

Designated Ethics Supervisor

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Board member's potential conflict of interest arising from personal interests in a federal contract - Executive Branch Ethics Act (AS 39.52)

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Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act, (hereinafter "Ethics Act" or the "Act"), you have requested advice concerning a possible conflict of interest posed by a board member's interests and activities in a certain federal contract between the Department of Interior's National Park Service and a Native association, of which the board member is the president. In accordance with AS 39.52.240(b), we provided verbal advice to you on October 29, 1992.¹ The written opinion herein confirms the advice given at that time and clarifies additional duties imposed by the Ethics Act on members of the board.

BACKGROUND

The following is our understanding of the facts, based on information provided in a letter by the chair of the board dated October 8, 1992, and in a fax from the department dated October 13, 1992.

Presently, A is a member of a board serving as a Vice Chair. A is also a member of a tribal council of his Native village and is president of X Native Association (hereinafter "X Native Association").² A has stated that he has extensive experience and familiarity with the subsistence hunting and fishing practices in the Y region. A's experience in this area is derived in part from his own private interests as a subsistence hunter and fisherman in the Y region, and from his experiences as a representative acting on behalf of his village and the Native Association. Prior to serving on the board, A has represented both his village and the Native Association in numerous hearings

¹ Assistant Attorney General Elizabeth J. Kerttula provided the oral advice confirmed by this opinion.

² The Native Association is a nonprofit Native organization authorized by and representing eight village councils.

before the board as a proponent of proposals relating to the subsistence rights of the Native groups in the Y region.³ Additionally, recently, while serving on the board pending confirmation by the legislature, A participated in litigation in support of his village against the State of Alaska and specifically the board on matters relating to the subsistence rights of his village.⁴ This litigation is pending before the Alaska Supreme Court.

In addition to A's extensive representation of his native village and the Native Association before and against the board on matters relating to the rights of native subsistence users in Y region, as president of the Native Association, A recently executed a contract on behalf of Native Association with the Department of Interior's National Park Service Alaska Region to conduct a research study of customary and traditional subsistence use patterns by residents living adjacent to L National Park (hereinafter the "Native Association Contract"). The Native Association Contract is dated September 25, 1992.⁵

Article II of the Native Association Contract, "Scope of Work," identifies two major objectives of the research work to be performed under the contract that are of relevance here. In part, Article II states:

Potential deliverables that may result from Native Association's proposal:

³ The boundaries of the Y region are set forth in the Alaska Administrative Code.

⁴ The foregoing background history concerning A comes directly from an affidavit by him dated April 27, 1992, that he submitted in support of his village's litigation against the State of Alaska and the board. In the lawsuit, his village challenged the board's regulations for moose hunting in Y region for failing to adhere to the state's subsistence law requirements. Ruling in his village's favor, Judge Z entered a final judgment on July 28, 1992, invalidating the board's regulations for moose hunting in Y region. The State of Alaska has appealed Judge Z's judgment to the Alaska Supreme Court, and the Court has stayed the judgment pending resolution of the appeal.

⁵ Pursuant to Article III of the Native Association Contract, the duration of the contract is one year commencing with the signature date of September 25, 1992, unless terminated earlier or otherwise amended.

1. Identification of those individuals or families that have a direct dependence on park/preserve subsistence resources;
2. Submission of applications for subsistence eligibility permits pursuant to Section 13.44, Title 36 Code of Federal Regulations, on behalf of individuals or families to the Superintendent for evaluation for permitting subsistence uses within L National Park

According to these objectives, a primary use of the Native Association studies will be to assist subsistence users living in areas adjacent to L National Park, an area that covers the Y region, in obtaining federal subsistence permits.

Based on A's involvement and interests in the Native Association Contract, you requested from this office advice in accordance with AS 39.52.240 regarding whether A might have a conflict of interest should he continue to participate as a member of the board on matters affecting the Y region. Accordingly, we advised you verbally on October 29, 1992 that it would be prudent to excuse A from participating as a board member on matters affecting the Y region until further determination could be made.

