

July 26, 2011

Steve Titus
Regional Director, Northern Region
Department of Transportation & Public Facilities
2301 Peger Road
Fairbanks, Alaska 99709

Re: Union Activity as Outside Service
AGO File No. AN2010100321

Dear Steve:

You recently requested advice regarding whether an employee who serves as an officer or representative for an employee union must submit the Outside Employment or Services Notification required by AS 39.52.170(b) of the Executive Branch Ethics Act. This opinion, under AS 39.52.240(a), confirms our interim advice provided by email on June 23, 2011, that public officers who serve as a director, steward, or similar designated representative of a union with which the state has a bargaining agreement are not required to report that service annually or as it occurs as provided by AS 39.52.170(b). Also, we have reconsidered our advice that other union related service fitting the reporting criteria in the Act does have to be reported, as discussed below.

Your request for advice was prompted by an inquiry from an employee who serves as an employee representative and negotiator for a state union, as an officer of the state-wide organization, and as trustee for the union's Legal Trust. The employee may receive some compensation in the form of travel expenses or meals in connection with these activities. The draft notification also reported service as an officer of the Alaska AFL/CIO and on the board of a union political action committee.

In enacting the Ethics Act, the legislature recognized that public officers retain their rights to personal and financial interests and may follow independent pursuits so long as these interests and pursuits do not interfere with the public officer's full and

faithful discharge of his or her state duties.¹ One principal policy underlying the Act is to “discourage [public] officers from acting upon personal and financial interests in the performance of their public responsibilities.”² Substantial conflicts of interest must be avoided.³

Alaska Statute 39.52.170(a) prohibits a public employee from rendering services to benefit a personal or financial interest or from accepting employment outside the employee’s agency if “the outside employment or service is incompatible or in conflict with the proper discharge of official duties.” To ensure that the state is informed about public employees’ outside activities and may address potential conflicts, AS 39.52.170(b) requires that all public employees rendering services for compensation or engaging in other employment report that service or employment for review and approval annually on July 1 or as a change occurs.

Under the Ethics Act, membership or other involvement in an organization from which a person or organization receives a benefit is a “personal interest.” The definition of “personal interest” is broad.⁴ Thus, the scope of the phrase, “services to benefit a personal . . . interest,” in AS 39.52.170(a) seems to encompass involvement in state unions. However, a closer examination of the state/union relationship as prescribed by other state law confirms that union involvement is not considered to be “outside” the scope of state employment and an employee’s position. Rather, it is associated with and a right of state employment.⁵

The Public Employment Relations Act (“PERA”), originally adopted in 1972, recognizes that government benefits from affording public employees the right to share in decision-making affecting wages and working conditions and establishes the legal

¹ AS 39.52.110(a).

² AS 39.52.010(a)(2)(A).

³ AS 39.52.110(a)(3).

⁴ The definition of “personal interest” refers to “organization, whether fraternal, nonprofit, for profit, charitable, or political” and “organization” is otherwise defined to include “a group, association, society, political party, or other entity made up of two or more persons, whether operated for profit or non-profit.” AS 39.52.960(15) and (18).

⁵ The conclusions expressed in this opinion are based in part on input from the Division of Personnel’s Labor Relations Manager Kate Sheehan and Assistant Attorney General William Milks, who advises the division.

framework for public sector labor relations in Alaska.⁶ PERA confirms the right of public employees, including state employees, to choose their own union representatives and to engage in collective bargaining. Public employees may join and assist labor organizations, may engage in collective bargaining “through representatives of their own choosing,” and may engage in concerted activities for mutual aid or protection.⁷ PERA also identifies certain actions by an employer to be unfair labor practices, including employer interference with a labor organization. Specifically, it provides that “(a) public employer or an agent of a public employer may not . . . interfere with the formation, existence, or administration of an organization.”⁸ And finally, PERA provides various mechanisms for resolution of employer and union or employee disputes.⁹ Thus, union representation and activity is not outside service and does not have to be reported under AS 39.52.170(b).

