

# LEGAL SERVICES

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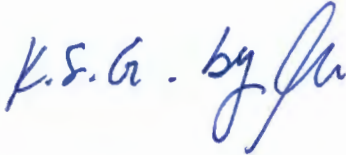
## MEMORANDUM

March 26, 2016

**SUBJECT:** Constitutionality of HB 357 (Work Order No. 29-LS1520\A)

**TO:** Representative Paul Seaton  
Attn: Jenny Martin

**FROM:** Kate S. Glover  
Legislative Counsel



You have asked for a legal opinion regarding the constitutionality of HB 357, which adds nonvoting legislative members to the Board of Regents of the University of Alaska and to the Board of Education and Early Development. Including legislative members on an executive branch board raises issues under the separation of powers doctrine and the dual office-holding prohibition in art. II, sec. 5 of the Constitution of the State of Alaska. The fact that the legislative members are nonvoting members reduces the risk that the bill, if enacted and challenged, would be found to violate the separation of powers doctrine or the dual-office holding prohibition, but it may not resolve these issues.

With respect to the separation of powers doctrine, it is generally considered a violation of the doctrine for a member of the legislative branch to also hold a position with the executive branch.<sup>1</sup> Both the Board of Regents and the Board of Education and Early Development have substantial authority to execute the law, adopt rules or regulations, and implement state education policies.<sup>2</sup> In addition, the Board of Regents is established under art. VII, sec. 3 of the Constitution of the State of Alaska, which provides that the regents are to be appointed by the governor, subject to confirmation by the legislature. The members of the Board of Education are also appointed by the governor under art. III, sec. 26 of the Constitution of the State of Alaska. Taking note of this constitutional authority, the Attorney General's office has recognized the important executive functions of both of these boards, and distinguished them from advisory commissions.<sup>3</sup> Because

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<sup>1</sup> See *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

<sup>2</sup> See AS 14.07.165 (duties of the Board of Education and Early Development); AS 14.07.170 (same); AS 14.40.170 (duties of Board of Regents); art. VII, sec. 3, Constitution of the State of Alaska (Board of Regents governs the University of Alaska).

<sup>3</sup> See 1976 Op. Att'y Gen. No. 44 (Dec. 27, 1976) ("The Board of Regents of the University of Alaska is altogether different from these advisory and clearinghouse commissions."); 1987 Inf. Op. Att'y Gen. No. 241 (Sept. 23, 1987) ("The Board of

these boards have the authority to make decisions and act upon them, they are not merely advisory boards.

The second constitutional issue raised by the bill involves art. II, sec. 5 of the Constitution of the State of Alaska, which states in part that "No legislator may hold any other office or position of profit under the United States or the State." The Alaska Attorney General has concluded that in this constitutional provision "of profit" modifies "position" but not "office", so that service in any "office" is prohibited regardless of whether the legislator receives compensation for that service. If a legislator exercises executive branch powers or duties the arrangement is likely to violate the separation of powers doctrine.

The Department of Law (DOL) has consistently argued that appointments of legislators to executive branch boards are unconstitutional.

Legislative membership violates art. II, sec. 5 of the Alaska Constitution, which precludes legislators from dual office-holding. *See State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 - 78 (Alaska 1980). In *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968), the court explained the rationale is to "guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers. . . ." There is a consistent line of opinions from this office that legislators may not hold positions on executive branch boards. Cf. 1980 Op. Att'y Gen. No. 21 (September 14; J-66-212-81) (legislators may not serve on statehood commission); 1988 Inf. Op. Att'y Gen. 226 (April 12; 883-33-0022) (legislative appointments to children's trust unconstitutional); 1988 Inf. Op. Att'y Gen. 37 (July 1; 663-88-0430) (state legislator should not serve on land use advisory committee); 1989 Inf. Op. Att'y Gen. 297 (May 1; 663-89-0506) (legislators should not serve on commission to investigate Exxon Valdez spill); 1989 Inf. Op. Att'y Gen. 45 (July 1; 883-89-0111) (inclusion of legislators of Amateur Sports Authority is unconstitutional).<sup>4</sup>

The DOL has stated that it might be possible for legislators to serve on temporary advisory boards. In one opinion, the DOL said "It is not our opinion that either the separation of powers doctrine or the prohibition against dual-office holding absolutely forbids the formation of inter-branch committees which are established as clearinghouses for an exchange of ideas and advice on a given subject and which do not exercise

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Education is the only . . . board at the head of a principal department under article III, section 26, of the Alaska Constitution and controls, at least in part, about one-third of the entire state budget. Because it is such a uniquely powerful board, our concerns about conflicts of interest and separation of powers are especially serious.").

<sup>4</sup> 1996 Op. Att'y Gen. No. 883-96-0063 (May 24, 1996).

sovereign power, i.e., which do not make, execute, or declare the law, do not offend either prohibition . . . . Put another way, discussing and advising on the matter may be done by an inter-branch committee; deciding upon and acting on the matter may not."<sup>5</sup> The DOL has allowed that it may be permissible for legislators to hold a position on a purely advisory committee, but neither the Board of Regents nor the Board of Education and Early Development is a purely advisory committee.

Although including legislators on the Board of Regents and the Board of Education and Early Development infringes on executive branch authority, the risk under both the separation of powers doctrine and the dual office-holding prohibition is reduced because the legislators would not be voting members. Note, however, that the Supreme Court of Arkansas found, under similar constitutional prohibitions, that it does not matter whether a legislator who is a member of an executive branch board has the power to vote or not--membership on the board is itself a violation.<sup>6</sup> The Supreme Court of South Carolina came to the opposite conclusion, and found that the fact that a legislative member is a nonvoting member can cure the constitutional problems.<sup>7</sup> The Alaska Supreme Court has not decided a case addressing this issue, so I cannot provide a definitive analysis. Legislators currently serve as nonvoting members on a number of executive branch boards, but it is important to note that the boards at issue in HB 357 are boards with the constitutional and statutory authority to govern a principal executive department and the state university and a court reviewing this might find that distinction significant.

If I may be of further assistance, please advise.

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<sup>5</sup> 1977 Inf. Op. Att'y Gen. No. J-66-265-78 (Nov. 16, 1977) (citations omitted).

<sup>6</sup> *State Bd. of Workforce Ed. and Career Opportunities v. King*, 985 S.W.2d 731, 735 (Ark. 1999).

<sup>7</sup> *S. Carol. Pub. Int. Found. v. S. Carol. Transp. Infrastructure Bank*, 744 S.E.2d 521 (S. Carol. 2013).