ISSUES

Based on the foregoing facts and in response to the specific requests you made to us on October 8 and 13, 1992, and additional concerns you have expressed to us since regarding application of the Act's disclosure requirements to members of the board, we address the following legal issues:

1. Whether A's personal interests in the Native Association Contract resulting from his involvement as president of the Native Association give rise to an actual or potential conflict of interest or other violation of the Ethics Act that justifies the decision to excuse A from participating as a member of the board on all management matters affecting the Y region.
2. Whether members of the board are required before taking official action to come forward upon their own initiative and disclose to the chairperson (the designated ethics supervisor) all personal and professional interests and activities that potentially could give rise to a conflict of

interest concerning a particular subject matter before the board.

3. Whether A's possession of an Assistant O license by itself gives rise to a potential conflict of interest violation for which A should be excused from participating as a member of the board on matters affecting the Y region.

ANALYSIS

I. CONFLICT OF INTEREST RULES AND OTHER PROHIBITIONS OF RELEVANCE UNDER THE ETHICS ACT

The board is an entity created by statute whose seven members are appointed by the governor subject to confirmation by a majority of the members of the legislature in joint session. The Ethics Act states that except as specifically provided it "applies to all public officers within executive-branch agencies, including members of boards or commissions." AS 39.52.910(a). "Board or commission" is defined to include any "board, commission, authority, or board of directors of a public or quasi-public corporation, established by statute in the executive branch, but excluding the Alaska Railroad." AS 39.52.960(4). Clearly, the board is "established by statute within the executive branch" and therefore its members are public officers subject to the provisions of the Act.

As public officers within the executive branch, the members of the board must abide by the strict "high moral and ethical standards" required by the Act. AS 39.52.010(a). In this regard, the Ethics Act sets forth certain standards concerning conflicts of interest that may infect a public officer's ability to faithfully and impartially discharge the officer's public trust responsibilities.⁶ While AS 39.52.110(a)(1) recognizes that public officers "are drawn from society and, therefore cannot and should not be without personal and financial interests," AS 39.52.110(a)(3) requires that public officers "distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material."

To provide some guidance in this difficult area of demarcation between conflicts that are "minor" and "inconsequential" and those that are "substantial" and "material," the Act

⁶ The Act affirms that "each public officer holds office as a public trust." AS 39.52.110(a).

provides:

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.

AS 39.52.110(b).

Where there exists the possibility of a conflict of interest and therefore a potential violation of AS 39.52.110, the Act requires that the public officer

(1) refrain from taking any official action relating to the matter until a determination is made under this section; and,

(2) immediately disclose the matter in writing to the designated supervisor.

AS 39.52.210(a).

In determining what personal interests give rise to a conflict of interest violation of the Act, we also are aware that members of the board receive their appointments from the governor because of their interests and experiences in matters coming before the board, and therefore such individuals are bound to have some personal interests in board matters. Nonetheless, members of the board, like all public officers, are bound foremost by the Act's general mandate to abide by "high moral and ethical standards," and therefore board members should refrain from taking official action on matters whenever there exists the potential for a conflict of interest until a further determination is made by the designated ethics supervisor.⁷ AS 39.52.210(b); 1991 Inf. Op. Att'y Gen. (Aug. 14; 663-91-0323); 1989 Inf. Op. Att'y Gen. (Aug. 30; 663-90-0073).

⁷ "Official action" includes any "recommendation, decision, approval, disapproval, vote or other similar action, including inaction, by a public officer." AS 39.52.960(14).

