

MEMORANDUM

State of Alaska Department of Law

TO: Designated Ethics Supervisor

DATE: February 26, 1993

FILE: 663-93-0292

TEL.NO.: 465-3600

SUBJECT: Possible bias of Board Member
Executive Branch Ethics Act
(AS 39.52)

FROM: Stephen C. Slotnick
Assistant Attorney General
Governmental Affairs--Juneau

You have requested our advice on a potential violation of the Executive Branch Ethics Act, AS 39.52.010--39.52.960, which was disclosed to you by a board chair pursuant to AS 39.52.220. The potential conflict arises because a group that is opposed to a set of regulations before the board also opposed the board chair's confirmation before the legislature. The board chair disclosed this situation as a potential violation because he was concerned about the appearance of impropriety. We conclude that there is no evidence of an actual conflict of interest. We communicated this conclusion to you prior to the most recent board meeting, and you informed the board chair that you found no conflict.

FACTS

The facts as disclosed to you are the following: Governor Hickel appointed X as the chair of Board Y. During the confirmation hearings on X before the Alaska legislature, X's appointment was opposed by Corporation Z. X is in the same business as Corporation Z, but in a different region of the state. X's letter of disclosure to you states,

[Now for my perception of conflict. Prior to being confirmed by the legislature, there was considerable effort by Corporation Z and others to defeat my nomination. Second, Corporation Z made some accusations about me and copied certain Commissioners and a senator. Third, a Senator was approached about my nomination and a lobbyist suggested to me that his clients (some of whose members hire Corporation Z) felt that a business interest created a conflict for me. Lastly, several employees of Corporation Z have alleged that I am in the pocket of other interests represented on Board Y.]

X questioned whether he should participate in two matters before the board because any decision on these matters would inevitably affect Corporation Z, and either Corporation Z or the members

of an independent contracting organization that deals with Corporation Z might perceive a conflict. In addition, X asked whether he, as a representative of the same business interests as Corporation Z, should participate in votes that affect all such businesses.

Following your receipt of this disclosure letter, you questioned X as to whether he had an actual conflict of interest. He stated that he would receive no financial benefit from either of the two agenda items. He also stated that he had no personal bias that would affect his deliberation over these issues. He reiterated that his concern was that the parties might perceive a conflict of interest.

ANALYSIS

Alaska Statute 39.52.120(b)(4) states: "A public officer may not . . . take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest." Thus, the first question is whether X has a financial interest in the matters before the board.

X is an independent business person in one region of Alaska. The matters before the board concern recognition of a new independent contractors organization in a different region of Alaska and regulations governing the degree of influence and economic investment that industry may have in these organizations. The first issue is purely regional and has no direct financial impact on X. The second issue would also not affect X, as he or she has no investment or involvement in such organizations and has no plans to become involved. While it is conceivable that he or she, as a business person, might consider undertaking such investment in the future, this possibility is too speculative and conjectural to establish a conflict of interest. AS 39.52.110(a)(3) & (b)(2). Moreover, because the regulations would apply statewide, they would affect X only as they affect the generic class of business persons. In this situation, the Ethics Act, read in concert with the Act establishing Board Y, contemplates participation of the business members of the board who do not have a substantial financial interest in the matter under consideration. 1992 Inf. Op. Att'y Gen. at 5 (Jan. 1; 663-92-0180). In sum, X is not precluded from participation in these matters by virtue of a financial interest in them.

The second question presented by this disclosure has to do with bias or personal animus. We believe that, under the Act, it would be a conflict of interest for a public official to participate in a matter where his or her participation was motivated by bias or personal animus. Alaska Statute 39.52.120(a) states, "A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person." The proposed regulations interpreting this statute states that "'unwarranted benefits or treatment' includes . . . any action by a public officer giving an unfair advantage to another person where the motivation for the treatment is improper." 9 AAC 52.120(a) (proposed). This regulation further states that "For purposes of this section, 'improper motivation' is one not related to the best interests of the state . . ." 9 AAC 52.120(f) (proposed). In sum, the Act prohibits a public officer from taking official action that is motivated by personal animus or bias.

Thus, the question of bias is a subjective question of "improper motivation." When

the evidence raises an inference of improper motivation, it will require a case-by-case analysis and an inquiry into the actual motivation of the public official. This is in contrast to the "financial interest" question, which is evaluated on an objective basis: if a public officer has a financial interest in a matter, he or she cannot participate, even if that interest is not a motivating factor. See AS 39.52.120(a); 1991 Inf. Op. Att'y Gen. at 3 n.3 (Apr. 16; 663-91-0352).

Here, the subjective evidence indicates that the public officer does not have a conflict of interest. X informed you that he or she had no bias on the issues before the board.

Bias could be proved with objective, circumstantial evidence. For example, if the public officer consistently voted against the interest of one party or had no rational basis for his or her vote, that could indicate that bias was a motivating factor. Here, the only objective evidence from which we could infer bias is the fact that one group lobbied against the public officer's confirmation. To reach a conclusion of bias from this evidence requires an inference that the board member carries a grudge against the party that opposed his or her nomination. Public officials are entitled to a presumption of regularity in their official actions. *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 296 (1965); 29 Am. Jur. 2d, *Evidence* •• 171-72 (1967). Without more, an inference of bias based on these facts is too speculative and cannot be the basis for recusal under the Ethics Act; under the Ethics Act, "appearance of impropriety" is not the standard. 9 AAC 52.010 (proposed). Indeed, almost all public officials participate in or are affected by the political process; we presume, however, that they can perform their official duties and act in the state's best interest.

In sum, whenever a public officer admits that he or she might be motivated by personal animus or bias in taking official action, or where the evidence indicates that bias is a motivating factor, that public officer should not participate in the pending action. Here, there is no evidence of bias. Accordingly, the public officer does not have a conflict of interest and may participate in the pending matters before the board.