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May 21, 2009

Designated Ethics Supervisor

Re: Application of Ethics Act to Financial Interests of New Employee
AGO File No. 661-07-0014

Dear Designated Ethics Supervisor,

You recently requested advice regarding the application of the Executive Branch Ethics Act to matters disclosed by Employee upon his return to employment as an engineer with the Agency. This opinion provides my advice pursuant to AS 39.52.240.

In his request, Employee advises that he was employed by Company from January 2007 until April 2009. As a Company retiree, he receives lifetime medical insurance. He reports that the current monthly premium paid by Company is approximately \$357. He will receive dental and vision insurance for 18 months. He does not know the premium but says it is likely less than \$5000. He also will receive either monthly annuitized pension payments for life or an equivalent lump sum cash payment. The value will be more than \$5000.

I. General Principles for Applying Ethics Act.

The Ethics Act is intended to ensure that public officers will not base their public responsibilities upon their own personal or financial interests.¹ A purpose of the Act is to ensure that “public officers conduct the public’s business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest.”² The Act also

¹ AS 39.52.010.

² AS 39.52.010(a)(4).

acknowledges that public officers should be free to pursue personal and financial interests, and are valued for those interests, as long as they do not interfere or conflict with the officer's public responsibilities.

In AS 39.52.110, the Alaska Legislature provided guidance for evaluating public officer disclosures and potential conflicts of interest.³ It stated in part that the "standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material." It also stated

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.

The Act speaks principally to actual substantial conflicts of interest, not the appearance of conflict alone.⁴ It requires individual determinations regarding potential conflicts of interest on a case by case basis.⁵ Where a potential conflict exists, action must be taken to avoid the conflict.

II. ANALYSIS OF DISCLOSED INTERESTS

Generally, the Ethics Act requires that you consider whether Employee may take action in his position with Agency that may affect his own interests, either favorably or unfavorably. The Act is concerned with both actions providing personal gain and actions taken to avoid an adverse effect on a public officer's interests.

³ AS 39.52.110(c).

⁴ 9 AAC 52.010; *1993 Inf. Op. Att'y Gen.* (Jan. 1; 663-93-0113); 1993 WL 595769 (Alaska A.G.) at *2-3, 5.

⁵ *1999 Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232); 1999 WL 1454824 (Alaska A.G.).

The Ethics Act does not address relationships and interests pre-dating a public officer's state service that do not survive after the officer's state service begins. We consider how Employee's actions may affect his current personal and financial interests.⁶ Under the Act, "financial interest" means "an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, . . . 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."⁷ Since Employee will continue to receive financial benefits from Company, he has a "financial interest" that may potentially be affected by his official actions. If he chose to take the lump sum pension payment, he would no longer have a current financial interest in Company other than the health insurance benefits.

We understand that Employee's position involves analysis of development and other plans and resource surveillance in Alaska. The job requires familiarity with field operations including conformance to prudent and acceptable engineering standards and to ensure that all operations are in compliance with the law. He may also recommend policy and prepare drafts of proposed regulations. Finally, as an engineer, he makes recommendations for approval and prepares administrative orders or proposals, as appropriate. As Company is an entity whose activities are overseen by Agency, Employee's actions for Agency could or would affect Company.

Employee's request for ethics determination suggests that his situation may involve a potential misuse of position under AS 39.52.120. That provision of the Ethics Act lists various actions that are not permissible. Subsection (a) states in part that "a public officer may not use, or attempt to use, an official position for personal gain."⁸ Also, subsection (b)(4) states that a public officer may not "take or withhold official

⁶ "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(18).

⁷ AS 39.52.960(9)(A).

⁸ "Gain" includes "actual or anticipated gain, benefit, profit or compensation." AS 39.52.960(10). "Benefit" is anything that is to a person's advantage or self-interest, or from which the person profits regardless of financial gain, including transfer of money, contracts, or anything of value, among other things. AS 39.52.960(3).

action in order to affect a matter in which the public officer has a personal or financial interest.” Where a potential violation of this section arises, a public officer must refrain from participating in the matter that is the subject of the potential violation, unless AS 39.52.110(b) permits participation.⁹

Under AS 39.52.110(b), as ethics supervisor you evaluate whether an interest is “insignificant” or the effect of an official action on the interest would be “insignificant or conjectural.” The value of the health insurance benefits over time and the pension to Employee are arguably significant. Therefore, you should focus on whether Employee’s official actions in a matter could likely increase or decrease the value of his interests or otherwise materially and substantially affect his interests.¹⁰

Given the nature of Employee’s disclosed interests, it appears conjectural that any actions he may take as an engineer with Agency could substantially affect his interests, if at all. The cost of the health insurance premiums is most likely set as to all retirees based on factors not likely to have a direct connection with Agency operations or Employee’s actions. We assume that the value of his pension benefit is fixed or only accrues interest or dividends based on investment factors, not related to day-to-day operations. Even if Company were to encounter future financial difficulties, it would seem highly conjectural to link the viability of the company and an impact on his benefits to his actions as an Agency employee.

We caution that the application of the standards in AS 39.52.110(b) is specific to the circumstances and depends on the specific action involved. Here, generally, Employee’s identified interests appear to represent “minor and inconsequential” conflicts that are unavoidable in a free society rather than conflicts of interests that would be substantial and material. Nevertheless, you should advise Employee that if he is presented with a matter suggesting a link to his interests, he must refrain from action and seek further specific advice from his ethics supervisor at the time.

⁹ 1999 *Inf. Op. Att’y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.) at *2.

¹⁰ 2005 *Inf. Op. Att’y Gen.* (Mar. 24; 663-05-0191), 2005 WL 1198705 (Alaska A.G.) at *5 and opinions discussed therein.

If you have any question regarding this advice, please do not hesitate to call. Under AS 39.52.210(b) and .240(c), you are required to provide Employee a written determination. The confidentiality that attaches to this advisory opinion is Employee's and therefore you may share it with him.

Sincerely,

RICHARD A. SVOBODNY
ACTING ATTORNEY GENERAL

By:
Julia B. Bockmon
Assistant Attorney General

JBB/ljt