

MEMORANDUM

State of Alaska
Department of Law

TO: Cindy Smith
Boards and Commissions

DATE: June 5, 1997

FILE NO.: 663-96-0257

TELEPHONE NO.: 465-3600

SUBJECT: Member of State Board Who
Seeks Employment with the
Board on Which the Member
Serves

FROM: Stephen C. Slotnick
Assistant Attorney General

You have asked two questions regarding a member of a state board who seeks employment with the board on which the member serves: (i) whether a member of a state board may apply for a position as the executive director of the board on which the member serves, when the member had taken official action that affected the position; and (ii) whether a member who intends to apply for a position with the board must resign from the board before applying. The answer is that a board member may apply for a position with the board, but must resign from the board before applying. This memorandum overrules any previous memoranda inconsistent with this advice.¹

FACTS

A state board voted to terminate the employment of its executive director. The vote to terminate was 9 to 4 for termination, which was the minimum 2/3 majority required for termination. Following the termination, a member of the board, who had voted with the majority, applied for the vacant position of executive director.

DISCUSSION

A. A former public officer may apply for a position with the state even if the officer took official action concerning the matter.

Your first question is whether the member can apply for the job of executive director when the member help create the vacancy. This question implicates the ban on seeking employment regarding matters on which a former public officer took substantial official action while serving the state. AS 39.52.180(a). Here, the public officer clearly took substantial official

¹ This memorandum confirms the oral advice previously given in answer to these questions.

action regarding the executive director position when the member voted to terminate the previous director. This statute, however, “does not prohibit an agency from contracting with a former public officer to act on a matter on behalf of the state.” AS 39.52.180(b). Accordingly, the Ethics Act does not per se prevent this board member from applying for the executive director position.

B. The board member must first resign before applying for a position with the board.

Whether a board member must resign before applying for a position with the board has been addressed twice before by this office, but with differing results. In 1988, we advised that the Ethics Act required that a board member must resign before applying for the position of executive director with a board. 1988 Inf. Op. Att’y Gen. (663-88-0297; Jan. 20). In 1990, however, we reversed that advice and determined that a board member could apply for the position of chief executive officer of a public corporation, as long as the board member did not participate in the hiring process. 1990 Inf. Op. Att’y Gen. (663-90-0378; April 23).

The answer to the question hinges upon whether state employment constitutes a “contract” for purposes of AS 39.52.150. It is well-established that a public officer may not apply for a state contract let by the officer’s administrative unit if the officer may take official action on the contract. Moreover, this conflict cannot be “cured” by the board member abstaining from participation. *See, e.g.*, 1997 Inf. Op. Att’y Gen. (663-97-0400; May 30) (if organization in which board member has a personal interest applies for grant from board, member must resign from board or divest personal interest). Thus, under AS 39.52.150, all that matters is whether a board member has authority to take action on the state contract, grant, lease or loan that is let by the board.² If so, then the board member may not apply for or have a personal or financial interest in the contract.

The 1990 opinion reasoned that if state employment was not a “state contract” for purposes of AS 39.52.150, then the general conflicts provision of AS 39.52.120 applied. Under this provision, a conflict may be cured by abstaining from official action. 1997 Inf. Op. Att’y Gen. (663-97-0400; May 30). The 1990 opinion concluded that the 1988 opinion erred in considering state employment to be a state contract for purposes of AS 39.52.150.

The 1990 opinion remained the interpretation of the law until the Attorney General adopted ethics regulations in 1994. These regulation state that “‘state contract’ includes

² An exception to this absolute ban exists where the contract is “competitively solicited.” AS 39.52.150(b). This exception is not implicated in this case because the hiring process for an executive director is a collaborative process among board members rather than a strictly objective competitive solicitation. *See* 1988 Inf. Op. Att’y Gen. (663-88-0297; Jan. 20).

employment with the state, regardless of whether that employment is evidenced by a written agreement.” 9 AAC 52.900(8). Thus, the regulations overruled the 1990 opinion. Under the regulations, state employment is a state contract for all Ethics Act provisions. Accordingly, the strict provisions of AS 39.52.150 apply to persons seeking employment as the executive director of a state board. Any board member who wishes to apply for that position must first resign from the board.

CONCLUSION

State employment is a contract for purposes of AS 36.52.150. A board member must resign from a board before applying for employment as executive director of the board. This opinion overrules that portion of the 1990 informal attorney general opinion that advised otherwise.