

March 12, 2013

Patricia Jacobson
Chair and Designated Ethics Supervisor
University of Alaska Board of Regents
202 Butrovich Building
910 Yukon Drive
P.O. Box 755300
Fairbanks, AK 99775-5300

Re: *Advisory Opinion Addressing Denali Commission Compensation*
AGO File No. AN2010100322

Dear Chair Jacobson:

This opinion addresses your request for advice regarding the Request for Ethics Determination, dated January 28, 2013, forwarded to you by Pat Gamble, President of the University of Alaska. As chair of the Board of Regents for the university, you serve as Mr. Gamble's ethics supervisor and are entitled to receive advice under AS 39.52 240(a).

Mr. Gamble seeks clarification of his responsibilities under the Executive Branch Ethics Act. Specifically, he asks whether acceptance of federal compensation for service on the Denali Commission, a federal agency created to provide job training and encourage economic development in Alaska, will violate AS 39.52.120. He considers his work with the commission to be part of his job as the president of the university. To date, he has waived compensation from the commission for that work because AS 39.52.120(b)(2) states that a public officer may not receive compensation for performance of official duties from a person other than the state.¹ He reports that, based on a recent analysis of federal law, the Denali Commission will require that he be paid

¹ "Compensation" is defined in the Ethics Act to mean "any money, thing of value, or economic benefit conferred on or received by a person in return for services rendered or to be rendered by the person for another." AS 39.52.960(7).

federal compensation for commission service in the future. The commission also will reimburse travel expenses either to him if he pays those expenses or to the university if the university pays them, as it has in the past.

As discussed in detail below, acceptance of the compensation from the Denali Commission is permitted and doing so will not violate the Ethics Act. Also, the commission's payment of travel expenses in this circumstance is a gift to the state.

I. BACKGROUND INFORMATION

A. Denali Commission

The Denali Commission is an independent federal agency created by the Denali Commission Act of 1998² to, among other things, provide job training and encourage economic development in distressed communities in Alaska and to promote modern infrastructure needs, including power, water and sanitation, in rural Alaska. The federal legislation creating the commission provides for seven specially named commissioners appointed by the United States Secretary of Commerce, including the Governor of Alaska, who serves as co-chair, and the President of the University of Alaska, or for either position, an individual selected from nominations submitted by the governor or university president.³

The Denali Commission Act also provides that the commissioners "shall be compensated" for their services based on a federal pay schedule and requires the commission to pay their travel expenses, including per diem based on federal rates.⁴ In an opinion dated March 30, 2012, the Comptroller General of the United States Accountability Office determined that the commission may not accept waivers of compensation from nonfederal commissioners because failure to pay the compensation would violate the Antideficiency Act. That act prohibits federal agencies from accepting voluntary services without specific statutory authority.⁵

Then, in December 2012, the Internal Revenue Service issued a Letter Ruling determining that the Denali Commission's nonfederal commissioners are its "employees"

² Pub. L. No. 105-277, div. C, title III, §§ 301, 303, 112 Stat. 2681-1, 2681-637 (Oct. 21, 1998), *current version at* 42 U.S.C § 3121 note (2012).

³ *Id.* at Section 303(b)(1)(A) & (B).

⁴ *Id.* at Section 306(a) & (b).

⁵ *See* 31 U.S.C. § 1342 (2012).

and that compensation paid for commission services is income, which must be included in the person's gross income for federal tax purposes, whether accepted or not. In reaching the conclusion that the commissioners are employees, and not agents of their respective offices or organizations identified in the Denali Commission Act, the ruling finds, among other reasons, that the Secretary of Commerce appoints the person to serve in each position and may remove that person; that is, a position is not filled by operation of the statutory designations alone.

B. Past Recognition of Denali Commission Service as Function of State Position

Historically, based on President Gamble's disclosure, the opinions discussed in the preceding section, and a 2003 informal attorney general opinion,⁶ we understand that Alaska public officers serving as commissioners have simply declined to accept compensation from the Denali Commission based on the prohibition in AS 39.52.120(b)(2) and that the commission regularly reimburses travel expenses to the state. The basis for both is the conclusion that the person serving as commissioner in either the university president's or governor's slot is performing official state duties and serving in an official state capacity.

