

MEMORANDUM

State of Alaska
Department of Law

TO: Al Clough
Deputy Commissioner
Department of Commerce,
Community and Economic
Development

DATE: July 5, 2005

FILE NO: 665-05-0171

TEL. NO.: 451-2811

FROM: Paul R. Lyle
Sr. Assistant Attorney General
Opinions, Appeals & Ethics

SUBJECT: Marine Pilots Board:
Alleged Conflicts of Interest
Related to Proposed
Retirement Surcharge

Introduction

You have requested an opinion regarding alleged conflicts of interest for board members of the Board of Marine Pilots (“the board”).¹ AS 08.62 establishes the board within the executive branch under the Department of Commerce, Community and Economic Development. Members of the board are appointed by the governor and are “public officers” subject to the provisions of the Executive Ethics Act. AS 39.52.910(a); AS 39.52.960(4); AS 39.52.960(21)(B).

Facts

The board is comprised of two active pilots, two active registered agents or managers of vessels subject to AS 08.62, two public members and the commissioner of the department or his designee. You are the commissioner’s designee on the board and act as its chair. As chair of the board, you are the board’s designated ethics supervisor. AS 39.52.960(8)(E).

The board has authority to adopt rates for pilotage services. AS 08.62.046. Recently, a retirement surcharge rate for the Southwest Alaska Pilot’s Association (“SWAPA”) was approved by a 4-3 vote of the board in Case No. 1950-04-01. SWAPA is a recognized pilots association under AS 08.62.

¹ The board members affected by this opinion have waived their confidentiality under AS 39.52.240(g) and AS 39.52.240(h).

The Alaska Steamship Association (“ASA”), an industry group, opposed the surcharge. ASA asserted at the hearing on the surcharge that a board member who is also a member of SWAPA had a conflict of interest and was disqualified from voting on the measure under the Executive Ethics Act. ASA alleged that the board member possesses a significant personal and financial interest in the creation of a retirement system for SWAPA and in the retirement surcharge imposed on shippers. Pilots argued that, if they were conflicted out, so were board members from the industry.

The state’s hearing officer, acting as an advisor to the board, permitted each board member to decide whether they would vote on the issue. All board members decided to participate in the matter.

Currently pending before the board in proceeding OAH No. 05-0036-MPT is a proposed retirement surcharge for the Alaska Marine Pilots (“AMP”), another recognized pilot association. If adopted, proceeds from the surcharge will be deposited into a joint retirement fund being established by SWAPA and AMP. ASA also opposes this surcharge and continues to allege that the SWAPA pilot board member possesses a conflict of interest because SWAPA and AMP are forming a joint retirement plan.

Also pending in proceeding OAH No. 05-0036-MPT are competing motions directed at having all board members declare their interests in either pilot associations or the ASA or its members or affiliates. Pilot members of the board maintain that, if they have significant financial conflicts of interest, industry members may also have significant financial conflicts of interest concerning the retirement surcharge.

In addition, you advised us that one of the public members of the board is a vice-president of a company that provides port services to shippers in a port city in Alaska. The company has contracts with shipping companies that will have to pay the retirement surcharge if it is adopted by the board. You have asked whether that board member may have a conflict of interest when voting on the retirement surcharge.

Questions

1. Do board members who are also members of pilot associations have a conflict of interest that precludes them from voting on the retirement surcharge?
2. Do board members who are vessel agents working for maritime service companies have a conflict of interest that precludes them from voting on the retirement

surcharge?

3. Does the public member of the board who is a vice-president of a company that has contracts with shippers that will have to pay the retirement surcharge have a conflict of interest in the retirement surcharge matter?

Summary of Advice

1. It was contrary to the Ethics Act for the pilot board member who is a member of SWAPA to vote on the SWAPA retirement surcharge. However, the SWAPA board member participated in the vote based on the legal advice of a hearing officer who left the decision to vote entirely to the board member's discretion. In this circumstance, we do not think the board member intentionally violated the Ethics Act.

