoming. There was simply no reason to presume a lack of cooperation on Public Officer's part.

3. The complainant alleges and admits that the Department of Law has issued a decision finding that Public Officer could participate in natural gas line negotiations while maintaining his interest in the deferred compensation plan. While we are not bound by that decision and while we believe additional factual documentation was necessary to confirm the Department's conclusion, we generally agree with the legal analysis and conclusion. We believe this factor counsels against the need for a full-blown investigation.

Based on the above considerations, we decided to begin the investigation in a limited but sufficient manner. As explained below, we decided that if Public Officer submitted documents which would clarify the terms and conditions of his participation in the deferred compensation plans, and confirm that the plans were as described in his initial response, the investigation would be concluded and the complaint would be dismissed.[15]

IV. The Burden of Proof Requires a Showing of Probable Cause That a Violation Occurred

The Ethics Act provides that if there is "probable cause" to believe that a violation of the Ethics Act has occurred, Independent Counsel shall request formal proceedings.[16] The Ethics Act also provides that if there is not "probable cause," Independent Counsel shall dismiss the

[15] See Preliminary Decision, attached as Exhibit B.
[16] AS 39.52.350(a).

complaint.[17] As noted above, we do not find, at this juncture, probable cause that a violation has occurred.

The Ethics Act does not define "probable cause." However, the Alaska Supreme Court has consistently defined "probable cause" as being established when a reasonably prudent person would believe that an act had occurred.[18] The standard of "probable cause" is lower than a "preponderance of the evidence" or a "more likely than not" standard.[19] Using this probable cause standard at this stage allows the Independent Counsel to filter out frivolous and non-meritorious complaints while still pursuing other complaints where further investigation might reasonably yield proof for a hearing. If formal proceedings were instituted, Independent Counsel would then have the burden of proving by a preponderance of the evidence that a violation had occurred.[20]

V. Essential Facts in the Complaint

The factual allegations against Public Officer are spread throughout the Complaint and are not presented in a succinct or uniform fashion. In some cases the facts are directly stated; elsewhere factual allegations are stated by quoting from a March 24, 2005 Memorandum of the Department of Law[21] (the "March 24 Memorandum") with apparent agreement; in other cases factual statements from the March 24 Memorandum are quoted and the complainant expresses disagreement with those quotations; in other cases factual statements seem to be presented as rhetorical questions, parenthetical asides, or in the form of hypothetical situations. Furthermore, some of the factual allegations in the complaint appear to be inconsistent with one another.[22]

The essential facts in the complaint relevant to a determination of probable cause to believe that Public Officer violated the Ethics Act are:

1. Public Officer has a one to two million dollar "investment" in BP and ConocoPhillips.[23] These "investments" are a deferred compensation plan with BP and a deferred compensation plan with ConocoPhillips.

---

[17] AS 39.52.320.
[18] See, In the Matter of J.A., 962 P.2d 173, 176 (Alaska 1998)(discussing multiple cases).
[19] Id.
[20] AS 39.52.360(c).
[21] File No. 663-05-0171 (March 24, 2005)("Ethics Act Considerations: Personal Investments").
[22] Fundamentally, the complaint raises apparently contradictory concerns --- one being that Public Officer would favor BP and ConocoPhillips by advocating for their proposal; the other being that the proposal could bankrupt the companies and harm Public Officer's investment, thereby presumably creating a disincentive for Public Officer to reach an agreement with either company. There are other inconsistencies. For instance, the complaint refers to Public Officer as both "the employee" and the "former employee" of BP and/or ConocoPhillips. See, Complaint p.2 and p.8. Similarly the Complaint asserts on p.2 that the risk to Public Officer's deferred compensation plan(s) is that the plan(s) may lose their value if BP and/or ConocoPhillips become insolvent. On p.7, the Complaint states that the plans may "definitely increase, decrease, or 'just maintain'" their value based on the results of the pipeline project.
[23] See, Complaint Cover Letter.

