

STATE OF ALASKA

DEPARTMENT OF LAW
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September 9, 2004

Former State Employee

Re: Post-State Employment Advice
Our file no. 663-05-0029

Dear Former State Employee:

You have requested advice under AS 39.52.250(a) concerning a prospective position as a member of the board of directors of XYZ, Inc. Until recently, you were employed by a State Public Agency ("Public Agency") as its executive director. This advice is based on the facts you provided to us in a telephone conversation and by e-mail.

You recently retired from state service, having served as the executive director of the Public Agency. XYZ, Inc. contacted you after you retired, and asked whether you would be interested in serving on the company's board of directors. The board membership is a compensated position. XYZ has a contract to provide services supporting the work of the Public Agency. You have asked whether you may accept this position without obtaining a waiver of the post-state employment restrictions of AS 39.52.180. We have concluded that you may serve on the XYZ, Inc. board of directors without a waiver.

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 contract between the State Public Agency and XYZ, Inc.

According to the information you provided, the Public Agency board approved a service contract between the Public Agency and XYZ, Inc. prior to your appointment as executive director. The contract was probably renewed during your time at the Public Agency. XYZ’s performance was not under review in particular. The Public Agency staff routinely evaluate performance and determine whether the services provided by private contractors are consistent with the Public Agency’s objectives.

While you served as executive director, a Public Agency manager, Ms. Roe [a pseudonym], was responsible for providing oversight and recommendations regarding the

services involving XYZ, Inc. and other private service providers. Ms. Roe reported to another manager who, in turn, reported to you. You were responsible for putting together the agenda for the board's approval. Ms. Roe and the other manager generally made the presentations and recommendations to the board on these issues, but occasionally you would participate in the discussion as well.

As executive director, you encouraged staff to review the performance of the Public Agency in a specific area of agency operations ("the operational issue") and to make recommendations to the board. Such a review was done a few months before you retired. The work was done independently by Ms. Roe and the other manager. You reviewed the recommendation prior to sending out the board meeting packet but you did not change the staff's work or recommendation. The board considered the issue at its next meeting.

I have reviewed the minutes from that Public Agency board meeting. Ms. Roe made a presentation on the operational issue. The minutes state that Ms. Roe said, "staff's recommendation is to [give a contract for services related to the operational issue to XYZ, Inc.]"

The minutes reflect that Ms. Roe made a detailed presentation on the operational issue, that certain Public Agency board members asked questions, and that Mr. Smith [a pseudonym], a private consultant, responded to the questions. According to the minutes, your comments on the issue were limited to a statement that "it is Ms. Roe's ongoing charge to continue monitoring the [operational issue] and to make recommendations ... as needed." One of the Public Agency's board members then moved that the board adopt the staff's recommendation to give a service contract to XYZ, Inc. Another board member seconded the motion and it carried, without objection. Following the board's action, Mr. Smith "complimented Ms. Roe for her detailed look at the underlying [operational issue]."

There was no action concerning the XYZ, Inc. contract pending at the Public Agency at the time you retired. XYZ, Inc. was, of course, providing services to the Public Agency under its contract, but, again, no particular matter with regard to the contract was pending.

Your duties as a board member for XYZ, Inc.

Your duties as a member of the board of directors of XYZ, Inc. would include several board meetings each year, at least one strategy meeting each year, and possibly conference calls related to the organization. You expect that your duties as a board member would be to review the performance and quality of XYZ's work and other potential ventures. You would not have any role in managing the contract XYZ has with the Public Agency or in reviewing the operational issue related to that contract.

Analysis

We have determined that the post-state employment provisions of the Ethics Act, AS 39.52.180, do not preclude your proposed employment as a board member with XYZ, Inc.. You may accept the position and undertake the duties of a board member for XYZ. A waiver under AS 39.52.180(c) is unnecessary.

Based on the information you have provided, it does not appear that your role on the board of XYZ, Inc. would involve “a matter that was under consideration” by the Public Agency while you served as executive director and in which you “participated personally and substantially through the exercise of official action.”

Here, the “matters” are the contract between XYZ and the Public Agency and the review of the Public Agency’s operational issue. The contract was in place when you became executive director. You state that the contract was probably renewed while you were in office, but any approval of the contract would have been by action of the Public Agency board, without your personal and substantial involvement.

As to the review of the Public Agency’s operational issue, Ms. Roe did this review, not you. The goal of the review “was to identify whether there was [a need for services from an additional service provider in order to meet the objectives of the Public Agency concerning the operational issue].” Ms. Roe did the review. Ms. Roe works under the supervision of the manager who reports to you. Ms. Roe was the staff member who made the presentation and recommendation to the board. The staff’s recommendation, based on the review, was to [give XYZ, Inc. a contract to provide services with respect to the operational issue.] The board unanimously adopted the recommendation. Your role was limited to knowing that the review was underway, preparing the board’s agenda, reviewing the staff’s recommendation before it was sent out in the board packets, and commenting at the board meeting that it is Ms. Roe’s ongoing charge to continue monitoring the operational issue and make recommendations as needed.

We conclude that your involvement in the contract between XYZ, Inc. and the Public Agency was not “personal and substantial.” Rather, your role was in the nature of general supervision of Public Agency employees (such as Ms. Roe) without direct involvement in the matter, ministerial functions not involving the merits of the matter under consideration (such as calendaring an agenda item for the board), and routine processing of documents (such as reviewing board packet materials before sending them out to the board). These activities do not constitute “personal and substantial participation in a matter” under AS 39.52.180(a). *See* 9 AAC 52.100(b).

In addition, you may, without a waiver, undertake future work for XYZ, Inc. concerning its contract with the Public Agency if the issue is one that was not pending before the Public Agency while you served the state. For instance, if the Public Agency

staff again review the agency's operational issue and a new recommendation is made to the board to give another contract to XYZ, Inc., that would be a new matter. Work on a new matter is not prohibited even if the new matter is related to a matter on which you participated as a state employee. 1997 Inf. Op. Att'y Gen. (June 24; 663-96-0576).

Your proposed employment with XYZ, Inc. 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. Those methods are newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a non-confidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission.

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.

You may have had access to information in the course of your state duties that has not been disseminated to the public or that is confidential by law. You should ensure that AS 39.52.140 is observed during your employment with XYZ, Inc., if you accept the position. 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