

MEMORANDUM

State of Alaska Department of Law

TO: Commissioners

DATE: September 6, 2006

FILE NO.: 661-07-0010

THRU: Linda Perez, Director
Division of Administrative Services
Office of the Governor

TEL. NO.: 269-5216

FAX: 279-2834

FROM: Judy Bockmon
Assistant Attorney General
Opinions, Appeals, & Ethics Section

SUBJECT: Ethics Act Considerations for
Commissioners: Issues When
Seeking Other Employment and
Post-State Employment
Restrictions

This memorandum is intended to provide you with general advice about restrictions and other considerations under the Executive Branch Ethics Act that arise when a commissioner seeks other employment while still in State service or that apply to a former commissioner for a period of time after leaving State service. As addressed further below, advice regarding specific post-state employment situations may be requested from your designated ethics supervisor or from the Attorney General.

I. ETHICS ISSUES WHEN SEEKING OTHER EMPLOYMENT

A. Prohibition on the Use or Attempted Use of Official Position for Personal Gain or to Seek Other Employment

The Ethics Act prohibits a public official from using his or her official position for personal gain or to seek other employment or contracts.¹ However, in past opinions we concluded that

[s]kills, knowledge, experiences, and contacts gained while serving in government cannot be totally ignored or made unusable when seeking employment after leaving government. The representatives drawn from society will often return, and to place an unreasonable restriction on the ability to return would hurt the public interest by discouraging potential state officials from accepting public employment. State employment can be a valuable educational experience and the potential personal growth while serving the state

¹ AS 39.52.120(a); AS 39.52.120(b)(1).

is a prime recruitment factor for luring qualified private citizens to state employment. To totally eliminate the value of that experience for two years after state service would significantly deter those contemplating state service.

...

Of course, regardless of whether employment is in the public or private sector, the expertise and knowledge one gains in a job are transferable skills that employees rightfully take with them and that enable the employees to seek more responsible positions.²

Therefore, seeking post-state employment while still in state employment is not, in and of itself, an "attempt to use official position for personal gain" in violation of AS 39.52.120(a) or "seeking other employment or contracts through the use or attempted use of official position" in violation of AS 39.52.120(b)(1).

In your state position, you may have interacted with many persons and companies in Alaska and elsewhere and may continue to do so. Merely seeking employment with an entity with which one interacts as a state employee without any action that could constitute "use" of one's official position in that effort does not violate the Ethics Act. This conclusion is supported by testimony before the House Finance Committee on the section of the ethics bill that was enacted as AS 39.52.120:

For example, before the Senate State Affairs Committee on April 3, 1986, Assistant Attorney General Susan Cox testified:

[T]he intent of [AS 39.52.120(b)(1)] ... seeking other employment or contracts through the use of your official position would be where you made a deal that, you know, I'll send a lot of sweet contracts your way while I am the contracting officer in this department and when I am ready to quit you'll hire me.

Later, before the May 12, 1986, meeting of the House Finance Committee, Randall Burns, special assistant to the Attorney General testified:

² 1986 Inf. Op. Att'y Gen. (Sept. 24; 663-87-0109), 1986 WL 81207 at *3 (Alaska A.G.), quoting the sectional analysis of the bill enacted as AS 39.52.180.

[W]e state that a public officer may not use or attempt to use an official position for personal gain ... [a]nd then there's a list of prohibitions. One that you would not seek employment or contracts through the use of your job. A simple example would be if you were a contracting officer you would be prohibited from saying I'll get this contract through this department for you but you make sure that I have this job when I leave state service. Things of that nature.³

Thus, the legislature did not intend AS 39.52.120(a) and .120(b)(1) to categorically prohibit state employees from seeking jobs with companies with which they interact while in state employment. Rather, the key is whether the employee uses or attempts to use his state position in seeking other employment.

If you talk to a firm or company about employment, you may explain your experience, skills and knowledge, including that which you have gained in your state service. You are allowed to put the "transferable skills that employees rightfully take with them" to use for a new employer in the private sector.⁴ However, you should not do or say anything in making such contacts that could constitute or imply that you are offering, or have the ability to offer, grant or ensure, state benefits or action that you may have influence over as a public official in return for promised employment. That type of action is a use or attempted use of official position for personal gain and is prohibited under the Ethics Act.

In discussing employment with a prospective employer, you should also avoid implying that, if hired, you would be able to influence matters and issues the company may have with the state because of your personal contacts with state officials. Statements to that effect may be viewed as an attempt to use your official position to obtain the job.

On the other hand, once you leave state service, the Ethics Act does not bar you from acting on behalf of your new employer to discuss matters with state officials with whom you served, so long as you are not otherwise precluded from doing so under the Ethics Act restrictions on post-state employment regarding certain matters and lobbying activities discussed below.

