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Designated Ethics Supervisor

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Commission chair employed
by vendor; Executive
Act
(AS 39.52)

Ethics

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INTRODUCTION

A request for an advisory opinion under the Executive Branch Ethics Act (AS 39.52) has been referred to me. It was asked whether the chair of a state commission may encounter prohibited conflicts of interest while working as a trainer in a field that is related to the functions of the commission. The circumstances in which a conflict may arise involve some situations where the chair of the commission appears as a trainer in his professional capacity. There also is a concern if the commission considers awarding a grant or contact to the commission chair's employer.

This memorandum will address the following questions:

1. Does a conflict arise when a commission chair appears before a group as the commission chair and subsequently provides his professional business card or a brochure that promotes his employer's training sessions in the same subject area?

2. Does a conflict arise when a private business has encountered the commission chair in his state-appointed capacity, and then is solicited through a mailed brochure to hire the chair as a trainer in his private capacity, if the brochure does not identify the trainer as the commission chair?

3. Does a conflict arise when the commission considers hiring a trainer to make a presentation and the commission chair's employer is one of the vendors considered for the training contract?

For the reasons set out below, we conclude that no conflict of interest arises when a professional brochure or business card is

printing

Redated for

Designated Ethics Supervisor

January 1, 1993
December 18, 1992
Page 2

Our file: 663-93-0113

distributed, but that a serious conflict could arise if the commission is called upon to take action upon a grant or contract award that may go to the commission chair's employer.

FACTUAL BACKGROUND

A person appointed as chair of a state commission has recently become employed as a trainer and consultant with a local organization that provides services in the same field. In his capacity as an employee of the organization, he provides training in the area that is the concern of the commission. In his capacity as the commission chair, he also may provide similar training. On occasion, he may make an appearance at a meeting representing the state commission; he may then distribute his employer's brochures, which advertise the organization's training services. The brochures identify this person as a trainer, but do not identify him as the commission chair. Though he may refer to his chairmanship position as a credential in conversation, he does not use his position on the commission as an endorsement.

You report that he has done an excellent job as chair of the commission and that he is an excellent trainer. There are very few individuals with this person's skills in the state of Alaska. You state that presently the commission chair's employer is not receiving funds from the commission to provide training services.

APPLICABLE LAW

The Executive Ethics Act is intended to ensure that public officers will not act upon personal or financial interest in performing their public responsibilities. AS 39.52.010. However, it also acknowledges that a public officer should be free to pursue personal and financial interests, as long as they do not interfere or conflict with the person's public responsibilities. AS 39.52.110 provides:

(a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public

printing

Designated Ethics Supervisor

Our file: 663-93-0113

Redated for

January 1, 1993

December 18, 1992

Page 3

duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that

(1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;

(2) people who serve as public officers retain their rights to interests of a personal or financial nature; and

(3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.

(c) The attorney general, designated supervisors, hearing officers, and the personnel board must be guided by this section when issuing opinions and reaching decisions.

This provision recognizes that a public official may pursue his or her own business interests as long as there is no substantial and material impropriety that may result in personal gain.

printing

Redated for

Designated Ethics Supervisor

January 1, 1993
December 18, 1992
Page 4

Our file: 663-93-0113

AS 39.52.120 more specifically restricts the actions of public officials to prohibit the use of an official position to secure unwarranted benefits or treatment. Specifically, under AS 39.52.120(b)(1), a public officer may not "seek other employment or contracts through the use or attempted use of official position."

Furthermore, AS 39.52.120(b)(4) prohibits personal participation in a public matter if the public officer has a "personal or financial interest that may affect the matter." Financial interest is defined at AS 39.52.960(9) to mean:

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

(B) holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management;

"Source of income" is defined at AS 39.52.960(22) to include compensation received from an employer. When a public officer may be called upon to make a decision regarding a state grant or contract, he or she may not stand to benefit financially from that state grant or contract.

AS 39.52.150(a) addresses influence in the awarding of grants and contracts, and states:

(a) A public officer, or an immediate family member, may not attempt to acquire, receive, apply for, be a party to, or have a personal or financial interest in a state grant, contract, lease, or loan if the public officer may take or withhold official action that affects the award,

printing

Redated for

Designated Ethics Supervisor

January 1, 1993
December 18, 1992
Page 5

Our file: 663-93-0113

execution, or administration of the state grants,
contract, lease, or loan.

DISCUSSION

You have described two circumstances in which cards or brochures that do not specifically identify the person as a state commission chair may be distributed to promote the private business interests of the commission chair. The first arises when the commission chair makes a public presentation on behalf of the commission and then distributes his cards or brochures to individuals who express additional interest. The second circumstance may occur when a private entity that has had some dealings with the commission receives a brochure in the mail that identifies the person, whom they also know to be the commission chair, as a trainer. In each case, it would be likely that the person receiving the information would be able to readily identify that the organization's trainer was also the commission chair, even though the brochures do not explicitly state that fact.