2. Public Officer is "the employee" or "former employee" of BP and/or ConocoPhillips.[24]

3. If BP or ConocoPhillips becomes insolvent, Public Officer will lose the entire value of his deferred compensation plans.[25] The gas line negotiations could result in BP and/or ConocoPhillips becoming insolvent.[26]

4. Public Officer's actions as negotiator may "increase, decrease, or 'just maintain' his one to two million dollar interest in the BP and ConocoPhillips [deferred compensation] plans."[27]

VI. Review of Public Officer's Response

Public Officer timely responded to the complaint and provided documentation detailing his employment history and deferred compensation plans in response to our preliminary decision.[28] Public Officer's response can be distilled into the following factual assertions relevant to a determination of probable cause:

1. Public Officer never worked for BP or ConocoPhillips, and presently does not work for them. Rather, Public Officer worked for ARCO, which was the predecessor of BP, and for Phillips Petroleum Company, which was the predecessor of ConocoPhillips. When ARCO and Philips Petroleum Company existed, ARCO, Philips Petroleum, BP, and ConocoPhillips were all competitors; BP and ConocoPhillips are still competitors.[29]

2. The corpus of the deferred compensation plans consists of wages and salary that Public Officer previously earned while working for ARCO and Phillips Petroleum Company. These plans are debts of BP and ConocoPhillips, which were assumed when BP acquired ARCO and when ConocoPhillips acquired Phillips Petroleum Company, respectively. Public Officer is not paid wages or salary by BP or ConocoPhillips.[30]

---

[24] See, Complaint, p.2 and p.8. The Complaint made one reference to Public Officer as "the employee" of BP and ConocoPhillips. While it appears more likely that the complaint uses that term for emphasis rather than as an assertion of fact, we have included it in the statement of facts in the event that is what was intended.
[25] See, Complaint, p.2.
[26] See, Complaint, p.2.
[27] See, Complaint, p.7.
The complaint also suggests that Public Officer may breach some sort of duty arising under the Alaska Constitution to utilize Alaska's natural resources for the maximum benefit of the people. Complaint, p.8. If such a duty exists – and we do not decide if it does – any breach of such duty would clearly not violate the specific terms of the Ethics Act. These allegations do not warrant an investigation and are dismissed. AS 39.52.310(d).
[28] Public Officer's response, including all supplemental materials, is attached as Exhibit C to this letter.
[29] See, Response, p.3; Public Officer provided written statements from BP and ConocoPhillips confirming that he was employed by their predecessor entities, and that he is not and never has been employed by BP or ConocoPhillips.
[30] See, Response, p.3.

3. Public Officer does not own shares in BP or ConocoPhillips. Public Officer owns deferred compensation plan accounts for which BP and ConocoPhillips are the custodians.[31]

4. Public Officer does not control the rate of return of his deferred compensation plans. The rate of return on the BP plan is set on an annual basis and based upon independently set rates (such as a treasury rate). The rate of return on the ConocoPhillips plan is set according to the rate of return of mutual funds that Public Officer selects.[32] Neither rate is related to or depends on the gas pipeline or stock price of BP and ConocoPhillips.

5. Public Officer is not a "lead negotiator" in the gas line negotiations. He has an advisory role. Jim Clark is currently the chief negotiator and the only person with the authority to make negotiating decisions. Pedro van Meurs was the chief negotiator before Mr. Clark. The Governor has the ultimate negotiating authority.[33]

6. The Commissioner of Revenue, the Governor, and the Legislature must approve the final terms of any gas pipeline contract.[34]

7. The estimated cost to build the gas line is approximately $20 billion, to be split four ways among the three companies and the State. Accordingly, each company would pay approximately $5-6 billion over the course of planning and construction. In 2004, BP Group LLC earned more than $15 billion in profit and ConocoPhillips earned more than $8 billion in profit. In the first three quarters of 2005, BP Group LLC earned more than $18 billion in profit and ConocoPhillips earned more than $9 billion in profit.[35]

VII. The Department of Law Memorandum

As both the complainant and Public Officer point out, the State Department of Law concluded in the March 24 Memorandum that Public Officer's deferred compensation plans do not constitute a conflict of interest. While we generally agree with the legal analysis of the Department of Law in the March 24 Memorandum, we sought further documentation relating to

[31] See, Response, p.3.
[32] See, Response, p.3 and DOL Memorandum, p.7;Public Officer provided information from BP and ConocoPhillips confirming the criteria used to determine the rate of payout of the deferred compensation plans. For the BP plan the rate of payout equals the highest of the following rates: (1) 125% of the 120 month rolling average of the 10-year U.S. treasury note rate for the period ending June 30 effective for the plan year commencing thereafter; (2) the Citibank Base Rate i.e. the prime rate, in effect on October 15 of the plan year. For the ConocoPhillips plan the rate is determined by the average rate of return of a broadly diversified group of mutual funds. See Exhibit C, explaining benefit calculations.
[33] See, Response, p.5.
[34] See, Response, p.6.
[35] See Response, p.6.

the terms of the deferred compensation plans. This additional documentation confirms Public Officer's allegations and the factual assumptions supporting the Department's conclusions.