2. The SWAPA retirement surcharge adoption has been appealed to superior court. Since the SWAPA retirement surcharge was approved in a manner that violated the Ethics Act, we recommend that the board void the surcharge under AS 39.52.430(c) and re-vote on the matter.

3. The SWAPA pilot board member may be conflicted out of voting on the pending AMP retirement surcharge if the facts establish that the viability of the SWAPA retirement plan or the level of SWAPA retirement benefits depends upon the adoption of the AMP retirement surcharge. *See* Recommendation in No. 6, below.

4. Given the information we have been provided, it does not appear that the vessel agents who are board members have a conflict of interest with respect to the retirement surcharge. It is conjectural that their votes on the retirement surcharges would affect their employment as vessel agents. However, additional information may indicate that the financial ties between the vessel agents' employment and their actions on the Marine Pilots Board is closer than we have been given to understand. *See* Recommendation in No. 6, below.

5. As a general matter, the more likely it is that the public member's company may be affected by his vote on the retirement surcharge, the more likely it is that he has a significant financial interest in the retirement surcharge matter, thus creating a conflict of interest. *See* Recommendation in No. 6, below.

6. We recommend that you hold a hearing to explore the effect, if any, that the AMP retirement surcharge is likely to have on the viability of the SWAPA retirement program or the level of SWAPA retirement benefits so that you can determine whether the SWAPA

board member has a significant personal or financial interest in the AMP surcharge matter. We also recommend that you hold a hearing to explore the extent of other board members' personal or financial interests in issues or organizations coming before the board. Once you have more detailed information about these interests, we can assist you in determining whether any board members have significant personal or financial interests that disqualify them from voting on the surcharge or other issues pending before the board.

Legal Analysis

We first examine general principles applicable to all public officers and then apply these principles to each class of board member whose conduct is under review.

I. General Principles under the Ethics Act

Two sections of the Executive Ethics Act are implicated by the facts of this case, AS 39.52.120(a) and AS 39.52.120(b)(4).

AS 39.52.120(a) precludes public officers from using their official positions for personal gain and from granting an unwarranted benefit or treatment to any person. AS 39.52.120(b)(4) precludes public officers from taking official action in order to affect a matter in which they have a personal or financial interest.²

However, AS 39.52.110(b) provides that, even where there is a personal or financial interest in a matter, there is no violation of the Act if: (1) the officer's interest in the matter

² For purposes of AS 39.52.120(b)(4), a "personal interest" is defined as membership or involvement by the officer or an immediate family member in an organization that benefits from the officer's involvement or membership. AS 39.52.960(18). A "financial interest" means an interest that is a source or expected source of income for the public officer or an immediate family member or a position held by the officer or an immediate family member in a business, such as an officer, director, partner, manager, or employee. AS 39.52.960(9). The definition of "official action" includes voting on a matter. AS 39.52.960(14).

For purposes of AS 39.52.120(a), "personal gain" means an action that benefits an officer's personal or financial interest. 9 AAC 52.990(b)(6). Thus "personal gain" bears the same meaning as "personal interest" and "financial interest." The definition of "unwarranted benefit or treatment" most relevant to the facts of this case concerns granting a benefit by deviating from normal procedures based on an improper motivation. An "improper motivation" is defined as an action that is not in the state's best interest and that gives primary consideration to a person's relationship with the officer, financial association with the officer, potential for conferring a future benefit on the officer, or political affiliation. 9 AAC 52.990(b)(4).

is insignificant, (2) the action affects a large class of persons to which the officer belongs, or (3) the officer's action would have an insignificant or conjectural effect upon the matter.

We have determined by regulation that membership in a class is not a significant interest if the officer is required by statute to be a member of the class, the official action taken affects all members of the class, the officer does not receive a significant financial or personal benefit from the action, and the action is not based on an improper motivation. 9 AAC 52.030(a).

