

LEGAL SERVICES

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MEMORANDUM

July 7, 2009

SUBJECT: Filling a vacancy in the office of Lieutenant Governor

TO: Representative Jay Ramras
Chairman of the House Judiciary Committee

FROM: Tamara Brandt Cook
Director

(1) How does the governor's designee for Lieutenant Governor vacate the office?

AS 44.19.040 deals with appointment of a successor to the Lieutenant Governor and states: "If the person designated and confirmed is removed from or vacates the appointment, the governor shall appoint a successor subject to confirmation in the same manner as the person initially appointed." The statute does not set out a method whereby the designee vacates the position, so any method that clearly indicates the intent of the designee to vacate the position as successor to the Lieutenant Governor is acceptable. However, it would be prudent for the designee to notify the Governor of his intention to vacate the office in writing so that there is no question that the designee has made that election.

On July 4, 2009, the current designee, Joe Schmidt, Commissioner of the Department of Corrections, is quoted at KTUU.com as saying, with respect to assuming the office of Lieutenant Governor: "I didn't officially decline, I just relayed some concerns that I had and I'm assuming that those concerns were shared." If Commissioner Schmidt has not and does not vacate the appointment, Governor Sarah Palin has clear authority to remove the designee. AS 44.19.040 provides that a designee who has been confirmed is in line for succession to the office of Lieutenant Governor "subject to the pleasure of the governor." Governor Palin has indicated that she has chosen Lieutenant General Craig Campbell, Commissioner of Military and Veterans' Affairs. Again it would be prudent that the removal of Commissioner Joe Schmidt, if that occurs, be in writing to avoid any question regarding the status of both commissioners. Under the statute, a new designee will ultimately have to be formally presented in writing by the seated Governor to the legislature for confirmation.

(2) What issues are raised if the Governor names a new designee for Lieutenant Governor?

Under art. III, sec. 11 of the state constitution, when there is a vacancy in the office of Governor the Lieutenant Governor becomes Governor and serves for the remainder of the term. As a result of this succession, the office of Lieutenant Governor, in turn, becomes vacant. The state constitution does not directly provide for succession to the office of Lieutenant Governor. Instead art. III, sec. 13 states:

SECTION 13. Further Succession. Provision shall be made by law for succession to the office of governor and for an acting governor in the event that the lieutenant governor is unable to succeed to the office or act as governor. No election of a lieutenant governor shall be held except at the time of electing a governor.

The statutes provide for succession to the office of Lieutenant Governor as the method for addressing the question of further succession under AS 44.19.040 - 44.19.046. AS 44.19.040 provides in full:

Sec. 44.19.040. Appointment of successor to lieutenant governor.

After taking an initial term of office, the governor shall appoint, from among the officers who head the principal departments of the state government or otherwise, a person to succeed to the office of lieutenant governor if the office of lieutenant governor becomes vacant. The appointment is subject to confirmation by a majority of the members of the legislature meeting in joint session. The person designated and confirmed is next in line for succession to the office of lieutenant governor, subject to the pleasure of the governor. If the person designated and confirmed is removed from or vacates the appointment, the governor shall appoint a successor subject to confirmation in the same manner as the person initially appointed.

Governor Sarah Palin has designated Joe Schmidt, Commissioner of the Department of Corrections as the successor to the office of Lieutenant Governor and Commissioner Schmidt has been confirmed. Consequently, when Sean Parnell is sworn in as Governor and the office of Lieutenant Governor becomes vacant, it is Commissioner Schmidt who would automatically assume that office under AS 44.19.042. However, Governor Palin has also indicated that she has chosen Lieutenant General Craig Campbell, Commissioner of Military and Veterans' Affairs, as the designated successor to the office of Lieutenant Governor. Note that, under AS 44.19.040, the designee serves in that capacity "at the pleasure of the governor," so Governor Palin may change her designee if she chooses to do so, but the successor designee is also subject to confirmation.

This brings up the question of whether a new designee may assume the office of Lieutenant Governor before being confirmed. If not, of course, the successor Governor,

Sean Parnell, might elect to name a different person as designee. Based upon the evolution of the bill that ultimately resulted in the enactment of AS 44.19.040 - 44.19.046, it appears that the legislature considered the alternative and decided not to authorize recess appointments to fill the office of Lieutenant Governor before the designee is confirmed. In contrast, AS 39.05.080(3) and (4) provide that a person who is appointed to an office that is subject to confirmation exercises the duties of that office until the legislature declines to confirm or until the last day of the session if the legislature does not take the confirmation up. Note that AS 39.05.080 does not apply if a law relating to a particular position contains different provisions, so, as a matter of statutory construction, provisions in AS 44.19.040 prevail over contrary provisions in AS 39.05.080 and the designee may not assume the office of Lieutenant Governor until after confirmation.

Alas, the situation is somewhat muddled by the question of whether art. III, sec. 27 of the state constitution might apply because of the statutory requirement for confirmation of the Lieutenant Governor designee. It provides:

SECTION 27. Recess Appointments. The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

Does the fact that the legislature by statute elected to require confirmation of a Lieutenant Governor designee mean that the governor has the power to make a recess appointment under the constitution, even though the legislature intended to preclude recess appointments to the office of Lieutenant Governor, or, in context, is section 27 confined to confirmations made under the preceding two constitutional sections: section 25, department heads, and section 26, certain boards and commissions? Is the requirement of confirmation applicable to a designee to fill a vacancy in the office of Lieutenant Governor enacted under the authority of article III, sec. 13, invalid under the reasoning of Bradner v. Hammond, 553 P.2d 1 (Alaska 1985), holding that the power of confirmation is limited to the offices covered by article III, secs. 25 and 26? Given the broad authority granted under sec. 13 to provide for succession, it seems unlikely that art. III, sec. 27 or the Bradner v. Hammond decision applies, but these are unresolved questions.

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