³ 1990 Inf. Op. Att'y Gen. (April 23; 663-90-0378), 1990 WL 517997 (Alaska A.G.) at *2.

⁴ 1986 Inf. Op., 1986 WL 81207 at *3.

B. Restrictions on Use of State Equipment

A public official may not "use state time, property, equipment, or other facilities to benefit personal or financial interests."⁵ Given this provision, we recommend that, if you decide to seek other employment, you avoid using state time, state telephones, state facsimile machines, state e-mail, or other state resources in that effort.

Nevertheless, AS 39.52.110 generally requires a public official's actions to cross a "significance threshold" in order for a violation to be actionable. It requires designated ethics supervisors and the attorney general to distinguish between "minor and inconsequential conflicts" and those that are "substantial and material."⁶ While *de minimis* use of state equipment for personal or financial benefit is generally not actionable, it should be avoided. However, you may make limited use of state telephones or state e-mail, for example, with the prior approval of your designated ethics supervisor.⁷

C. Notice of Potential Violation

If you wish to enter into employment discussions with a firm or company that conducts business with the state and you could be in a position to take official action with respect to that firm or company while you remain in state service, you should immediately submit a "Notification of Potential Violation" to your designated ethics supervisor as required by AS 39.52.210. You may also submit a notification during your remaining state service, if you encounter any other situation where you are not sure of your ethical obligations. This form is available on the Attorney General's Ethics webpage.

The purpose of the notice requirement is to permit your ethics supervisor to determine whether a violation could or will exist and recommend preventative action to you to address the situation and thereby avoid an impermissible conflict or other violation of the Ethics Act. This notice of potential violation process does not mean that you

⁵ AS 39.52.120(b)(3).

⁶ AS 39.52.110(a)(3); AS 39.52.110(c)(requiring ethics supervisors and the attorney general to be guided by section .110 when interpreting and enforcing the Ethics Act).

⁷ 9 AAC 52.050.

cannot ultimately discuss or accept employment with the subject entity. Rather, it will permit, for example, reassignment of duties so that any official action on the matter does not come to you for decision, review, consideration, or supervision.

In the event that you submit a Notification of Potential Violation to your ethics supervisor, you must refrain from taking any official action relating to the matter disclosed until your ethics supervisor makes a determination.⁸

II. POST-STATE EMPLOYMENT ETHICS RESTRICTIONS

A. Two-Year Restriction on Participation in Certain Matters

Under AS 39.52.180(a), a two-year prohibition applies to certain post-state employment activities. For two years after leaving state service, a former state officer may not “represent, advise or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action.” The Department of Law reads this provision consistent with the legislature’s intent that AS 39.52.180 be narrowly applied.⁹ Thus, subsection 180(a) prohibits an activity during the two-year post-state employment period only if the activity meets each of the elements of that subsection.

The Ethics Act and related regulations define most of the terms used in AS 39.52.180(a). A “public officer” includes any public employee in the classified, partially exempt, or exempt service.¹⁰ “Person” includes a business or organization.¹¹ “Compensation” means money or other economic benefit received in return for services rendered to another.¹² “Administrative unit” means “a branch, bureau, center, committee,

⁸ AS 39.52.210(a)(1)

⁹ 1997 Inf. Op. Att’y Gen. at 3 (Apr. 30; 663-97-0328) (citation omitted).

¹⁰ AS 39.52.960(20), (21).

¹¹ AS 39.52.960(17).

¹² AS 39.52.960(7).

division, fund, office, program, section, or any other subdivision of an agency.”¹³ “Agency” includes an executive branch department.¹⁴

“Matter” includes “a case, proceeding, application, contract, or determination.” It “does not include the proposal or consideration of legislative bills, resolutions and constitutional amendments, or other legislative measures; or the proposal, consideration, or adoption of administrative regulations.” General formulation of policy also does not constitute a “matter” for purposes of post-state employment restrictions.¹⁵

Whether participation in a matter is “personal and substantial” depends on the circumstances of each case. Routine processing of documents, general supervision of employees without direct involvement in a matter, and ministerial functions not involving the merits of a matter do not constitute “personal and substantial” participation.¹⁶ “Official action” means “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.”¹⁷ As a former agency head, you are precluded from further involvement in matters in which you had substantial actual involvement and took official action. The bar does not extend to all action by your former agency simply because you were the agency head.

Please note that even if a post-state employment activity satisfies all of the elements for being prohibited, there are two exceptions to this prohibition. First, a state agency may contract with a former public officer to act on a matter on behalf of the state.¹⁸ Second, the head of the agency may waive the prohibition if he or she determines in writing that the former public officer’s representation is “not adverse to the public interest” and the waiver is approved by the attorney general.¹⁹

¹³ AS 39.52.960(1).

¹⁴ AS 39.52.960(2).

¹⁵ AS 39.52.180(a); 9 AAC 52.100(a).