The 2003 informal opinion, which addressed a public officer's disclosures of Denali Commission reimbursements of travel expenses as gifts under the Ethics Act, illustrates this conclusion. AS 39.52.130(a) prohibits a public officer from accepting a gift that benefits his personal interests if, under the circumstances, one could reasonably infer that the gift is intended to influence the performance of official duties. Under AS 39.52.130(b), public officers must report gifts valued over \$150 if the officer may take official action relating to the giver or if the gift is connected to the officer's governmental status. The opinion recognized, without detailed discussion, that commission-related work and travel were part of the disclosing officer's official duties. That characterization was then the foundation for the application of AS 39.52.130 and the advice given.

The opinion advised that the travel reimbursement fell well within ethics regulation 9 AAC 52.060(b) as a gift to the state. It reached this conclusion because the costs were comparable to what the state would pay for such travel and the purpose was to underwrite official duties of a commissioner on the Denali Commission, not to influence decisions made by a state officer serving as a commissioner. The opinion also relieved

⁶ 2003 *Inf. Op. Att'y. Gen.* (July 23; 665-04-0003) (confidential).

the officer of making further disclosures of such reimbursement, finding the travel and reimbursement of expenses clearly acceptable under the Ethics Act.⁷

II. ALASKA STATUTE 39.52.120(b)(2) IS PREEMPTED BY FEDERAL LAW.

As the circumstances suggest, there is a conflict between the Denali Commission Act and the Ethics Act—that is, between federal and state law. So we first consider whether the federal statute requiring federal compensation for Denali Commission service preempts the Ethics Act bar in AS 39.52.120(b)(2) prohibiting acceptance of compensation for official duties from an entity other than the state. As explained above, the commission is required to pay the compensation mandated by the Denali Commission Act to its nonfederal commissioners because to do otherwise would violate the federal Antideficiency Act. The IRS ruling reinforces this conclusion and requires the commission to issue W-2 forms to the commissioners. Thus, federal law has been interpreted to require an Alaska public officer’s acceptance of compensation from another entity that the Ethics Act would prohibit.

The Alaska Supreme Court discussed the law of federal preemption in *Allen v. State*.⁸ The doctrine derives from the Supremacy Clause of the U.S. Constitution which declares that federal law shall be “the supreme law of the Land.”⁹ The Court recognized “three major types” of federal preemption: “express,” “field,” and “conflict” preemption.¹⁰ Express preemption occurs “when Congress explicitly declares an intent to preempt state law in a particular area.”¹¹ Field preemption occurs “when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law.”¹² And conflict preemption occurs “when a state law and a federal law are in conflict, either because

⁷ *Id.* This blanket approval for accepting travel expenses was subject to two conditions. It applied only to expenses paid by the Denali Commission itself; expenses paid by another entity related to commission business would need to be disclosed as a gift. And if the travel arrangements were significantly more costly than what the state would pay—that is, providing a personal benefit to the officer, not the state—a gift disclosure would be required.

⁸ 203 P.3d 1155, 1161 (Alaska 2009).

⁹ U.S. Const. art. IV, § 3, cl. 2.

¹⁰ *Allen*, 203 P.3d at 1161.

¹¹ *Id.*

¹² *Id.*

compliance with both state and federal law is impossible or because the state law ‘stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.’”¹³

The Denali Commission Act does not “explicitly declare[] an intent to preempt state law” regarding compensation for Denali Commission service. Thus there is no express preemption here.

As for field preemption, the Alaska Supreme Court has held that “[c]ongressional intent to occupy the field will not be lightly inferred” and the courts will look for a “clear and manifest purpose of Congress” to occupy the field of regulation.¹⁴ This is particularly the case where historic police powers of the state are involved and employment relationships are traditionally within the state’s police power and a matter of local concern.¹⁵ Here, the context of the Denali Commission Act generally suggests an intention to support, not supplant, efforts by Alaska to assist its rural communities. And the Act’s provision providing for compensation for federal service does not address the other employment of individuals serving as commissioners or the subject of state ethical standards. This is not an instance where Congress sought to occupy an entire field of regulation.