VIII. Public Officers are Entitled to a Presumption that They Have Acted in Good Faith; There Is No Evidence in this Case to Rebut that Presumption.

The complaint alleges that Public Officer has violated of AS 39.52.120 (b)(4). A violation of AS 39.52.120 may be shown if the public officer's motive or intent was to "take or withhold official action in order to" affect his or her personal financial interest. Thus, we must review the facts to determine if there is evidence of intent by Public Officer to advance his financial interest.

In considering motive, Attorney General Opinions ("AGO") interpreting the Ethics Act, have, for many years, consistently held that a public officer is entitled to a presumption that he or she is not motivated by self-dealing.[36] We agree that this presumption is fair and reasonable.

Beyond the presumption, we believe that timely and full disclosure by the public official should also be considered evidence of good faith. The sectional analysis of the Ethics Act explains that a "major aspect of this legislation is its 'preventative' posture. . . It is these preventative procedures that give the bill its true strength, because it provides a positive approach to solving potential abuses and appropriately assists officers before the fact, rather than waiting for violations to occur which the attorney general must then prosecute."[37] Thus, absent any allegation of bad faith by the complainant, and where, as here, prior disclosure has been made, we find good faith on the part of Public Officer. Thus, the inquiry left is only whether the deferred compensation plans, in and of themselves, create a significant conflict of interest under the Act.

IX. "Insignificant" Conflicts Do Not Give Rise to a Violation of the Ethics Act.

The Ethics Act recognizes that some conflicts are "minor and inconsequential" and some are "substantial and material."[38] Only substantial and material conflicts violate the Ethics Act.[39] If the public officer's interest in a matter is insignificant, or if the public officer's action or influence would have an insignificant or conjectural effect on the matter, the public officer's actions do not violate the Ethics Act.[40]

---

[36] Attorney General Opinion 663-97-0140 (April 26, 1996) ("Ethics Complaint Against Executive Assistant of Board X"), Attorney General Opinion 663-93-0292(February 26, 1993)("Possible bias of Board Member").Under established rules of statutory construction, when an agency charged with interpreting and applying a law construes that law, a court will give that construction some deference. See, e.g., Wendte v. State, 70 P.3d 1089 (Alaska 2003). Therefore, we also give Attorney General Opinions that apply the Ethics Act some deference.
[37] 1986 Sen. Journal 2211.
[38] AS 39.52.110(a)(3).
[39] Id.
[40] AS 39.52.110(b).

With regard to "insignificance," there are two ways a personal or financial interest in a matter could be insignificant: (1) being small in size and (2) having little relation to "the matter" at issue. The Act recognizes that there is no conflict if the size of a public officer's financial "interest" in a "matter" is sufficiently small. The "interest" at issue is not the overall size of the interest, but rather the portion of the interest that could be affected by the public officer's actions in the matter.[41] For example, if a public officer was involved in making a district-wide zoning decision and also owned a house in the district worth $350,000.00 that might go up in value by $100.00 because of the zoning decision, the size of the official's financial "interest" in the "matter" would be $100.00, not $350,000.00. In such a hypothetical situation, the $100.00 "interest" would pose a "minor and inconsequential"[42] conflict. This is particularly true given that the impact of a zoning regulation are widespread and the public officer's "interest" would be shared with much of the public.[43]

Second, a personal or financial interest could have an insignificant relation to the matter, and so not be "in" the matter. A public officer's financial interest must be viewed in relation to the matter in which he/she might take official action. Thus, for example, while a regulation permitting increased commercial fishing might increase the demand for marine diesel fuel, a member of the fisheries board would probably not have a conflict of interest if he also held stock in an oil company; the connection between fishing and fuel demand is too remote or derivative to be "in" the "matter."[44]

These concepts were synthesized in the discussion of Independent Counsel Tom Daniels when Mr. Daniels was called upon to determine whether Mr. Renkes' stock ownership constituted an "insignificant" financial interest in the coal negotiations between Alaska and the Republic of China.[45]

