

MEMORANDUM

State of Alaska
Department of Law

TO: Division Director

DATE: March 24, 2005

THRU: Barbara J. Ritchie
Chief Assistant Attorney General
Opinions, Appeals, & Ethics



FILE NO: 663-05-0160

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SUBJECT: Ethics Advice
Concerning Conjugal
Relationships and
AS 39.52.120

FROM Brita L. Patterson
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Opinions, Appeals & Ethics

You requested advice on how the Executive Ethics Act applies where two state employees work in a supervisor-subordinate role and are also cohabiting in a conjugal relationship.¹ The supervisor is in charge of scheduling for the administrative unit, including for his or her cohabiting/conjugal partner, and on at least one occasion the supervisor may have participated in an evaluation team that affected the partner's receipt of a promotion. You also asked us to consider what actions can be taken when people in this situation live and work in a remote area, making a transfer of one of them to another position in the agency impracticable.

The Executive Ethics Act

There are several sections of the Executive Ethics Act, AS 39.52, that are relevant to the described situation.²

Alaska Statute 39.52.120(a) states that a public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant

¹ This opinion was modified and expanded for publication by the State Ethics Attorney.

² The ethics issues and considerations discussed in this opinion would also apply to situations involving people who are legally married.

unwarranted benefits or treatment for any person. The regulation interpreting this section defines “unwarranted benefits or treatment” to include “a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on improper motivation.” 9 AAC 52.040(a)(1). “Improper motivation” means “a motivation not related to the best interests of the state, and includes giving primary consideration to a person’s kinship or relationship with a public officer[,]” or “financial association with a public officer[.]” 9 AAC 52.990(4)(A)-(B).

A public officer may also not take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest. AS 39.52.120(b)(4). “Official action” is “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.” AS 39.52.960(14). “Financial interest” means “an interest held by a public officer or an immediate family member, which includes... a professional relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit.” AS 39.52.960(9)(A). It also means holding a position in a business as an employee. AS 39.52.960(9)(B). “Personal interest” is defined as “an interest held or involvement by a public officer, or the officer’s immediate family member or parent, including membership, in any organization... from which, or as a result of which, a person or organization receives a benefit.” AS 39.52.960(B)(18). A salary is a “benefit.” AS 39.52.960(b)(3).

Of particular concern in this circumstance is the definition of “immediate family member.” “Immediate family member” includes “another person cohabiting with the person in a conjugal relationship that is not a legal marriage.” AS 39.52.960(11)(B).

Finally, a public employee who is involved in a matter that may result in a violation of AS 39.52.120 (or any other section of the Code of Ethics) shall “(1) refrain from taking any official action relating to the matter until a determination is made under this section; and (2) immediately disclose the matter in writing to the designated supervisor and the attorney general.” AS 39.52.210(a)(1)-(2).

Legal Analysis

Supervising and participating in the promotion of a partner with whom one is cohabiting in a conjugal relationship raises a number of issues under the Ethics Act, which are discussed below.

AS 39.52.120(a)

A public officer may not "... intentionally...grant unwarranted benefits or treatment for any person." AS 39.52.120(a). If, for example, the parties were to deviate from normal procedures in scheduling work hours or projects for the convenience of their relationship or were to give preference based on the parties' personal relationship, the motivation would not be related to the best interests of the state. Instead, these actions would indicate that primary consideration was being given to the subordinate's relationship with the supervisor and would therefore be an unwarranted benefit based on improper motivation under the Ethics Act.

Furthermore, an action by the supervisor to promote his or her conjugal/cohabiting partner can not reasonably be distanced from the notion that the supervisor's own financial association with the partner motivates the bestowing of this benefit.

AS 39.52.120(b)(4)

A subordinate employee is an "immediate family member" of the supervisor where the parties are cohabiting in a conjugal relationship that is not a legal marriage. AS 39.52.960(11)(B). As a result, the supervisor has a derivative financial interest in the schedule and employment status of his or her partner, including the receipt of a promotion.

Because of this interest, under section .120(b)(4), the supervisor is precluded from taking or withholding official action that may affect his or her partner. He or she is conflicted out of participation on any panel or review process concerning the subordinate employee, may not make recommendations regarding the promotion or receipt of benefits, and may not participate in scheduling of the subordinate employee with which he or she has the relationship or participate in evaluating the subordinate's job performance.

Conflict Not Insignificant

The standards of ethical conduct for members of the executive branch distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interest that are substantial and material. AS 39.52.110(a)(3). In addition, people who serve as public officers retain their rights to interests of a personal or financial nature. AS 39.52.110(a)(2). Thus, the Ethics Act provides that there is no

substantial impropriety if, as to a specific matter, a public officer's personal or financial interest in the matter is insignificant. AS 39.52.110(b).

In our opinion, the relationship between the supervisor and the subordinate is significant. Moreover, the promotion and scheduling action that may have been taken by the supervisor is significant. The supervisor has authority to schedule his or her partner in a manner that is significant to the partner and to others in the administrative unit. Furthermore, the supervisor may have participated in a decision that materially and substantially affected the financial status of his or her partner. As the partner is an "immediate family member," the supervisor has a significant derivative financial interest in such actions.

AS 39.52.210

For the above reasons, in accordance with AS 39.52.210, the supervisor should have promptly disclosed, in writing, the facts and circumstances to the designated ethics supervisor. Furthermore, the supervisor was obligated to refrain from taking any official action relating to any matter affecting the financial interests of the subordinate employee until the designated ethics supervisor made a determination regarding the potential violation. In addition, the better practice would be for the subordinate to also make a disclosure of a potential violation under section .210 in order to avoid a possible claim that the subordinate was aiding a violation.

Possible Corrective Actions

The cohabiting/conjugal relationship between a supervisor and a subordinate is the source of the potential and actual conflicts raised in this case. You advised us that it is not realistic to transfer one of these employees to another position in this remote location and have asked for suggestions concerning how the matter may be addressed under AS 39.52.210.

Since the conflict is created by the supervisor-subordinate relationship between this couple, the solution to addressing the conflict is to sever that relationship. It is left to the discretion of the department to decide how best to sever the supervisor-subordinate relationship. The employees could continue to work in the same location if: (1) the supervisory position were eliminated and both employees were supervised by someone else, or (2) the subordinate was supervised by a distant supervisor for all purposes while the local supervisor continued to supervise other employees. If that is not possible, then one of the employees will either have to be transferred or terminated.

These employees have a right to be in a personal relationship if they so choose and cannot be ordered to sever their personal relationship. However, the employees do not have a right to continue in their current employment situation where their conjugal relationship creates potential or actual violations of the Ethics Act.

Conclusion

Because the relationship and corresponding actions may run afoul of AS 39.52.120(a) and (b) and AS 39.52.210(a), prompt action should be taken to remedy the violation.

If you have any questions about our conclusions and the advice, please do not hesitate to contact us.