Finally, conflict preemption occurs when “compliance with both state and federal law is impossible” or when state law “stands as an obstacle” to federal law.¹⁶ That is, we must consider whether the state regulation—AS 39.52.120(b)(2)—obstructs or conflicts with the purpose of the federal regulation—Section 306 of the Denali Commission Act. Section 306 of the Denali Commission Act, as interpreted by the United States Accountability Office and the Internal Revenue Service, requires federal compensation at a federal rate for service on the Denali Commission. Strict application of AS 39.52.120(b)(2) to prevent acceptance of such compensation because Denali Commission service is part of a public officer’s official state duties, would obstruct the operation of Section 306.¹⁷ Very simply, compliance with one act violates the other. Thus in these circumstances, we conclude that the federal statute preempts AS 39.52.120(b)(2)

¹³ *Id.* at 1162.

¹⁴ *Webster v. Bechtel, Inc.*, 621 P.2d 890, 898 (Alaska 1980).

¹⁵ *Id.*

¹⁶ *Allen*, 203 P.3d at 1161.

¹⁷ Having a recipient turn over the federal funds to the state, even exclusive of the amount of the tax, would seem to equally frustrate the intent of the Denali Commission Act that the commissioners be paid at the federal rate.

to the extent that the state statute precludes a state officer from accepting federal compensation for service on the Denali Commission.

III. APPLICATION OF ETHICS ACT TO DENALI COMMISSION COMPENSATION AND PAYMENT OF TRAVEL EXPENSES

A. Acceptance of Compensation Results in No Substantial Impropriety

Although, under the Ethics Act, the acceptance of compensation for the performance of official duties from an entity other than the state is a violation, the Act requires that we distinguish between minor and unavoidable conflicts and those that are substantial and material.¹⁸ It also permits us to conclude that “there is no substantial impropriety” if the circumstances of a specific matter fall within certain standards set out in AS 39.52.110(b).¹⁹ Therefore, we also analyzed whether, in addition to federal preemption preventing application of AS 39.52.120(b)(2), acceptance of the federal compensation in these circumstances would result in a substantial violation of the Act. We conclude that it would not.

The Ethics Act, generally, and AS 39.52.120, titled “misuse of official position,” address conflicts between a state officer’s individual interests and the state’s interests and remove incentives for the officer to act in any way inconsistent with his or her official duties. As pertinent here, AS 39.52.120(a) generally prohibits a public officer from using, or attempting to use, his official position for personal gain. And AS 39.52.120(b)(2) more specifically states that a public officer may not “accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state.”

From the state’s perspective, Denali Commission service by the governor, the university president or another public officer, as designee, to advance the state’s interests addressed by the Denali Commission Act is considered consistent with and a responsibility of the public officer’s state position. Thus, service on the commission alone does not constitute improper action to facilitate receipt of benefits to which the officer is not entitled. Therefore, such service is not a “misuse” of position for personal gain under AS 39.52.120(a), even though the officer may receive a benefit.

The purpose of AS 39.52.120(b)(2) is to prevent a public officer from having divided loyalty when conducting specific state business. It prevents state action on a matter taken not in the interests of the state, but taken instead to benefit the person paying

¹⁸ AS 39.52.110(a)(3).

¹⁹ AS 39.52.110(c).

the compensation and the financial interests of the public officer. It also prevents duplicate compensation for the same work. The Denali Commission was established to address certain state concerns and a state officer's service on the commission is in the interest of both the state and commission. Given the federal compensation must be paid under federal law, applying this provision strictly would not serve the principal purpose of the prohibition or the goals of the Ethics Act or would penalize the recipient.²⁰

Also, as discussed above, under the Ethics Act, we must distinguish between minor and unavoidable conflicts and those that are substantial and material. We may find with respect to specific matters that there is no substantial impropriety if a public officer's interest in a matter is insignificant.²¹ Here, we believe the mandated federal compensation is a minor and unavoidable conflict. We understand that the anticipated annual compensation for the commission's meetings and other commission work will total approximately \$1625 before taxes.²² In our opinion, this amount may be characterized as insignificant in the particular circumstances and thus its acceptance creates no substantial impropriety under the Act.²³

²⁰ Even if a recipient turns over the funds to the state or gifts them back to the commission, the amount will be reportable income for federal income tax purposes under the IRS ruling. We have not explored whether an officer's state compensation could be reduced to offset the payment because the officer would still be receiving compensation from an entity other than the state. And it would seem to implicate state statutory authority specifying that the Board of Regents sets compensation for the university president as well as authority prohibiting the reduction of the compensation of an agency head during his or her tenure. *See* AS 14.40.170; AS 39.20.080.

²¹ AS 39.52.110(a)(3); AS 39.52.110(b)(1).