¹⁶ 9 AAC 52.100(b).

¹⁷ AS 39.52.960(14).

¹⁸ AS 39.52.180(b).

¹⁹ AS 39.52.180(c).

B. One-Year Restriction on Lobbying

An additional post-state employment restriction applies to a former governor, lieutenant governor and head of a principal department in the executive branch. Under AS 39.52.180(d), these former state officers “may not engage in activity as a lobbyist under AS 24.45 for a period of one year after leaving service.”

Under the Alaska statutes governing lobbying activity, AS 24.45, “lobbyist” means a person who (1) engages in the business of influencing legislative or administrative action, or (2) “receives wages or other economic consideration, including reimbursement of travel and living expenses, to communicate directly with any public official . . . for the express purpose of influencing legislative or administrative action . . . and . . . during more than 40 hours in any 30-day period in one calendar year.”²⁰ “[I]nfluencing legislative or administrative action’ means to communicate directly for the purpose of introducing, promoting, advocating, supporting, modifying, opposing, or delaying or seeking to do the same with respect to any legislative or administrative action.”²¹ “[C]ommunicate directly’ means to speak with a legislator, legislative employee, or public official . . . by telephone[,] by two-way electronic communication[,] or in person.”²² The one-year prohibition applies to lobbying of the Alaska State Legislature **and** agencies of the executive branch of the State of Alaska.²³

The lobbying prohibition does not, however, bar a former commissioner from serving as a “volunteer lobbyist described in AS 24.45.161(a)(1).²⁴ That statute defines a “volunteer lobbyist” as an individual “who lobbies without payment of compensation or other consideration and makes no disbursement or expenditure for or on behalf of a public official to influence legislative or administrative action other than to pay the individual’s reasonable personal travel and living expenses” and “who limits lobbying activities to appearances before public sessions of the legislature, or its committees or subcommittees, or to public hearings or other public proceedings of state agencies.”

²⁰ AS 24.45.171(10).

²¹ AS 24.45.171(8).

²² AS 24.45.171(4).

²³ *See* AS 24.45.171(1), (9), and (10).

²⁴ AS 39.52.180(d).

The lobbying prohibition also does not preclude you from serving as a “representational lobbyist.”²⁵ This type of lobbyist is one “who attempts to influence legislative or administrative action, and receives only reimbursement for his [or her] travel and personal living expenses,” but “is not employed by the person or group on whose behalf he [or she] is lobbying and receives no salary, fee, retainer, or any economic consideration whatsoever, other than reimbursement of travel and personal living expenses, for his [or her] services as a lobbyist.”²⁶

C. Prohibition on Use or Disclosure of Undisseminated or Confidential Information

Further Ethics Act restrictions that may affect post-state employment involve certain information obtained during your state service. These same restrictions apply to you now as a current public officer.

You are precluded from disclosing or using information gained in the course of, or by reason of, your official duties that could in any way result in the receipt of any benefit for you or an immediate family member, “if the information has not also been disseminated to the public.”²⁷ For purposes of this restriction, “information has been disseminated to the public if it has been published through newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a non-confidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission.”²⁸

Furthermore, you “may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.”²⁹

Unlike the restrictions on lobbying and post-state employment, these restrictions on disclosure of undisseminated or confidential information do **not** have any time limit.

²⁵ *Id.*

²⁶ 2 AAC 50.511(a).

²⁷ AS 39.52.140(a).

²⁸ 9 AAC 52.070.

²⁹ AS 39.52.140(b).

III. ADVICE ON ETHICS MATTERS

A. From Designated Ethics Supervisor While In State Service

As discussed above, if you are involved in a matter that may result in a violation of the Ethics Act, you must disclose the matter to your designated ethics supervisor and the attorney general. You must also refrain from taking any official action regarding the matter until your designated ethics officer has evaluated the circumstances and determined whether a violation of the Act may occur. Under the Act, your designated ethics supervisor is the Governor, who has delegated the responsibility to Linda Perez, Director of the Division of Administrative Services in the Office of the Governor. Ms. Perez may seek guidance from us regarding your questions and concerns.

B. From Attorney General Following State Service

The Ethics Act expressly provides that a former public officer may request an opinion from the attorney general interpreting the Ethics Act.³⁰ If you have any questions about how the Ethics Act applies to your post-state employment, please contact us. The advantage to you of requesting advice is that it protects you from liability. The Ethics Act provides that protection in AS 39.52.250(b):

A former public officer is not liable under this chapter for any action carried out in accordance with the advice of the attorney general issued under this section, if the public officer fully disclosed all relevant facts reasonably necessary to the issuance of the advice.

Thus, so long as you fully disclose the relevant facts and abide by the advice we provide, you have legal protection. I may be reached at the above numbers or by e-mail at Judy_Bockmon@law.state.ak.us.

JBB/av

³⁰ AS 39.52.250