

MEMORANDUM

State of Alaska

Department of Law

To: Joseph L. Perkins, P.E.
Commissioner
Dept. of Transportation and Public Facilities

Date: October 6, 1998

Through: Stephen C. Slotnick
Ethics Supervisor
Department of Law

Subject: 1999 WASHTO
Conference - Ethics
Issues

From: James E. Cantor
Supervising Attorney
Transportation Section, Anchorage

You asked several ethical and legal questions regarding the Department of Transportation and Public Facilities' hosting of the Western Association of State Highway and Transportation Officials 78th annual conference in 1999. In this memorandum, I respond only to the ethics issues. We have already responded to your legal questions.

The Western Association of State Highway and Transportation Officials (WASHTO) is a non-profit organization comprised of the transportation agencies of 17 western states. WASHTO is a sister to a national organization called the American Association of State Highway and Transportation Officials (AASHTO). By law, Alaska's standards for the construction and maintenance of highways must conform as closely as practicable to AASHTO standards. AS 19.10.160 and 36.30.060. The annual WASHTO conference provides an opportunity to examine and recommend standards applicable to western highways, provides training, and includes a trade show. The annual conference attracts 550 to 850 government and private participants.

WASHTO has no permanent staff. Staffing to organize and conduct the annual conference is generally provided by the host state. Financing for the conference has traditionally come from multiple sources, including participant registration fees, vendor registration fees, trade show booth space fees, and donations by businesses in the transportation industry. The total budgets for the last two annual conferences were \$155,000 and \$280,000, with industry donations accounting for about a third of the totals.

You asked if there are any ethical considerations in asking state employees to help organize the conference. The answer under the Executive Branch Ethics Act (AS 39.52) is no. The Department participates in WASHTO to assist it in carrying out its duties, not to benefit the personal or financial interests of its employees. The Ethics Act does not

prevent the Department from using state employees to help host the annual WASHTO conference. The conclusion is the same, under the Ethics Act, whether the employees are paid or volunteering their time.

You next asked about the private donations that help fund the WASHTO conference. The donations will be to WASHTO, not the State. The Department officials organizing the conference hope to solicit donations on behalf of WASHTO. The Department proposes setting up a trust account within the Department of Administration to handle donated and other funds belonging to WASHTO. The WASHTO trust account will be maintained in the Department of Administration rather than a private bank for ease of auditing should the government's role ever be questioned. Any funds remaining in the trust account after the conference will be returned to WASHTO. Because staffing and accounting for the WASHTO conference will be provided by the state, donations would not only be solicited by state employees but also received and spent by state employees.

Donors will be recognized in some fashion at the conference. For example, one suggestion is that donors could be recognized for "sponsoring" a meal or other event.

The Executive Branch Ethics Act would not prohibit the solicitation or receipt by state employees of donations to support the WASHTO conference. Nor would the ethics act limit the size of the donations. Under the ethics law, donations may not personally or financially benefit the officers conducting the solicitation or receiving the funds. AS 39.52.120 - 39.52.130. The ethics law would not prohibit solicitation and receipt because the WASHTO conference benefits the state rather than the personal or financial interests of its employees.

The ethics law may constrain the manner in which the department can solicit funds. Under AS 39.52.120(a), a public officer "may not intentionally secure or grant unwarranted benefits or treatment for any person." The definition of "unwarranted benefits or treatment" in 9 AAC 52.040 does not neatly fit the WASHTO situation. Nonetheless, it could be argued that being listed as an event sponsor is an advertising benefit such that choosing to solicit from one party and not another could create an unwarranted benefit. This argument can be avoided by sending a solicitation to the entire class of potentially interested parties. In this case, I would assume that to be the list of contractors and suppliers who do business with the Department's highways sections.

A prior opinion of this office made a similar recommendation in response to a proposal by the Division of Parks to seek donations. 1986 Inf. Op. Att'y Gen. (June 30; 663-86-0470). In that case, the Division of Parks proposed to recognize donors in a brochure, raising concerns about a constitutional guarantee of equal access to public forums. This office recommended a public solicitation and further noted that once an agency allows advertisements or recognition of donations in brochures, the Constitution

may limit any discretion to exclude particular groups, companies, or individuals. *Accord* 1993 Inf. Att’y Gen. (July 12; 663-94-0007) (“[T]he department must be circumspect about how it solicits donations so as not to favor certain groups or exclude others.”). The Department can avoid constitutional disputes by sending a solicitation to the entire class of potentially interested parties, such as the list of contractors and suppliers who do business with the Department’s highways sections, and by not refusing other groups, companies, or individuals who may wish to make donations and receive recognition at the WASHTO conference.

Prior ethics opinions issued by this office have cautioned as a matter of policy that “while [solicitation of donations] might not be a direct violation of the Act, such a practice might lend itself to abuse, and certainly would create an inappropriate impression.” 1989 Inf. Op. Att’y Gen. (Mar. 20; 663-89-0217); 1989 Inf. Op. Att’y Gen. (Oct. 5; 663-89-0556). *Compare* 1992 Inf. Op. Att’y Gen. (June 1; 661-92-0692) (“[T]his advice was given in the context of gifts that appeared to benefit the state employees personally, and perhaps it would be less applicable to a situation where the benefit is clearly restricted to the state itself.”). To ameliorate any inappropriate impressions, “[c]are must be taken to avoid any implication that the giver is entitled to favorable treatment through official action” or that those who do not give will be treated unfavorably. 1986 Inf. Op. Att’y Gen. (June 30; 663-86-0470).

The Department should also monitor the manner in which donations and other WASHTO funds are expended. This office has in the past advised that sponsored activities should not be “so lavish or excessive that they can be construed as gifts to individual [government employees] rather than sponsorship of a legitimate [agency] function.” 1993 Inf. Op. Att’y Gen. (July 6; 663-93-0397). *See also* 1988 Inf. Op. Att’y Gen. (Mar. 11; 663-88-0328).

Additionally, WASHTO funds should not be used to directly pay any salaries and wages due state employees who assist with the conference. Under the Executive Branch Ethics Act, the Department itself should pay those salaries and wages. AS 39.52.120(b)(2). 1986 Inf. Op. Att’y Gen. (September 25; 661-86-0576) (“AS 39.52.120 probably prohibits your employee from receiving any compensation from the nonprofit corporation while employed by the state because the employee’s job duties with the state would be so closely intertwined with any work connected with the nonprofit.”). *See also* 1987 Inf. Op. Att’y Gen. (Feb. 11; 661-87-0279) (“[D]onated money cannot be used to pay salaries of state employees”); *accord* 1993 Inf. Op. Att’y Gen. (July 12; 663-94-0007).

Lastly, please recall that public officers must currently report the receipt of all gifts worth more than \$50, whether in the form of meals or other entertainment, to their designated ethics supervisor if the public officer may take or withhold official action that affects the giver. AS 39.52.130. After January 1, 1999, the reporting threshold will be

increased to \$150. Sec. 83, ch. 74 SLA 1998. In addition to requiring reports if the public officer may take or withhold official action that affects the giver, the law will at that time also require reports if the gift is “connected to the public officer’s governmental status.” Id. A gift is a transfer of property or provision of a service for less than full value. 9 AAC 52.060. “Official action” is broadly construed in this context to mean a recommendation, decision, approval, disapproval, vote, or other similar action or inaction. AS 39.52.960. The phrase “connected to a public officer’s governmental status” is undefined. Depending on the circumstances, this reporting requirement may be implicated if Department officials are hosted at meals or events sponsored by donors.

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