Daniels concluded that whether a financial interest was "insignificant" should be determined on a case-by-case basis.[46] Daniels also concluded that:

> The overriding purpose of the restrictions in the Ethics Act is to insure that public decisions are made on the basis of sound public policy, not private financial gain. With this in mind, the ultimate issue is whether the potential gain to the public official is significant. Several factors determine whether the potential gain is significant. The first is the nature of the public official's private financial interest. The second is the

[41] This could be a potential gain, or the avoidance of a potential loss.
[42] See, AS 39.52.110 (a)(3). See, Attorney General Opinion 663-97-0074 (September 6, 1996)(concerning zoning issues) and Attorney General Opinion 663-99-0232 (September 28, 1999)(observing that amounts in the range of $3,000.00 would be "substantial" and lesser amounts likely would not).
[43] See, AS 39.52.110 (b)(1).
[44] See, e.g. Attorney General Opinion 663-87-0594 (July 10, 1987)(Finding no conflict due to the lack of any relationship between the public officer's decision and "financial interest" in the "matter").
[45] See, Recommendation of Independent Counsel (April 8, 2005).
[46] We agree. See, e.g., Attorney General Opinion 663-99-0232 (September 23, 1999) ("Service on a State Board That Awards Grants").

> [potential] effect of the public action on the private financial interest. And the third is the likelihood that this potential effect will occur.[47]

We believe this test sets forth a realistic and workable way to determine if a public official's financial interest related to public work should be considered a conflict. We therefore adopt and apply the test stated by Mr. Daniels to determine whether Public Officer's deferred compensation plans are "significant" or "insignificant" under the Act. In adopting this test, we note that the test itself incorporates the Act's requirement that there be a connection between the financial interest at issue and the matter in which the public officer could take or withhold official action. Thus, prior to applying the Daniels test, we must clarify 'the matter" in which Public Officer is taking official action.

X. The "Matter" at Issue Includes the Immediate and Reasonably Foreseeable Consequences of the Natural Gas Pipeline Negotiations, and Excludes Remote or Contingent Possible Occurrences

Here, "the matter" is the ongoing negotiations for a natural gas pipeline under and pursuant to the Alaska Stranded Gas Development Act (ASGDA). "The matter" also includes the immediate and reasonably foreseeable consequences of the negotiations. By way of example this could include: (1) any agreements resulting from the negotiations and selection process (or the lack of such agreement); (2) the initial steps that would occur following execution of the agreement (along with any agreed upon attendant obligations of the parties); and (3) the reasonably foreseeable economic impact of the agreement on the state and companies involved (or excluded, as the case may be).

"The matter" cannot be reasonably considered to include remote, contingent, or speculative possible outcomes. For instance, the complainant speculates that a natural gas pipeline could be the target of a terrorist attack.[48] The possible occurrence of such an event could, according to the complaint, push BP or ConocoPhillips into insolvency.[49] This assertion is immaterial to a consideration of Public Officer's financial interest because "the matter" in which Public Officer is involved cannot be defined so broadly as to include such remote, contingent, or speculative possibilities.

XI. Public Officer Does Not Have a Significant Fianancial Interest in the Gas Pipeline Negotiations

The first prong of the Daniels test is a consideration of the financial interest at issue. for the purposes of the complaint, Public Officer's "financial interest" consists of two deferred compensation plans.

The details of Public Officer's plans are as follows:

---

[47] Recommendation of Independent Counsel, p.15 (April 8, 2005) (emphasis added).
[48] See, Complaint, p.8, n.34.
[49] See, Complaint, p.8.

