

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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August 27, 2004

Former State Employee

Re: Post-State Employment
Our file no. 663-05-0028

Dear Former State Employee:

You have requested advice under AS 39.52.250(a) concerning your future employment in a finance and accounting position with an agency in the federal government (Federal Agency A). In addition, before you called me, I received calls from your supervisor and your acting designated ethics supervisor for the state agency you work with (Department X) requesting advice concerning your future employment in light of the Ethics Act restrictions on post-state employment. Given that the requests for advice on this matter came from both your department and from you, I am copying this letter to the designated ethics supervisor and the division director for your state division.

This advice is based on the facts you provided to me in a telephone conversation on [], 2004, your resignation letter dated [], 2004, and your e-mail to me dated [], and my discussions with your supervisor and your designated ethics supervisor.

You are currently employed as an accountant with Department X, Division of Y, in the Z Section. You submitted a letter of resignation from that position to your supervisor effective August 31, 2004. You are resigning because you have accepted an accounting position with Federal Agency A. You have asked whether the post-state employment restrictions in the state Ethics Act preclude you from undertaking certain work in your new position at Federal Agency A and, if so, what those restrictions cover.

There are two relevant provisions of the Ethics Act that impose restrictions on employees who leave state service: AS 39.52.180(a) and AS 39.52.140.

AS 39.52.180: Post-state employment

For two years after leaving state service, AS 39.52.180(a) precludes a former state officer from (1) representing a person (2) for compensation (3) with regard to any matter (4) that was under consideration by the administrative unit of state government in which that officer served and (5) in which the officer participated personally and substantially (6) through the exercise of official action. “The Department of Law has consistently read this subsection in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.” 1997 Inf. Op. Att’y Gen. (Apr. 30; 663-97-0328)(citation omitted). In order to be disqualified from working on a matter during the two-year post-state employment period, your activity must fall within all six subsection 180(a) criteria.

Most of the terms used in AS 39.52.180(a) are defined in the Ethics Act and related regulations. A “public officer” includes any public employee in the classified, partially exempt, or exempt service. AS 39.52.960(20), (21). A “person” includes a business. AS 39.52.960(17). “Compensation” means the receipt of money in return for services rendered to another. AS 39.52.960(7). AS 39.52.180(a) defines “matter” to include a contract. AS 39.52.960(1) defines “administrative unit” as “a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency.” “Agency” includes an executive branch department.

Whether involvement in a matter is “personal and substantial” depends on the circumstances of each case. However, formulation of policy, 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” involvement. 9 AAC 52.100(b). “Official action” is defined as “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.” AS 39.52.960(14).

AS 39.52.140: Information not disseminated to the public and confidential information

AS 39.52.140(a) provides that a current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.

AS 39.52.140(b) provides that a current or former public officer may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.

Your Involvement in the Federal Reports Submitted to Federal Agency A by Department X

You outlined your current duties as an accountant for Section Z, Division Y, Department X, in an attachment to your resignation letter. Your duties and responsibilities include the preparation of Department X's federal reports for submission to Federal Agency A. You prepare the reports that are used to calculate the federal share of departmental expenditures recorded during the quarter; this quarterly financial information is used to prepare the financial status reports required for all federal grant and certain funds.

Your state position prepares the federal reports for numerous federal programs. You also supervise the accounting staff using the quarterly financial information to prepare other federal financial reports. In addition, you develop and maintain Department X's program reporting structure, which includes identifying the budget component for each federal grant and determining whether a federal grant is subject to cost allocation and the methodology for allocating costs. You also provide assistance to Department X's divisions to ensure that federal regulations are being addressed in their day-to-day administration of grants.

In the course of your work for Department X, you likely have had access to information concerning the state's federal reporting methodology and procedure that has not been disseminated to the public, and you may have had access to information that is confidential by law.

According to your resignation letter, the duties and responsibilities of your new position at Federal Agency A were described in the position notice as follows: "The purpose of this position is to provide technical financial expertise to state [] agencies to ensure that expenditures of these agencies are made in compliance with Federal [] regulations. Technical financial expertise includes providing consultation regarding financial management policy for the [] program, and reviewing and monitoring of expenditures and grant estimates for state [] agencies with complex accounting systems."