In addition to the foregoing conflict-of-interest rules, the Ethics Act sets forth additional prohibitions that are relevant to our discussion of A's situation. AS 39.52.120(a) prohibits a public officer from using the officer's position for personal gain or to secure unwarranted benefits for any person.⁸

Furthermore, 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 public officer has a personal or financial interest."⁹

II. A'S INTERESTS AND INVOLVEMENT IN THE NATIVE ASSOCIATION CONTRACT GIVES A A SUBSTANTIAL AND MATERIAL PERSONAL INTEREST IN Y REGION'S MANAGEMENT MATTERS THAT AFFECT SUBSISTENCE USERS IN Y

Based on A's involvement in the Native Association as its president and his execution of the Native Association Contract on its behalf, we believe that he possesses a substantial and material personal interest in the Y region's management matters affecting subsistence users in Y that, at a minimum, could give rise to a potential conflict of interest with his public trust duties to impartially serve as a board member. Accordingly, we advise you that it would be prudent to excuse A from participating as a board member in any Y management matter that could actually or potentially result in benefits being given to subsistence users over other user groups in Y.

⁸ "Gain" includes any "actual or anticipated gain, benefit, profit, or compensation." AS 39.52.960(10). "Benefit" is broadly defined under the Act to include "anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value." AS 39.52.960(3).

⁹ "Personal interest" includes any "interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership in any organization, whether fraternal, nonprofit, for profit, charitable or political, from which or as a result of which, a person or organization receives a benefit." AS 39.52.960(18). "Financial interest" includes not only economic gain, but also "holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management." AS 39.52.960(9)(b).

The interests of A in the Native Association, both as its president and as a member of his tribal council (which is a constituent member of the Native Association) give him a substantial personal interest in the benefits to be derived from as well as the obligations to be performed by the Native Association under the Native Association Contract. The interests and obligations of the Native Association and, derivatively, those of A in the Native Association Contract extend beyond the mere pursuit of academic studies. Under the Native Association Contract, the Native Association is to perform studies and analysis in the Y region for the purpose of assisting the Native members in the Y region obtain federal subsistence permits. Based on A's involvement in and relationship to the Native Association and the Native Association Contract, his personal interests therein transcend his own private concerns about subsistence matters in the Y region because they also include those of the Native Association and its constituent members whom he actively represents on such matters.¹⁰ As such, we believe that A possesses a substantial and material personal interest in the subsistence rights of all the Native Association constituent members in the Y region.

Matters attending the rights of subsistence users in Y are important matters that the board regularly addresses. 5 AAC 99.010. Where the board deliberates on proposals that actually or potentially advance the rights of subsistence users over other user groups in Y, we believe that A's participation as a board member will put him in a conflict between his interests and responsibilities to the Native Association and its constituents (Native subsistence users in Y) and his public trust responsibilities to discharge impartially his duties as a member of the board on behalf of all user groups. In such instances, it would be extremely problematic for A to remain impartial and unbiased,

¹⁰ In addition to A's personal interests in advancing and representing the Native members' interests on subsistence matters in the Y region through his position and involvement with the Native Association, it may well be that A additionally stands to financially benefit in his efforts to promote subsistence interests. For example, it may be that the more successful he is in advancing the subsistence interests of the Native Association and its constituents in the Y region, the more he will benefit financially as president of the Native Association; i.e., bonus, salary increases, or job security based on job performance, or possibly additional subsistence study contracts for the Native Association. At this point, we lack the information to determine what financial rewards or benefits A may reap by advancing the interests of the Native Association the Y region.

or to refrain from exercising any undue influence or otherwise misuse his official position on behalf of the Native Association groups whom he actively represents, while serving as a member of the board. AS 39.52.120(a) and (b)(4); 1989 Inf. Op. Att'y Gen. (Jan. 1; 663-89-0017) (a board member's employment with an organization that received funding from the state could give rise to violation of the Ethics Act where the board had review authority over matters affecting the organization); 1988 Inf. Op. Att'y Gen. (Oct. 27; 663-89-0178) (approval of a board member's participation in a professional services contract because the private organization had only a general interest in the board matters); 1988 Inf. Op. Att'y Gen. (Apr. 21; 663-88-0429) (approval of a board member's private employment so long as he abstained from participating on board matters relating to his private employer).