It is appropriate that the commission chair's personal business cards and his organization's brochures not identify him as the commission chair, since the use of this identification could easily mislead people into believing it was an endorsement.

It is also appropriate that when this person makes an appearance at a meeting in his capacity as commission chair, he not utilize that opportunity to promote his personal business. On the other hand, if he is attending a meeting that would be open to other vendors and has brochures available, in the same way that any other training vendor might have brochures available, it does not necessarily pose a conflict. Similarly, the distribution of brochures at a meeting which he is attending in his private capacity, to individuals who also happen to know that he is the commission chair, does not pose a problem. Nor does the distribution of brochures by mail to entities that are also aware of his position as commission chair constitute a misuse of his position.

The Executive Branch Ethics Act speaks to actual conflicts of interest, and not merely the appearance of conflict.

A problem arises if, at a public meeting where he is appearing as the commission chair, this person is approached for a business referral and in response, the commission chair then promotes his

printing

Redated for

Designated Ethics Supervisor

January 1, 1993
December 18, 1992
Page 6

Our file: 663-93-0113

private business interests. More than just an appearance of improper conduct, he would in that instance be using his official position at that meeting as an opportunity to promote his personal financial interests. On the other hand, the general availability of information about the training provided by his employer at such a meeting does not pose the same problem.

A conflict arises, however, if the commission may take action to provide funding, in the form of a grant or a contract, for a program that may result in the employment of the commission chair as a training presenter. AS 39.52.120(b)(4) prohibits a public officer from taking or withholding official action in order to affect a matter in which the officer holds a financial interest. Additionally, under AS 39.52.150, a public officer may not attempt to receive a state grant or contract if that person may take or withhold official action affecting the award.

Voting on a contract award or grant award that may go to his employer is clearly taking "official action" on the matter. At a minimum, the commission chair must refrain from voting, as well as participating in the discussion and interacting with commission members, concerning a grant or contract proposal that may involve his employer.

However, it probably is not sufficient for the chair to merely abstain from taking part in any discussion or decisions regarding grant awards or contracts that involve his employer. Simply not voting on one particular decision ignores the impact of the interaction between members of a commission. In a situation that involved the potential employment of a board member as executive director of the board, this office opined:

A board member/applicant may contend that if he or she did not participate in the hiring discussion or decision, there would be no conflict. Then, if he or she were not chosen as executive director, the board member/applicant could continue as a board member. Such a plan, however, ignores the reality of the collegial atmosphere of board participation. Non-applicant board members may well support or withhold support from a board member/applicant based on the influence actively or passively brought to bear by

printing

Redated for

Designated Ethics Supervisor

January 1, 1993
December 18, 1992
Page 7

Our file: 663-93-0113

the board member/applicant. The employment decision could easily be tainted by considerations other than the applicant's employment qualifications.

1988 Inf. Att'y Gen Op at 2 (Jan 20; 663-88-0297).

A decision that involves the potential employment of a commission member gives rise to a serious potential for conflict and the ongoing involvement of the commission member in future decisions may have an improper influence on the voting of other commission members.

In another decision, this office determined that a board member who applied for employment that was funded by a grant from the member's board would have a difficult time avoiding a conflict under the Executive Branch Ethics Act if the person remained a board member. (See 1989 Inf. Att'y Gen Op. Jan. 1; 663-89-0017).

This opinion, in part, concluded that simply refraining from voting on the matter concerning the person's own employment would not suffice; the ongoing board participation posed the problem.
Id.

In the present instance, any grant or contract for training that potentially could be awarded to his employer could possibly result in a direct financial benefit to the commission chair. Therefore, if it may be anticipated that the chair's employer will seek grants or training contracts from the state commission, the commission chair would have to resign to avoid a conflict.

CONCLUSION

Our review of the facts presented in this case leads us to the conclusion that the commission chair may continue in that capacity without encountering problems under the Executive Branch Ethics Act, as long as his employer does not seek a grant or contract from the commission that would result in a financial award being made to the employer. Furthermore, the committee chair should not distribute his business cards and brochures in response to inquiries from the public when he is appearing on his

printing

Designated Ethics Supervisor

Our file: 663-93-0113

Redated for

January 1, 1993

December 18, 1992

Page 8

capacity as committee chair. However, the commission chair and his employer may make available cards and brochures that specify that the person is a trainer employed by the organization as long as he is not identified as the commission chair and as long as this information is generally available at a meeting and may be provided by other training vendors.

KFB: jh