Department X currently has several pending ("deferred") issues under consideration between it and Federal Agency A. You prepared Department X's federal reports submitted on these deferred matters. You also prepared the quarterly reports submitted to Federal Agency A by Department X, including the reports for the quarter ending June 30, 2004.

Legal Analysis

Based on the foregoing, we have determined that under the Ethics Act, you may not, for a period of two years after leaving state service, represent, advise, or assist Federal Agency A in its review, monitoring, auditing, or consideration of the particular federal reports that were submitted to Federal Agency A by Department X and were prepared by you. You are also prohibited from being involved for Federal Agency A regarding any federal report prepared by an accountant whom you supervised if you were personally involved in critically analyzing the report and contributing to its accuracy while you were in state service. This includes but is not limited to the three pending matters that are currently deferred. To undertake such work for Federal Agency A you would need to obtain a waiver of the Ethics Act restrictions as provided under AS 39.52.180(c).

AS 39.52.180(a) precludes you from post-state involvement in matters in which you were personally and substantially involved through the exercise of official action while you were in state service. Here, the “matters” are the federal reports prepared by you in your capacity as an accountant, or prepared by an accountant working directly under your supervision and with your involvement as described above, and submitted by Department X to Federal Agency A for its review and action. We conclude that you participated personally and substantially in the preparation of these federal reports as well as the cost allocation plan and other financial material that form the basis for the information the state includes on the reports. Indeed, this work is a defining feature of your position at Department X.

We also conclude that you exercised official action concerning these reports. Official action means a recommendation, decision, approval, disapproval, vote, or similar action, including inaction. Your work as an accountant involved far more than simply a ministerial function of entering financial data onto a form. Your work included the making of many decisions on cost allocation, methodology, interpretations of federal rules and policies, and necessary justifications, to determine what is allowable for federal reporting and what figures would be included on the reports. Your involvement cannot be described as routine processing of documents or general supervision of employees without direct involvement in the matter. “Official action” is not limited to those with “final authority”; it is directed at any public officer who has personal and substantial involvement in a matter. 1994 Inf. Op. Att’y Gen. (Aug 24; 663-95-0038). “Official action” has also been found to exist where a former state employee gave technical assistance or participated in staff discussions on the matter. 1994 Inf. Op. Att’y Gen. (Aug. 24; 663-95-0038); 1989 Inf. Op. Att’y Gen. (Dec. 26; 663-90-0184).

If you wish to undertake work for Federal Agency A on a particular federal report submitted by Department X in which you personally and substantially participated, as explained above, you may request a waiver from Department X of the post-state employment restrictions. Under AS 39.52.180(c), the commissioner may waive the application of the post-state employment restrictions after determining that representation by the former public officer is “not adverse to the public interest.” The waiver must be in writing and must be provided to the attorney general for approval or disapproval.

You may, without a waiver, undertake work for Federal Agency A concerning federal reports submitted to it by Department X that you did not participate in personally and substantially through the exercise of official action. For example, you may work for Federal Agency A on federal reports submitted by Department X that you did not prepare or for which you did not directly supervise preparation. In addition, you may undertake work for Federal Agency A concerning federal reports that are prepared and submitted to it by Department X after you leave state service. The latter would be new matters, *i.e.*, not pending before the administrative unit while you served the state. Work on a new matter is not prohibited even if the new matter is related to a matter on which you participated while a state employee. 1997 Inf. Op. Att’y Gen. (June 24; 663-96-0576).

Your new employment with Federal Agency A also raises concerns under AS 39.52.140. Subsection 140(a) precludes a former state employee from using or disclosing information gained in the course of, or by reason of, the employee’s official duties that could in any way result in a benefit to the employee, if that information has not been disseminated to the public through the publication methods described in 9 AAC 52.070.

Subsection 140(b) precludes the unauthorized disclosure or use by a former state employee of information acquired during the course of the employee’s state employment that is confidential by law.

It is likely that you had access to information in the course of your state duties that has not been disseminated. You may have had access to information that is confidential by law, although that is less clear. You should ensure that AS 39.52.140 is observed during your employment with Federal Agency A. The section 140 requirements are not limited to two years as are the section 180 restrictions.

By law, this advice is subject to AS 39.52.250(b), which provides:

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 this advice.

If you have any questions about our conclusions and the advice provided in this letter, please do not hesitate to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

Barbara J. Ritchie
Chief Assistant Attorney General

cc: Designated Ethics Supervisor
Director of the Division Y, Department X