AS 39.52.110(c) provides that the attorney general and designated ethics supervisors "must be guided by [section 110] when issuing opinions and reaching decisions." There is no violation of the Act where an official takes action in a matter in which the official has an insignificant interest or where the officer's influence or action would have a conjectural effect on the matter.

Thus, in assessing an alleged violation or potential violation of section .120(a) or .120(b)(4) of the Ethics Act, we look first to see whether the public officer has a personal or financial interest in a matter pending before the officer. If so, we next look to see whether that interest is "significant" under section .110(b).

In determining whether a public officer's financial interest in a matter crosses section .110's "significance threshold," this office focuses, not on the bare market value of the interest, but on whether the public officer may take or withhold official action in the matter that will likely **affect the value** of the official's interest. In other words, we look to see whether the officer's actions in the matter would likely increase or decrease the value of the officer's financial interest. If so, we may preclude the officer from being involved in the matter, depending on the value of the officer's financial interest and the degree of the change in its value. If the public officer cannot affect the value of his financial interest in a matter through the exercise of official action, then the officer's financial interest does not create a conflict of interest under the Act.

2005 *Inf. Op. Att'y Gen.* (Mar. 24; 663-05-0171), 2005 WL 1198705 at *4 (Alaska A.G. 2005)³ (emphasis in original). "Furthermore, in rendering opinions under AS 39.52, we

³ *citing*, 1996 *Inf. Op. Att'y Gen.* (Sep. 6; 663-97-0074), 1996 WL 913884 at *2 (Alaska A.G. 1996); 1994 *Inf. Op. Att'y Gen.* (Nov. 29; 661-95-0214), 1994 WL 1029333 at *3 (Alaska A.G. 1994); 1989 *Inf. Op. Att'y Gen.* (Jul. 1; 663-89-0526), 1989 WL 266908 at *3 (Alaska A.G. 1989).

assume generally that if the requisite interest in a matter is found, then participation by the interest holder is for his/her own benefit.” *Id.* at *3 (citation omitted).

We apply these general principles to the facts of this case and the three classes of board members at issue.

II. Board Members who are Marine Pilots

In 1992 *Inf. Op. Att’y Gen.* (Nov. 25, 1991; 663-92-0180), 1991 WL 561443 (Alaska A.G. 1992)⁴(“1992 opinion”), this office was asked whether board members who are professional members of certain associations may vote on matters that affect the associations to which they belong.

In our 1992 opinion, we construed both section .120(a) and 120(b)(4) of the Ethics Act. Applying the general principles set out above and looking at the structure of the board, we concluded that

for professional members, the ‘class of persons to which the public officer belongs’ is the class of such professional members generally. Therefore, under AS 39.52.110(b)(1), when the professional members’ personal or financial interests in a matter before the board are identical with that of such professionals generally, it would not be unethical for the professional board member to participate. Thus, when the matter before the board involves multiple regions and associations, both professional members may participate, even if they would personally benefit from the proposed action.

However, when the matter before the board has only regional effect, or effect on a single association, it becomes a closer question. In other words, as the size of the ‘class’ shrinks, the substantiality of the member’s personal benefit increases.

...

Accordingly, when tariffs generally are being discussed, full participation should be allowed. ... However, if, for example, an emergency regulation were proposed to amend the tariff for only one region, the professional member from that region should recuse him or herself from discussion and voting on that amendment.

...

⁴ Redated for printing January 1, 1992; redacted for publication under AS 39.52.240(h).

... Thus, while the member may support, before the board, the interests of professional members generally without committing an ethical violation, any action taken on his or her part that favors his or her association over another would fall under personal, rather than class, benefit.

1991 WL 561443 at *4.

To summarize, we concluded that the professional members of the board could be involved in a matter that affects all professional members statewide. However, where the matter is specific to the board member's regional professional association or is specific only to the region in which that professional board member works, that board member must be recused from participating in the matter.⁵ *Id.* The conclusion of our 1992 opinion remains valid and directly applies to the current case.