1. ARCO EDP (Executive Deferral Plan): While Public Officer was employed with ARCO, he deferred monies into the company's deferred compensation plan. Since retiring from ARCO, Public Officer is now receiving monthly payouts from the money he had initially deferred into the plan. The plan began to pay out in 2005, and will continue for 15 years from 2005. The plan will continue to pay out as long as the company is solvent. The holdings within this plan earn a fixed crediting rate which is reset yearly based on the highest of the following rates: (1) 125% of the 120 month rolling average of the 10-year U.S. treasury note rate for the period ending June 30 effective for the plan year commencing thereafter; (2) the Citibank Base Rate i.e. the prime rate, in effect on October 15 of the plan year. These rates are based on factors unrelated to the gas pipeline or its foreseeable effects, and are out of Public Officer's control.[50]

2. Phillips Petroleum KEDCP (Key Executive Deferral Compensation Plan): While Public Officer was employed at Phillips Petroleum, he deferred money into the KEDCP. Public Officer now is having this money paid out to him through 2013. Currently, this money is invested in five broadly diversified mutual funds.[51] The funds are: Vanguard Short-Term Investment-Grade Fund; Vanguard Intermediate –Term Treasury Fund; Vanguard Total Bond Market Index Fund; Vanguard 500 Index Fund; and Vanguard Primecap Fund.

XII. Public Officer's Public Actions Will Not Have Any Legally Cognizable Impact on the Rate of Return of His Deferred Compensation Plans

The second prong of the Daniels test is a consideration of the potential effect of the public action on the private financial interest. The complaint alleges that:

> Public Officer's actions as negotiator may "increase, decrease, or 'just maintain' his one to two million dollar interest in the BP and ConocoPhillips [deferred compensation] plans."[52]

This allegation is not supported by the facts. In his response, Public Officer has provided sufficient information to confirm that the returns on the deferred compensation plans are not related to the success or failure of the gas line negotiations. Public Officer's distributions from the ARCO/BP plan depend on independently set rates of return wholly unrelated to the matter in which Public Officer is taking public action.

The Phillips Petroleum/ConocoPhillips plan depends on the rate of return of mutual funds selected by the employee.[53] Public Officer's investments in the mutual funds are distributed

[50] See, Response, p.3, and March 24 Memorandum, p.3-7; See also Arco Deferred Compensation Materials provided in Public Officer's Supplemental Response.
[51] See, Response, p.3, and March 24 Memorandum, p.8; See also ConocoPhillips Deferred Compensation Materials and account information provided in Public Officer's Supplemental Response.
[52] See Complaint, p.7.

through a number of broadly diversified funds. At any given time there is the possibility that one or more of the funds may hold investments in the stock of BP or ConocoPhillips. However, as observed by the Department of Law in the March 24 Memorandum, an investor's interest in a mutual fund is in the fund itself and does not constitute direct ownership of any particular stock that may be held by the fund. The funds are independently managed by an investment manager who adjusts the fund's investments to meet the fund's particular investment objectives. Moreover, the broadly diversified nature of mutual funds is, by design, intended to dilute the impact of any particular stock's performance on the performance or value of the fund as a whole.

Unlike direct ownership of stock, a mutual fund is distinct in that (1) management and investment decisions are made by an independent person or entity and (2) a mutual fund by its very nature dilutes the impact of any particular holding in the fund. These distinctions have lead other jurisdictions and the federal government to conclude that a public official's derivative interest in a company's financial health due to that official's mutual fund investments does not preclude that official from taking public action affecting the company involved.[54] We agree. We therefore conclude that Public Officer's role in the gas line negotiations does and can not have a legally significant impact on the calculation or value of his deferred compensation payments from ConocoPhillips.

In other words, other than the one exception discussed under the third prong of the Daniels test below, Public Officer's deferred compensation plans are not a financial interest in the matter (the natural gas pipeline negotiations) in which he has been called upon to take official action. Whether the negotiations result in a contract or not is legally irrelevant to the flow of income that Public Officer receives from the plans. The only possible exception to this would be, as the complainant asserts, if the immediate and foreseeable results of the negotiations might cause one or both companies to become insolvent, in which case Public Officer would lose his rights under the deferred compensation plans. We take this point up under the third prong of the Daniels test below.

XIII. There is No Legally Cognizable Risk that Public Officer's Public Actions As Negotiator Could Impact His Deferred Compensation Plans By Causing the Insolvency of the Companies Involved

The final prong of the Daniels test is a consideration of the likelihood that a potential effect will occur. The Complaint alleges as follows:

> If BP or ConocoPhillips becomes insolvent, Public Officer will lose the entire value of his deferred compensation plans. The gas line negotiations could result in BP and/or ConocoPhillips becoming insolvent. [55]

---

[53] See Response, p.5, and March 24 Memorandum, p.7.
[54] See, e.g., Opinion of the Justices No. 368, 716 So, 2d 1149 (Alabama 1998)(Permitting judge to participate in case involving corporation in which Judge's mutual fund had invested); New York City Housing Development Corp. vs. Hart, 796 F.2d 976 (7th Cir. 1986)(same); 1998 Ill. Atty. Gen. Op. 021, 1998 WL 986001 (Ill. A.G. 1998).
[55] See Complaint, p.2.

