

MEMORANDUM

State of Alaska Department of Law

TO: Designated Ethics Supervisor

DATE: July 14, 1995

FILE NO.: 661-95-0777; 661-95-0817

TEL. NO.: 269-5274

FROM: Nancy B. Meade
Assistant Attorney General
Environmental Section - Anchorage

SUBJECT: Outside employment under
contract administered by
separate unit of employee's
agency; outside employment as
research analyst (AS 39.52)

You have requested our advice on two potential violations of the Executive Branch Ethics Act, AS 39.52.010 -- AS 39.52.960, which were disclosed to you through ethics disclosure forms submitted pursuant to AS 39.52.170. First, "John Doe," an agency employee, wishes to subcontract with a state university (the University), which intends to contract with the agency to perform work on a project initiated by Mr. Doe in his former position at the agency. Second, Mr. Doe also wishes to become employed as a research analyst with the University. We conclude that neither of these proposed outside positions would violate any provision of AS 39.52.

FACTS

With respect to the first question, we understand from the ethics disclosure form that was forwarded to our office, as well as from Mr. Doe himself in a follow-up telephone conversation, that Mr. Doe formerly worked as the project manager for the agency's "Comparative Risk Project," a project designed to help the agency develop a methodology to use in prioritizing its workload. As part of his duties in that position, Mr. Doe applied for, and obtained, a grant from a federal agency; the funds from that grant are to be expended in conducting a three-part analysis, which will then yield a system for the agency to use in prioritizing its work. Two of the three parts are fairly scientific, and will probably be assessed by the agency's employees as part of their official duties, while the third is more of a statistical analysis, which will likely be conducted by non-agency personnel. This grant was obtained in the latter part of 1993, but, for a variety of reasons, very little work has been done under the grant to date.

In February 1995, Mr. Doe changed jobs within the agency; he is now in an unrelated position. Approximately two months later, the new manager of the Comparative Risk Project approached officials at the University to informally discuss whether the University could conduct the third, statistical part of the risk analysis, which will include conducting a public survey. The data from this research survey will be provided to the agency, which will then combine it with the other two components of the analysis to come up with a prioritization procedure.

After the University submits a proposal to the agency, and assuming the University obtains the contract, Mr. Doe would like to be employed as a research analyst for the project, helping to develop the survey and draft the final report. He obtained his Master's Degree in Public Administration from the University, and his work would be based on that expertise. It is wholly unrelated to Mr. Doe's current job. Mr. Doe estimates that the total time working on this project will be 30--60 hours, at a total salary of approximately \$300--500.

With respect to your second question concerning Mr. Doe's outside employment as a University research analyst, the facts appear to be straightforward. Mr. Doe wishes to work under a University grant, funded by a federal agency, to conduct research on a separate issue. The work is expected to take five to ten hours per week.

ANALYSIS

Since the first scenario potentially implicates several different provisions of the Executive Branch Ethics Act (the "Act"), each applicable section will be discussed in turn. The second question is discussed in section D below. At the outset, we note that Mr. Doe is clearly a "public officer" within the Act's meaning. AS 39.52.960(21) (term generally includes any employee of a state agency).

A. Misuse of Official Position

A public officer may not use his official position for personal gain; specifically, the officer may not "seek other employment or contracts through the use or attempted use of official position," and may not "receive . . . compensation for the performance of official duties or responsibilities from a person other than the state." AS 39.52.120(b)(1),(2). We have stated previously that this provision "was intended both to prevent bribes and to prevent employees from receiving double pay for performing their normal duties." 1987 Op. Att'y Gen. at 2 (Apr. 24, 663-87-0389).

Mr. Doe did not seek, or even consider, employment with the University relating to the Comparative Risk Project while he was employed as the project manager. Only after he left that position did the contracting opportunity arise with the University. Moreover, the fact that Mr. Doe is seeking only to enter a contract with another entity which, in turn, intends to contract directly with the state makes the relationship between Mr. Doe and the state indirect, making it even less possible that his official position in the agency somehow secured the contract for him. Thus, it does not appear that Mr. Doe used, or could have used, his official position to get the subcontract work with the University.

Second, the work Mr. Doe would do for the University is different from his "official duties" that he now does for the agency; designing a public survey on citizens' perceptions is wholly separate from Mr. Doe's current job duties. Mr. Doe's proposed employment would not run afoul of the prohibition on receiving outside compensation for performing official duties.

B. Improper Use of Information

Mr. Doe is prohibited from disclos[ing] or us[ing] information gained in the course of, or by reason of, [his] official duties that could in any way result in the receipt of any benefit for [him], if the information has not also been disseminated to the public.