²² The Chief Financial Officer for the Denali Commission advised that commissioners are paid based on a federal pay scale resulting in compensation of about \$500 per eight-hour day, currently. They have two in-person meetings per year lasting approximately 8 hours, and an hour-long meeting each month in which they do not have a day-long meeting or ten times per year. Thus, compensation for this service would be about \$1,625 per year before taxes.

²³ In an April 2012 advisory opinion, we reached a similar conclusion regarding payment of an honorarium to members of the Board of Chiropractic Examiners who are required to provide services to a national board under an agreement with the state. Although the members are not compensated by the state for this service, they had been advised that they could not accept the honorarium under AS 9.52.120(b)(2) because it was compensation for official duties from an entity other than the state. We concluded that prohibiting receipt of the honorarium did not further the purpose of the statute,

B. Other Potential Solutions to Compensation Issue

Discussion of the issue created for Alaska public officers by the mandated federal compensation touched on other possible solutions. One suggestion was to nominate a person who is not otherwise a university or state employee and would not be covered by the Ethics Act. This may be possible so long as such a nominee is acceptable to the U. S. Secretary of Commerce. But we have not analyzed the potential ramifications of having a private person representing state interests in this manner.

It was also suggested that Denali Commission service be considered outside service under AS 39.52.170 of the Ethics Act. This would be inconsistent with our past recognition and practice that this service is part of the state officer's official duties. And it raises other Ethics Act concerns. For example, state officers are not permitted to make use of state resources to support outside employment or service. Therefore, a state officer serving as a commissioner would need to account for his or her time, could not use state travel resources to make travel arrangements, and could not use state equipment to facilitate meetings and other commission related activity. Thus, while considering commission service as outside service would solve the compensation issue, it would create others.

C. Reimbursement of Travel Is A Gift to State

The regulations promulgated under the Ethics Act have long recognized that in appropriate circumstances a non-state entity or person's payment of travel expenses connected with official state duties may be a gift to the state, not a gift benefiting an individual officer's personal financial interests. And therefore such payment does not create a circumstance suggesting that the gift-giver intended to influence an individual officer's actions. The original ethics regulation addressing gifts to the state, 9 AAC 52.060(b) contemplates review of a gift disclosure submitted by the state officer and was applied in the 2003 opinion, discussed above, to confirm that the Denali Commission's reimbursement of travel expenses for commission-related travel is a gift to

placed a burden on the members, and if it was a conflict, it was a minor one. *2012 Op. Alaska Att'y Gen.* (April 19); 2012 WL 1515179 (Alaska A.G.). In footnote 27 to the opinion, we described an earlier opinion reconciling state employee service on a national board for the benefit of the state with the prohibition in AS 39.52.120(b)(4). We noted that AS 39.52.120(b)(2) did not apply because the board service was uncompensated, and then stated: "An employee would be precluded from accepting compensation in this situation." Such statement was overly broad given the balancing of interests required by AS 39.52.110. It does not permit consideration of specific circumstances, such as those addressed in this opinion.

the state. The opinion relieved the officer from further similar disclosures, with certain exceptions.

More recently, the Department of Law promulgated 9 AAC 52.060(c) to establish procedures to address those circumstances where the offer of travel is made to and accepted by a state agency, not the traveling officer, in advance. It permits the agency to recognize the travel as a gift to the state so that the traveling official does not have to report it as a gift.

Either regulation might apply to the reimbursement of Denali Commission travel expenses. Absent circumstances where the travel is not comparable to what the university or state would arrange or the payment is made by some entity other than the Denali Commission, where a disclosure would be required, we reaffirm the conclusion in the 2003 opinion that this travel reimbursement represents a gift to the state and no gift disclosures need be submitted.

Accordingly, as ethics supervisor for President Gamble, you may advise based on this opinion that acceptance of compensation from the Denali Commission is permissible. Also when the university arranges commission-related travel and is reimbursed by the Denali Commission at a level comparable to what the state would otherwise pay, no gift disclosure is required. If at any time the circumstances change, he should seek further advice.

President Gamble waived confidentiality with respect to this opinion and therefore, we are providing a copy to the Office of the Governor so that the governor's current and future designees may be similarly advised.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Julia B. Bockmon
Senior Assistant Attorney General

JBB/nrd

cc: Guy Bell, Director of Administrative Services, Office of the Governor