Our 1992 opinion and 9 AAC 52.030(a) largely control our legal analysis in the current case. The Board of Marine Pilots is required by statute to have two members who are licensed pilots. AS 08.62.010. Therefore, marine pilot board members are mandatory members of a statutorily created class. The marine pilot board member is precluded from voting on any matter pending before the board that affects only the region in which he works or that affects only his pilots association unless the interest is deemed insignificant. Because the SWAPA surcharge affects only SWAPA, the SWAPA pilot board member should not have voted on the surcharge unless his interest in the surcharge was insignificant under section .110(b).

Whether an interest in a matter is "significant" must be reviewed on a case-by-case basis. 1999 *Inf. Op. Att'y Gen.* (Sep. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G. 1999). There are two separate matters affecting the marine pilot board member in this case: (1) the SWAPA board member's involvement in the adoption of the retirement surcharge for SWAPA and (2) the SWAPA board member's proposed involvement in the adoption of the retirement surcharge for AMP. We review these matters seriatim to determine whether the SWAPA board member has a significant personal or financial interest in either matter.

A. The SWAPA board member's interest in the retirement surcharge hearing for SWAPA in Case No. 1950-04-01 is significant.⁶

⁵ This conclusion is consistent with the subsequently promulgated ethics regulation described above. *See* 9 AAC 52.030(a)(addressing when membership in a class is significant).

⁶ Our legal analysis primarily addresses AS 39.52.120(b)(4). However, a contravention of section .120(b)(4) may also contravene section .120(a) because the definitions of the phrases "personal interest," "financial interest," and "personal gain"

AS 39.52.120(b)(4) precludes public officers from taking official action in order to affect a matter in which they have a personal or financial interest. As we held in our 1992 opinion, professionals have both a personal and financial interest in their memberships in their respective professional associations. Thus, unless the SWAPA board member's interest in the retirement surcharge is insignificant under AS 39.52.110(b), he should not have taken official action on the matter.

As we stated above, under our section .110(b) two-step analysis, we look first to see whether the SWAPA board member's vote affected the value of the proposed retirement plan. If so, in the second step, we examine the value of the interest and the degree to which the value changed, if any.

(i) The SWAPA board member's action affected the value of his interest in the SWAPA retirement plan.

The SWAPA retirement system is a work in process. However, we understand that there will be no retirement system provided by SWAPA to its member pilots if there is no retirement surcharge adopted by the Marine Pilots Board.

The vote on the SWAPA surcharge was 4-3. Had the SWAPA pilot board member not voted on the surcharge, the surcharge (and the institution of SWAPA's retirement plan) would have failed. By voting on the SWAPA surcharge, the SWAPA board member took official action that transformed SWAPA's proposal from an unfunded retirement plan to a funded plan. Thus, under the first step of our section .110(b) analysis, we conclude that the SWAPA pilot board member affected the value of his interest in the plan.

(ii) The Value of the SWAPA plan is high and the degree of change in the value resulting from the SWAPA board member's official action was substantial.

Under the second step of our two-step analysis under section .110(b), we evaluate (1) the value of the retirement plan and (2) the extent of the change in its value resulting from the board member's official action.

(a) The likely value of the plan is high.

overlap. While a single event does not always implicate both sections, we conclude that the SWAPA board member's vote on the retirement surcharge for SWAPA members was contrary to both section .120(a) and .120(b)(4). Thus, the analysis in this section addressing AS 39.52.120(b)(4) applies with equal force to AS 39.52.120(a).

Because the SWAPA retirement plan is in its infancy, we cannot place a dollar value on the retirement benefits that will accrue to individual SWAPA pilots. However, the existence of any retirement plan is an important factor in attracting and maintaining a highly trained workforce. We are advised that pilots are well-paid individuals. We are also advised that the cost of the retirement surcharge to industry will be tens of millions of dollars over the 30-year life of the surcharge. It is therefore likely that a SWAPA retirement benefit will have a high value.