No doubt, at some point in the near future, either the Native Association or its constituent members will seek to influence the board on subsistence matters in Y very likely using the same data being collected under the Native Association Contract. Certainly in that situation, A would have an immediate and glaring conflict of interest in serving on the board on matters relating to the Native Association and its constituent members while serving as the Native Association's President. AS 39.52.160(a). We do not believe that we must await the time when the Native Association or its constituent members press their interests before the board before we are able to discern A's potential conflict of interest.¹¹

Where the board deliberates on subsistence proposals for Y, A's conflict of interest is most clear. However, where the board deliberates on nonsubsistence proposals for Y, the chair of the board then will have to determine whether A's active interests on behalf of the Native Association amount to an actual or potential conflict of interest. If the nonsubsistence proposal is one that, if taken or not taken, could actually or potentially give advantage to subsistence users over other user groups in Y, then it may be prudent to excuse A from participating as a board member even on such nonsubsistence matters.¹²

¹¹ In fact, A's substantial and material personal interests in assisting subsistence users in the Y region is amply demonstrated by his present involvement in his village's litigation against the board.

¹² There may be some situations where the board may consider taking action that could benefit all user groups in the Y region; i.e., the adoption of a conservation regulation that benefits all user groups. In this type of situation, where A is in no position to exert his influence on the board to benefit subsist-

Even if A were to disassociate himself from the Native Association and the Native Association Contract, there still might be a conflict of interest problem posed in situations where the Native Association or its constituents press subsistence proposals before the board.¹³ However, we cannot predict now what conflicts might arise in those situations.

III. A, AS A MEMBER OF THE BOARD, IS REQUIRED TO FULLY AND FORTH-RIGHTLY DISCLOSE TO THE DESIGNATED ETHICS SUPERVISOR, BEFORE TAKING OFFICIAL ACTION AS A PUBLIC OFFICER, ANY INTEREST OR ACTIVITY THAT COULD GIVE RISE TO EITHER AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST

In addition to the foregoing analysis, which clarifies how important it is for public officers to inform their designated ethics supervisor of any potential conflicts of interest they may have, the Ethics Act plainly states:

In addition to other provisions of this section, a public officer who is a member of [the board] may not act on a matter before the board if the public officer has not disclosed in the manner set out in AS 39.52.220 all personal or financial interests

(..continued)

ence users over other user groups in Y, we believe that he may participate as a board member.

¹³ Proposed regulations by the Department of Law, recently published for comment, address the situation where a violation of the Ethics Act might arise should a public officer, who previously held a position of responsibility in a large organization, takes official action on a matter in which his organization is involved and in which he was involved while working for the organization. In pertinent part, the proposed regulations state:

If the public officer has held a position of responsibility in a large organization within the two years preceding the officer's action on a matter in an official state capacity, the officer's action may be an ethical violation if, at the time the officer held the position, the organization was involved in the same matter pending before the administrative unit that the officer serves.

3 Alaska Admin. J. 1993, (to be codified at 9 AAC 52.110(c) (proposed Dec. 22, 1992)).

in a business or organization relating to [G]
resources.

The failure to abide by the Act's disclosure requirements imposed upon members of the board would amount to a violation of the Act for which a complaint could be filed against the offending board member. The Ethics Act would be seriously undermined unless public officers upon their own initiative diligently and completely informed their designated supervisors of any potential conflict of interest before taking official action on a particular matter before the board. AS 39.52.210(a)(1) and (2).

**IV. A'S POSSESSION OF AN ASSISTANT O LICENSE BY ITSELF DOES NOT
APPEAR TO GIVE RISE TO A CONFLICT OF INTEREST VIOLATION
UNDER THE ETHICS ACT**

As discussed earlier, whether a public officer's personal or financial interests amount to a "minor" and "inconsequential" conflict or one that is "substantial" and "material" is a question of degree. We cannot conclude that A's possession of the Assistant O license constitutes a "substantial" and "material" conflict of interest unless we learn more about the nature and extent of A's business.

MMW:tg