A supplement to the complaint repeats this allegation.[56] The Complaint suggests that Public Officer's performance of his public duties may be compromised in order to avoid the risk that the participating companies could become insolvent as a result of their participation in the pipeline negotiations. We must examine the possibility or likelihood that these risks could come to pass. In his response, Public Officer notes the BP and ConocoPhillips' share of the estimated cost of the gas line is roughly $5-6 billion, and that both BP and ConocoPhillips have earned profits that exceed that amount by several times in 2004 and the first three quarters of 2005.[57] Public records confirm that in 2004, alone, and in the first three quarters of 2005, alone, BP Group LLC and ConocoPhillips earned profits that far exceed their share of the estimated cost of the gas line based upon total revenues which dwarf the value of the gas line.[58] Public Officer also asserts that even if BP or ConocoPhillips became insolvent, they own such substantial assets that another company would likely acquire them, including their deferred compensation plan debts to Public Officer.[59]

In considering the likelihood that Public Officer's public action could result in the insolvency of BP and/or ConocoPhillips, we are mindful that the parameters of the "matter" in which Public Officer is taking public action is the negotiations related to a proposed natural gas pipeline and their reasonably foreseeable consequences. To find that the insolvency of BP and/or ConocoPhillips is a reasonably foreseeable consequence of the gas line negotiations, we would have to assume that the gas line negotiations will result in a contract acceptable to all participants including BP and ConocoPhillips, that the contract would be approved by the Legislature, and that the immediate and foreseeable results of the negotiations/contract would cause the insolvency of BP and/or ConocoPhillips. These assumptions are not reasonable and are, at best, conjectural. Such speculation does not rise to a level recognized by the Ethics Act. Future occurrences not reasonably foreseeable, such as a terrorist attack on an eventual pipeline, are not part of the "matter" to be considered.[60] We, therefore, find that there is no legal relationship between the "matter" and Public Officer's financial "interest."

XIV. Due to the Lack of a Significant Interest in the Matter, Public Officer is Not Precluded From Participating in the Pipeline Negotiations

The complaint alleges that Public Officer is a "lead negotiator" and that:

[56] Letter from Complainant to Personnel Board dated October 11, 2005.
[57] See Response, p.6.
[58] The ConocoPhillips 10-Q SEC filing dated November 2, 2005 discloses net income of $9.85 billion for the first three quarters of 2005. BP's corporate report dated October 25, 2005, discloses net income of $18.66 billion for the first three quarters of 2005.
[59] See Response, p.2-3.
[60] See Complaint, p.8, n.34.

> Public Officer is involved in the process of selecting which gas line development proposal should be accepted by the state and negotiating a contract with the successful proposer.[61]

In his response, Public Officer has stated that he has an advisory role in the negotiations and that he is not a person with the authority to make negotiation decisions.[62] Public Officer also states that any contract must be approved by the Commissioner of Revenue, the Governor, and the Legislature.[63]

We do not need to resolve the question of how much influence Public Officer has on the matter because we conclude that his "interest" in the matter is insignificant under the Daniels test. Thus, even if Public Officer did exercise significant influence on the matter now or in the future --- which is not obvious given the number of participants and layers of review[64] --- his exercise of influence would not violate the Ethics Act. The Ethics Act therefore does not preclude his participation, in any capacity, in the negotiations.

XV. Conclusion

For the reasons set forth above, the complaint filed August 3, 2005 inclusive of the supplement dated October 11, 2005 is dismissed.

DATED: December ____, 2005
SEDOR, WENDLANDT & WANG, LLC

By: _____
John M. Sedor

[61] See Complaint at p.6, n. 30; See also p.7. (Most of the factual allegations in the letter relate to the ongoing "negotiations" between the State and BP and ConocoPhillips; occasionally, however, the complaint addresses Public Officer's alleged role in the selection process for determining which pipeline development proposal the State will accept.)
[62] See Response, p.5.
[63] AS 43.82.400(a)(1), AS 43.82.435.
[64] See, Response, p.5-6.