LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 10, 2010

SUBJECT: CSHB 53( ) and questions relating to legislators serving on state boards, commissions, and authorities
(Work Order No. 26-LS0296\R)

TO: Representative Mike Doogan
Attn: Priya Keane

FROM: Alpheus Bullard
Legislative Counsel

You asked two questions relating to House Bill 53 (26-LS0296\A). In discussing these questions, Priya informed me that there are sitting legislators who currently serve as public members on state boards, commissions, and authorities (boards). This I did not know. After reviewing the bill and in light of this information, I've enclosed a blank committee substitute that addresses your questions. The questions, their answers, and a note about legislators serving as public members follow.

Constitutionality of legislators serving as public members of state boards.

The constitutionality of the practice that prompts your questions, legislators serving on state boards, is not assured. Article II, section 5 of the Alaska State constitution provides:

> No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

In Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), the Alaska Supreme Court provided its view of the policy underlying art. II, sec. 5:

> Alaska's constitutional prohibition against members of our three separate branches of state government holding any other positions of profit under the State of Alaska reflects the intent to guard against conflicts of interest,

> self-aggrandizement, concentration of power, and dilution of separation of powers in regard to the exercise by these governmental officials of the executive, judicial, and legislative functions of our state government. The rationale underlying such prohibitions can be attributed to the desire to encourage and preserve independence and integrity of action and decision on the part of individual members of our state government.

Id. at 35. This statement by the court is illuminating in that it finds that one of the purposes of this section is the maintenance of separation of powers among the executive, legislative, and judicial branches of government.

The only other published guidance as to the interpretation of the first sentence of art. II, sec. 5 of the Alaska Constitution is found in opinions of the Department of Law.

The Department of Law has maintained that there are two distinct types of positions that legislators are prohibited from holding: (1) any office of the state or of the United States, and (2) any position of profit. Thus the department has concluded that "of profit" modifies "position" but does not modify "office". 1988 Inf. Alaska Att'y Gen. Op., file no. 663-88-0371 (February 29); see also, 1977 Inf. Alaska Att'y Gen. Op., file no. J-66-674-77 (June 21). The department's view then is that a legislator may not serve on a state board or commission even if that service is without compensation because the membership on the board would constitute an office of the state. This is certainly one conclusion that can be drawn from the language of art. II, sec. 5. Another plausible construction of that language is that "of profit" applies to "office" as well as "position". In such a case if the office was without compensation, there may be no violation of art. II, sec. 5.

In regard to the separation of powers issue, the Department of Law has fairly consistently taken the position that legislators may not serve on executive boards whether salaried or not. See, 1988 Inf. Alaska Att'y Gen. Op., file no. 663-88-0371 (February 29); 1980 Inf. Alaska Att'y Gen. Op., file no. J-66-212-81 (September 24). In regard to the state bond committee, the department found that

> The Alaska Constitution provides for the separation of powers between the legislative, judicial, and executive branches of the government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976); Leege v. Martin, 379 P.2d 447 (Alaska 1963). The doctrine of the separation of powers precludes one branch from exercising the power of another. Nor may one branch intrude into the functions of another. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). The State Bond Committee is within the executive branch and performs executive functions. AS 37.15.101 - 160; cf., Walker v. Alaska State Mtg. Ass'n., 416 P.2d 245 (Alaska 1966). Accordingly, membership on the committee by members of the legislature would violate the separation of powers doctrine.

> Additionally, the Alaska Constitution prohibits members of the legislature from holding any other office. Alaska Const., art. II, § 5; Begich v. Jefferson, 441 P.2d 27 (Alaska 1968). While some jurisdictions allow inter-branch committees for financial matters, the prohibition contained in art. II, § 5 are literally and strictly enforced in Alaska. Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976); Begich v. Jefferson, 441 P.2d 27 (Alaska 1968). Membership on the state bond committee would constitute dual-office holding for legislators and violate the prohibition.

1977 Inf. Alaska Att'y Gen. Op., file no. J-66-265-78 (Nov. 16) (non-Alaska citations omitted). The department reached a similar conclusion with regard to legislator members of the Alaska Statehood Commission, 1980 Inf. Alaska Att'y Gen. Op., file no. J-66-212-81 (September 24), and the University of Alaska Board of Regents (December 27, 1976).

Does the bill require a legislator sitting as a public member on a state board, commission, or authority (board) to step down?

The first draft of the bill prohibited any person who sought nomination or became a candidate for elective state or federal office during the proceeding year from being appointed (unless serving ex officio) to a state board. The bill did not require either an incumbent legislator or a legislative challenger to resign from a state board. The bill's applicability section provided that this membership restriction applied only to persons appointed to a board on or after the effective date of the bill. Consequently, no currently sitting legislator would have been required to step down as a public member of a state board, even if they had run for office in the year preceding the bill's enactment and would have only been ineligible for appointment or reappointment once the legislator again ran for state executive or legislative office.

The enclosed blank committee substitute prohibits any person who sought nomination or became a candidate for elective state or federal office during the proceeding year from service on a state board, and provides that any person who indicates an intention to become a candidate for elective state or federal executive or legislative office terminates the person's board membership.

If HB 53 (26-LS0296\A), if enacted, would not require a sitting legislator to cease serving as a public member on a state board, is there a constitutional equal protection issue, because the legislator could remain on the board, but a challenger (for the legislator's seat) would be prohibited under the bill?

Under the first draft of the bill, a sitting legislator would, like the legislator's challenger, be ineligible for appointment or reappointment to the board if the sitting legislator was again seeking nomination or had again become a candidate for elective state or federal office during the proceeding year. Both the legislative incumbent and the challenger would have been similarly situated in their eligibility for appointment to the board. Similarly, both an incumbent legislator and a legislative challenger could continue to

serve on the state board while running for office. So the question became whether a legislator's ability to continue to serve, while a legislative challenger could not be appointed, created an equal protection issue. Without a specific set of facts it's difficult to know whether this would have created an equal protection issue. Facially, both a legislator and a legislative challenger were similarly situated vis a vis appointment and ability to continue to serve, so it seems unlikely that the bill would have been interpreted to create an equal protection violation.

Under the blank committee substitute, neither a sitting legislator nor a legislative challenger could be appointed or serve on a state board if the person sought nomination or became a candidate for elective state or federal office during the preceding year, unless holding a particular elective state or federal office is required by law for appointment.

If you have further questions, please do not hesitate to contact me.

TLAB:ljw
10-079.ljw

Enclosure