(b) The degree of change in the SWAPA retirement plan's value was substantial.

The SWAPA pilot's vote was crucial to passage of the surcharge. The 4-3 vote moved the value of the proposed SWAPA retirement system from zero (had the surcharge been defeated) to a firm expectation of a substantial financial benefit. Therefore, we conclude that the degree of the change in value as a result of the board's vote was substantial.

Under our two-step "significance" analysis, the pilot board member's vote was contrary to the Ethics Act. He took official action on a matter in which he had a significant financial interest.

(iii) The SWAPA board member has a significant personal interest.

The SWAPA pilot board member also had a significant personal interest in the surcharge because it directly benefited the pilots association to which he belongs and made the decisive difference in that association's ability to provide a retirement plan for its members, including the SWAPA pilot board member. In our 1992 opinion, we held that professional members of a board should not vote on matters that affect only their professional associations, as opposed to all associations generally, because of the significant personal interest professionals have in their own associations.

The SWAPA board member's vote on the SWAPA retirement surcharge was contrary to section .120(a) and .120(b)(4).

(iv) What remedy should be applied?

Given the peculiar facts of this case, we do not believe that the SWAPA pilot board member intentionally violated the Ethics Act. The SWAPA board member voted on the SWAPA retirement surcharge after being advised by the state hearing officer that, although recusal would be preferable, the decision to vote was the board members' alone to make. We can not fault the SWAPA board member for following that legal advice, as did all other

board members. Nevertheless, the advice was wrong as a matter of law and procedure.

AS 39.52.220(a) requires board members to declare potential conflicts on the record. After a potential conflict is declared, the board chair must make a ruling on the issue and may obtain advice from the Department of Law before making that determination. AS 39.52.220(b). If a board member objects to the chair's ruling, the board must vote on whether there is a conflict of interest and the subject of the conflict must abide by that decision. However, if the Attorney General has advised the chair or issued an opinion concluding that a conflict exists, the board member cannot take official action on the matter regardless of the board's vote on the conflict issue. 9 AAC 52.120(b)(3).

In this case, although parties to the hearing alleged there was a conflict of interest, the board did not vote on the conflict. The hearing officer, rather than the chair, addressed the conflict. In addition to these procedural deficiencies, a published opinion of the Attorney General expressly prohibits board members from acting on any matter that affects only their own professional associations. *See* 1991 WL 561443. Thus, although we would not take enforcement action against the board member for following the hearing officer's legal advice, the fact remains that his vote was contrary to the Ethics Act.

The Ethics Act provides that "[a]ny state action taken in violation [of the Act] is voidable, except that the interests of third parties and the nature of the violation may be taken into account." AS 39.52.430(c). The board's action on the SWAPA retirement surcharge has been appealed to superior court. One of the issues raised on appeal is the alleged violation of the Ethics Act.

We recommend that the board void the vote on the SWAPA retirement surcharge and reconsider the surcharge without the participation of the SWAPA board member or other board members who may have a conflict of interest under the advice provided in this opinion.

B. The SWAPA board member's interest in the retirement surcharge hearing on the AMP retirement surcharge at issue in Case No. OAH 05-0036-MPT may be significant.

Whether the board member who is a member of SWAPA has a significant personal or financial interest in the AMP retirement surcharge pending before the board is more difficult to assess. The ASA alleges that the retirement plan that AMP is presenting to the board was originally a proposal to establish a statewide plan that has now been modified to be a joint plan comprised of only SWAPA and AMP pilots.⁷ *Motion to Disqualify Board*

⁷ Under our 1992 opinion, the pilot board members and the vessel agents could

Member (April 6, 2005) at 2. The ASA also alleges that

SWAPA witnesses testified that SWAPA did not have a retirement plan and would not adopt a plan except the statewide plan that includes the other pilot organizations, now apparently being modified to a SWAPA/AMP plan.

