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May 14, 2008

Samantha Carroll
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Department of Natural Resources
550 West 7th Avenue, Suite 1400
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Re: Application of Post-State Employment Restriction
to Position with Municipality
AGO File No. 661-07-0027

Dear Ms. Carroll:

In March 2008, you forwarded an inquiry from a state employee who was contemplating a position with an Alaska municipality potentially involving similar tasks and assignments as the employee had in his state position. The employee asked whether the bar imposed by AS 39.52.180(a) of the Executive Branch Ethics Act applied to post-state employment with a municipality. After further review, this opinion letter confirms the advice we previously gave that the restrictions on post-state employment apply to a former state employee's employment by a municipality.

Section 180(a) begins: "A public officer who leaves state service may not, for two years after leaving state service, represent, advise, or assist a person for compensation regarding a matter …." The definition of "person" in the Ethics Act states that the word "includes a natural person, a business and an organization."[1] By regulation, the word "person" has been further defined to include "governmental entities."[2] In addition, AS 01.10.040(b) provides that "[w]hen the words 'includes' or 'including' are used in a

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1 Alaska Statute 39.52.960(17).

2 9 AAC 52.990(b)(5).

law, they shall be construed as though followed by the phrase 'but not limited to.'" So the term "person" in the Ethics Act is not limited to the enumerated list. In any case, as a municipality is a governmental entity, it is also a "person" for the purposes of the application of AS 39.52.180(a).

Moreover, when construing the language of a statute we must do so in light of the statute's purpose. The stated general purposes of the Ethics Act include discouraging public officials from acting upon their own personal and financial interests in the performance of their official duties and promoting the faith and confidence of the people of the state in their public officers.[3] The primary purposes of the two year bar in AS 39.52.180(a), consistent with the Act's general purposes, are removing improper motives (anticipation of future gain) from the considerations of public officials when they take discretionary official action and eliminating the appearance of impropriety. Section 180(a) accomplishes these purposes and balances a public officer's right to develop experience and expertise that he may use in future non-state endeavors by barring future employment only with respect to matters in which the officer has taken substantial official action and by narrowly defining the term "matter."[4]

The potential problem that AS 39.52.180(a) is intended to address does not disappear when the prospective employer is a municipality because municipalities may be the beneficiaries of discretionary state officer action, just as other persons are. Given the explicit mandate in AS 01.10.040 and our implementing regulation, we would need a clear legislative directive excluding former state officers who are employed by municipalities from the two-year bar imposed by section 180(a) to conclude that was the intention of the legislature.[5]

Review of the attorney general opinions addressing the post-state employment bar reflects that while the issue of the bar is most often raised with respect to employment by a private entity, it has been applied to employment with other governments in a few

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[3] AS 39.52.010.

[4] 1991 Inf. Op. Att'y Gen. (Feb. 25; 663-91-0291); 1991 WL 541943 (Alaska AG); 1986 Inf. Op. Att'y Gen. (Sept. 24; 663-87-0109), 1986 WL 81207 at *3 (Alaska A.G.), quoting the sectional analysis of the bill enacted as AS 39.52.180.

[5] The employee's inquiry noted that the Ethics Act has a definition of "instrumentality of the state" that includes municipalities within the term. AS 39.52.960(12). But that phrase is not used in AS 39.52.180(a) and we do not believe that recognition of municipalities as instrumentalities of the state in the definition section of the Act changes our conclusion that the two-year bar applies to former state officers later employed by municipalities.

instances.[6] Neither these opinions nor other guidance addressing AS 39.52.180 suggest a limitation or exception to the bar based on the type of employer.

As we advised you generally, the post-state employment bar applies to the specific "matters" in which the employee participated while in state service. The term "matter" is defined narrowly and construed to mean specific contracts, grants, permits, and proceedings addressing an exercise of discretion in determining the distribution of state resources or determining the rights of others.[7] It does not include formulation of policy or ministerial activities.[8] It does not extend to informational or promotional activities and like activities. We have stated that "the bar should not be extended to those types of activities that do not affect the rights of others" because "[t]o do so would extend the bar unnecessarily, thus compromising the countervailing interests that ameliorate the potential harshness of the restrictions."[9]

The restriction relates to work on the same matter for a new employer. The former employee would not be barred from working on a new permit application on behalf of the municipality, for example, simply because he worked on an earlier permit, as they would be different matters, even if the subjects may be similar. A former state employee, who is barred from work on a particular project, contract or permit, may not be barred from work on a new phase, an amendment or later revision, assuming the work encompassed by the new matter is different from the original and the employee had no involvement with the new matter while in state service.

We also advised that a former officer's employment with a local government that is serving the public interest, may suggest circumstances in which a request for a waiver of the bar under AS 39.52.180(c) could be considered. As you know, waivers are not often requested or granted but the head of an agency does have the authority to grant waivers, subject to approval by the attorney general.

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6 *See e.g.* 2004 Inf. Op. Att'y Gen. (Aug. 27; 663-05-0028), 2004 WL 33340303 (Alaska A.G. 2004)(post-state employment with federal government agency); 1994 Inf. Op. Att'y Gen. (Dec. 13; 663-94-0642), 1994 WL 804636 (Alaska A.G. 1994)(post-state employment with a municipality).

7 AS 39.52.180(a).

8 9 AAC 52.100(a) and (b).

9 1986 Inf. Op. Att'y Gen. (Sept. 24; 663-87-0109), 1986 WL 81207 at 6. In 2007 the definition of "matter" was amended to include the "proposal or consideration of a legislative bill, a resolution, a constitutional amendment, or other legislative measure, or proposal, consideration, or adoption of an administrative regulation." *See* AS 39.52.180(a) (2007).

Finally, we did not have enough information about the employee's potential work to evaluate whether the post-state employment bar would apply to assignments of the potential position or whether a request for a waiver might be appropriate. Under AS 39.52.250, a former employee is entitled to seek advice directly from us regarding the application of the bar to particular assignments in his new job. As we also advised, if the employee accepted the municipality's offer, you needed to remove him from further work on municipality matters because the potential to violate the Ethics Act would exist.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
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Assistant Attorney General

JBB/

cc: Melanie Lesh, Designated Ethics Supervisor, DNR