This conclusion is reinforced by the collective bargaining agreements with unions representing groups of state employees that the state has entered into consistent with the legal authority of PERA. Common in these agreements are provisions authorizing the union to appoint state employees to serve as union shop stewards or union representatives. In those roles, these employees may represent their co-workers in collective bargaining, grievances, disciplinary investigations, or similar matters that arise in a state workplace. Typically, the agreements provide that the union must identify to the state employer each employee who has been authorized to serve as a union steward or representative and that these employees have a certain number of hours per month that they may devote to their representation duties. Thus, under PERA and the collective bargaining agreements, notice is given to the state of some individual employee union activity and the compatibility of that service with the employee’s official duties is determined by agreement, similar to what occurs individually when outside service is reported under AS 39.52.170(b).¹⁰

⁶ AS 23.40.070.

⁷ AS 23.40.080.

⁸ AS 23.40.110(a)(2).

⁹ *See* AS 23.40.120 - .190.

¹⁰ Also, AS 39.52.160 of the Ethics Act recognizes that restrictions otherwise in place on a public employee assisting another person in a matter before his or her administrative unit does not apply to activities related to collective bargaining.

Our further review of this issue reflects that the public employee right to join and assist labor organizations and to engage in concerted activities for mutual aid or protection under AS 23.40.080 extends beyond the state bargaining unit to which they belong. When applying PERA, the Alaska Supreme Court looks to federal court interpretation of similar provisions of the National Labor Relations Act.¹¹ In interpreting the NLRA, federal courts have extended this right beyond an employee's own employment relationship to third parties, administrative and judicial forums, and appeals to legislators.¹² Thus service on the board of the Alaska AFL/CIO and service to a union political action committee¹³ is encompassed within the employer/employee relationship defined by PERA and is not outside service as addressed in AS 39.52.170, which must be reported.

This conclusion does not mean that an employee's interest in organizations such as a statewide union or political action committee or activities on behalf of such organizations are beyond the scope of other provisions of the Ethics Act or other state law.¹⁴ For example, "personal interest" as used in the Ethics Act includes involvement in political organizations.¹⁵ And the Ethics Act prohibits use of an employee's state

¹¹ 29 U.S.C. §§ 151 *et seq.* See *Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. Univ. of Alaska*, 669 P.2d 1299 (Alaska 1983).

¹² See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–67, 98 S. Ct. 2505, 2512–13, 57 L.Ed.2d 428, 438–39 (1978) (recognizing employees can seek to improve the terms and conditions of their employment outside the immediate employee-employer relationship such as through administrative and judicial forums, and by appealing to legislators to protect their interests); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir.1998) (recognizing "[e]mployees have the right to engage in concerted communications with third parties regarding legitimate employee concerns").

¹³ The political action committee disclosed by your employee is a separately established voluntary non-profit unincorporated association of members who choose to contribute. Its purpose is to promote political education and involvement and take positions regarding political candidates and government policy and legislation.

¹⁴ In *Alaska Community Colleges' Federation of Teachers, Local No. 2404*, the Alaska Supreme Court recognized that "[e]ven conduct which interferes with, restrains or coerces employees in the exercise of their collective rights may be held lawful if it advances a substantial and legitimate employer interest." 669 P.2d at 1308 n. 8.

¹⁵ AS 39.52.960(18).

position and resources to benefit personal interests or for political purposes.¹⁶ Also, the State Personnel Act recognizes a state officer's right to be a member of a political party and participate in political campaigns generally, but prohibits certain conduct related to political activity.¹⁷

Please call if you have any questions regarding this opinion.

Sincerely,

JOHN J. BURNS
ATTORNEY GENERAL

By:

Julia B. Bockmon
Senior Assistant Attorney General

JBB/jde

cc: Kate Sheehan, Labor Relations Manager, Department of Administration
William Milks, Assistant Attorney General, Labor and State Affairs

¹⁶ See AS 39.52.120(b)(34) (prohibiting use of state resources to benefit a personal interest); AS 39.52.120(b)(4) (prohibiting action to affect a matter in which a public officer has a personal interest); AS 39.52.120(b)(6) (prohibiting use of state resources for partisan political activity); AS 39.52.120(d) (public officers must take leave for campaigning, except minor, unavoidable activities).

¹⁷ See generally AS 39.25.160 and AS 39.25.178.