AS 39.52.140(a). Whether information has been "disseminated to the public" is determined under 9 AAC 52.070 (eff. 4/24/94); information that is merely available to the public, but has not been "published" under paragraph (a) of the regulation is not considered to have been disseminated.

It does not appear that Mr. Doe used, or will use, any particularized information that he had by virtue of his position as Comparative Risk Project Manager to design or conduct the public survey. The survey appears to be a separate, and smaller, aspect of the entire assessment; it is one of the three components of the methodology that the agency must examine under the federal grant, and its management is not susceptible to any private agency information. Since Mr. Doe likely does not even have any specialized information about conducting the survey that would benefit him by giving him an advantage in subcontracting with the University, there does not appear to be any violation of this provision.

On the other hand, Mr. Doe may have information that he gained as project manager that could be used to help the University tailor its eventual formal bid proposal more carefully to comport with exactly what the agency is seeking in the public opinion portion of the risk analysis. If any such information is not included in the agency's Request for Proposals, Mr. Doe may not use that information, since it would indirectly benefit him if the University should win the contract. Thus, if Mr. Doe does have any such non-disseminated information, he should not assist the University in preparing any bid that would be submitted to the agency.

C. Improper Influence

AS 39.52.150(a) provides:

A public officer . . . 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, execution, or administration of the state grant, contract, lease, or loan.

If Mr. Doe were to be employed by the University to do work under a University/agency contract, he would have a personal or financial interest in the state contract within the meaning of this rule. Nonetheless, since Mr. Doe has changed jobs, he is no longer in a position to "take or withhold official action" that could affect the contract between the agency and the University. This provision, then, does not prevent Mr. Doe from working for the University on the survey project.

Although this conclusion would allow Mr. Doe to work on a contract that is being administered by his own agency, the Act does not prohibit such an arrangement. Indeed, the Act specifically allows a public officer to have a personal or financial interest in a contract that is awarded or administered by the same agency for which that officer works, as long as that interest is reported in writing to the employee's designated supervisor. AS 39.52.150(d). By filling out the disclosure form, Mr. Doe has complied with that requirement.

D. Outside Employment

The Act also discusses the circumstances in which an employee is restricted from engaging in employment outside the state:

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) (emphasis added). This section is expanded upon in the regulations, which provide that outside employment violates this section

if the employee's designated supervisor reasonably determines that the outside employment or service

- (1) takes time away from the employee's official duties;
- (2) limits the scope of the employee's official duties; or
- (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties.

9 AAC 52.090 (eff. 4/24/94).

It is Mr. Doe's designated supervisor who will apply the tests in this provision. You must ascertain whether it can be reasonably determined that Mr. Doe's outside work for the University, as proposed, would take time away from his official duties. In making this determination, you will likely consider that he would do the extra work, which amounts to approximately ten hours per week, "outside normal working hours." See Ethics Disclosure Form, April 20, 1995. Second, in determining whether Mr. Doe's proposed work would limit the scope of his official duties, you will need to examine the substantive relationship between the public survey and any issues that Mr. Doe deals with in his current position. Finally, though we do not perceive other indications that the proposed project would be incompatible with, or in conflict with, Mr. Doe's current duties, you should make that determination as well.

The second question, concerning Mr. Doe's proposed work as a research analyst, is also resolved under these provisions. Generally, if he only does the proposed five to ten hours of work outside of his normal working hours for the state, it would appear reasonable to conclude that the outside employment is not interfering with his state duties. In addition, you must determine whether the proposed work would limit the scope of his official duties. Since it appears that the

periodic research work is unrelated to Mr. Doe's current duties, it may be reasonable to conclude that the outside employment does not limit the scope of Mr. Doe's official duties. Finally, there do not appear to be other indications that the proposed work would be incompatible with, or in conflict with, Mr. Doe's current duties.

Thus, as long as Mr. Doe reports this outside employment, AS 39.52.170(b), as he has, and as long as you determine that the outside positions meet the test in the regulation, they are probably permissible.

CONCLUSION

There does not appear to be any violation of the Executive Branch Ethics Act presented by the outside employment proposed by Mr. Doe, though you will need to make the specific determination required by 9 AAC 52.090. Although Mr. Doe's situation implicates several of the Act's provisions,¹ none appear to prohibit (1) his work for the University on the public survey portion of the Comparative Risk Project, or (2) his work as a University research analyst.

If I have misstated any facts in this opinion, or if you have any other questions, please contact me immediately.

NBM:vo

¹ Moreover, "[a]n appearance of impropriety does not establish that an ethical violation exists." 9 AAC 52.010 (eff. 4/25/94).