

Designated Ethics Supervisor

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Employee's participation
in fishery

Stephen M. White
Assistant Attorney General
Natural Resources Section - Juneau

Pursuant to AS 39.52.240, you have asked whether an employee may act as a licensed crewmember in a particular fishery.

I. Factual Background. Our analysis is based on the following facts that you have provided.

The employee works as a full-time, permanent research analyst. His work with the fisheries only involves calculating the earnings of fishermen. However, other members of the agency are studying a petition that calls for limiting entry into the fishery.

At some point, the employee may be called on to work on this question and on the question of what point system should be adopted to determine who would be issued initial permits for this fishery.

The employee wishes to assist a friend who is a commercial fishermen. He expects that he would go out with his friend several times during the season to help harvest. Although the employee would not be compensated on a wage or crew-share basis, it is likely that he would be able to take home some of the catch. According to him, his friend would likely give him some catch whether or not he went fishing with him. In order to assist his friend, the employee would need to obtain a commercial fishing crewmember's license.

II. Analysis.

Two sections of the Ethics Act deal with conflicts of interest. The first, AS 39.52.120, says that a public officer may not "use, or attempt to use, an official position for personal gain" or "take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest." AS 39.52.120(a) and (b)(4). "Official action" is

defined as "a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer." AS 39.52.960(14).

The second conflict of interest statute, AS 39.52.170, restricts outside employment. It says, "A public employee may not render services to benefit a personal or financial interest or engage in or accept employment outside the agency which the employee serves, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties." AS 39.52.170(a).

Our office has opined that the Ethics Act prohibits not only actual conflicts of interest, but also potential conflicts. 1989 Inf. Op. Att'y Gen. (August 30; 663-90-0073). Thus, the question here is whether the employee could make a decision, take an action, or render services in his employment that would benefit him if he participates in the fishery.

We note that a permit for participating in a limited entry fishery is valuable property. Although entry into the fishery is not yet limited, the agency is now contemplating this action.

In his present duties, the employee is not involved with deciding whether to limit entry into the fishery. We believe that so long as he does not become involved with this decision, there is no conflict between his employment and his participation in that fishery.

If the employee were to become involved with this decision, we believe there would be a conflict. This is because the agency, when it decides who can receive an initial permit for a limited entry fishery, is required to take into account, among other things, a person's past participation in that fishery. AS 16.43.250(a)(2). Whether and to what degree the person is compensated is not a factor. Therefore, once the employee participates in the fishery, he will satisfy, at least to some degree, the past participation requirement, and this may lead to him being awarded a permit if entry into that fishery is later limited. In that case, being involved in the decision on whether to limit entry into this fishery could, because of his past participation, benefit him.

Once the decision has been made to limit entry into a fishery, the agency adopts a complicated point system to rank permit applicants according to their degree of past participation. Points are awarded according to the capacity in which applicants participated in the fishery, the years they participated, the consistency of their participation, the number of years of participation, and other factors. The agency determines how many points can be awarded for each factor and how many total points are needed for the applicant to receive a limited entry permit for that fishery. Points are awarded not only to vessel skippers, but also to persons like the employee who are licensed crewmembers.

Under the same rationale that finds a conflict if the employee becomes involved in the decision on whether to limit entry into the fishery, there is a conflict if he becomes involved in drafting regulations that establish a point system for that fishery. In that case, there would be a potential for the employee to influence the criteria for past participation points in a way that could increase his likelihood of being issued a permit.

III. Conclusion

To prevent a violation of AS 39.52.120 and AS 39.52.170, the agency may allow the employee to participate in the fishery but prohibit him from being involved with deciding whether to limit entry into this fishery and with establishing the criteria for awarding points in it. If he becomes involved with either process, the agency should prohibit his participation in this fishery.

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