Id. at 6. ASA alleges that AMP will not establish a retirement plan “except in conjunction with SWAPA.” *Id.* However, it is unclear to us whether SWAPA will establish its own retirement plan if the AMP surcharge is not approved.

Whether the SWAPA board member has a significant interest in the AMP retirement surcharge turns on whether (1) SWAPA will institute a retirement plan of its own if the AMP surcharge is not approved by the board or (2) the value of the SWAPA board member’s retirement benefits will likely be affected by whether the AMP pilots join the plan.

If the SWAPA retirement plan will not, or can not, be implemented without the participation of AMP pilots, then we believe that the SWAPA board member is disqualified from voting on the plan: The SWAPA board member would significantly affect the value his own retirement by voting on the AMP surcharge because the SWAPA plan will not exist if the AMP surcharge is not approved. *See, e.g., 1994 Inf. Op. Att’y Gen.* (Nov. 29; 661-95-0124), 1994 WL 1029333, *3 (Alaska A.G.) (If an “allocation proposal will significantly affect the financial interests of the Board member as a fisher and permit holder in the fishery, then the Board member would have a conflict of interest and should not participate as a Board member when the Board deliberates and votes on the allocation proposal.”) Likewise, there would be a conflict of interest if it were likely that the retirement benefits available to SWAPA members would be affected by the AMP pilots’ participation in the plan.

On the other hand, if the ability of SWAPA to establish a retirement plan is entirely independent of AMP’s participation in the proposed joint plan -- and the SWAPA members’ retirement benefits would be unaffected whether or not AMP pilots participate in the plan -- then the SWAPA board member would not likely be able to affect the value of his interest in the SWAPA plan by taking official action on the AMP surcharge. In that case, the SWAPA board member’s vote on the AMP surcharge would have a conjectural effect on the SWAPA retirement plan and the SWAPA board member would not possess a conflict of interest under either AS 39.52.120(a) or .120(b)(4). *See AS 39.52.110(b)(2)* (There is no conflict where the action would have a “conjectural effect on the matter.”)

Therefore, it is essential that you determine how closely tied the viability of the

vote on a statewide retirement surcharge without violating the Ethics Act.

SWAPA plan or benefits level is to the AMP surcharge. The more dependent SWAPA's plan or benefits level is on the adoption of the AMP surcharge, the more likely it is that the SWAPA board member has a conflict of interest.

III. Board Members who are Agents of Vessels

It is more difficult to assess the interest of board members who are vessel agents.⁸ The board members who are vessel agents are employees of maritime service companies. The companies for whom these individuals work are not the shipping companies or cruise lines that would pay the retirement surcharges. However, the shippers and cruise lines do business with the companies that employ the vessel agents.

The vessel agents have no financial interest in the retirement plan funded by the surcharge. To our knowledge they have no investments in the companies that will be paying the retirement surcharge.⁹ However, they have a financial interest in their private employment with companies that do business with the shipping companies and cruise lines that must pay the retirement surcharge. Thus, they have a financial interest in their employment that may be affected by how they vote on the retirement surcharge, although it is far more attenuated than the interest the pilot board members have in their associations' retirement plans.

Whether the financial interest of vessel agents in their employment is "significant" turns upon the section .110(b) analysis set out above. As is the case with the marine pilot

⁸ As is the case with marine pilots, vessel agents would have no conflict of interest if the retirement surcharge were a statewide tariff and the vessel agents were not personally affected by its passage or defeat in a manner different in kind or degree from other vessel agents throughout the state. AS 39.52.110(b)(1); 9 AAC 52.030(b).

⁹ If any board member owns direct investments in a shipper or cruise line company that will be required to pay the surcharges, then we must determine whether they could affect the value of their stock by voting on the surcharge. You should ask the board members whether they have investments in these companies. If so, we must be advised as to the investment's value. The value of stock of a large company may not be affected by adoption of the surcharge, but we would need to look at that issue separately.

If financial interests in the shipping companies or cruise lines are owned through ownership of shares in an independently managed, broadly diversified mutual fund, then there is no significant financial interest that would disqualify the owner of the mutual fund shares from acting on the surcharge. 2005 *Inf. Op. Att'y Gen.*, 2005 WL 1198705 at *6-9.

board members, in order to determine whether the vessel agents' interest in the surcharge is "significant" we must first analyze whether the vessel agents could affect the value of their private employment by voting on the retirement surcharge. If so, we must next analyze the value of their private employment and the degree to which it could be affected by their participation in the surcharge proceeding.

In order to conclude that the vote of a vessel agent could affect the value of the vessel agents' private employment, we would have to establish that the shippers and cruise lines that must pay the retirement surcharge would either increase or decrease the business they did with the maritime companies that employ the vessel agents based upon the vote of the vessel agent board members. Assuming we could prove that a projected business increase or decrease was attributable to the votes of the vessel agents, we would next have to establish that the business increase or decrease would affect the employment status, salary or benefits of the vessel agents.

To give a concrete example, in order to establish that a vessel agent board member had a significant financial interest in the retirement surcharge proceeding, we would have to demonstrate that the shippers and cruise line companies would likely give business to the competitors of the company employing that agent if the agent voted for the retirement surcharge. We would next have to show that, in response to the lost business, the company employing the agent would either terminate his employment or reduce his salary and benefits because of the vote the agent cast.

Based on the information known to us at this time, it tentatively appears that the vessel agents' votes on the retirement surcharge would have a conjectural effect on the maritime companies employing them and on their continued employment for those companies. Under AS 39.52.110(b)(2), there is no violation of the Act if the official's action would have a conjectural effect upon a matter. Therefore, unless there is additional information that would more closely tie their employment, salary or benefits as vessel agents to how they vote on the retirement surcharge, it appears that the vessel agent board members do not have a conflict of interest in the retirement surcharge matter.

However, that tentative conclusion does not end our inquiry. You advised us that the relationship between shippers, maritime service companies and agents is complex. The services provided by the companies employing the vessel agents who are board members may be more directly connected with the shippers than we understand them to be. In addition, we do not know how closely associated the vessel agent board members are with the ASA.

As is the case with the SWAPA board member voting on the AMP surcharge, the closer the connection there is between the vessel agents' votes and their continued

employment, salary or benefits, the more likely it is that they have a significant financial interest in the retirement surcharge matter that disqualifies them from participating in or voting on the matter. Concomitantly, the more conjectural the connection between their votes and their employment, salary or benefits, the less likely it is that there is a conflict of interest.

We recommend that you hold a hearing to thoroughly explore the connection, if any, between the vessel agents' votes on the surcharge and their employment status. As we stated above, the more it appears the employment of the vessel agents will be affected by their board votes, the more likely it is a conflict of interest exists.

IV. Possible Conflict of Public Member

The significance of the financial interest of the public member who is vice-president of a company that contracts with shippers is also difficult to assess. His company has direct contracts with the shipping companies affected by the surcharge. There are competing service companies in the port city in which his business is located.

It is conceivable that shippers will stop using his company's services if the public member votes against the ASA position on the retirement surcharge. However, we have no information from which we can determine whether that is a likely outcome. Furthermore, an appearance of impropriety does not constitute a violation of the Act. 9 AAC 52.010. Therefore, a merely conceivable effect on the board member's business is not enough to establish that the member has a significant financial interest in the surcharge matter.

The more likely the public member's private business interest may be affected by the vote he casts on the surcharge, the more likely it is that the public member possesses a significant financial interest in the outcome of the surcharge proceeding. We recommend that you explore the public member's interest further to determine whether it is likely that his employment or his company's profitability would be affected by the way he votes on the surcharge.

Conclusion

If you have any questions concerning this advice, please do not hesitate to contact us. We will assist you in evaluating the additional facts adduced at a hearing conducted in accordance with our recommendation.