

# LEGAL SERVICES

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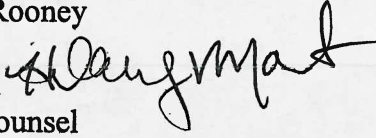
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## MEMORANDUM

January 16, 2013

**SUBJECT:** Marine Transportation Advisory Board  
(Work Order No. 28-LS0316)

**TO:** Representative Peggy Wilson  
Attn: Becky Rooney

**FROM:** Hilary Martin   
Legislative Counsel

Under AS 19.65.180(a), the commissioner of transportation and public facilities must consult with the Alaska Marine Transportation Advisory Board regarding candidates for the position of "director or deputy commissioner of the Alaska marine highway system."<sup>1</sup> You have asked if the Department of Transportation and Public Facilities reorganizes so that there is no longer a person with the title of "director" or "deputy commissioner" of the Alaska marine highway system, whether the department would still have to consult with the board.

### Consultation Requirement

Under the statute, the commissioner must consult with the board regarding candidates for the position of "director or deputy commissioner of the Alaska marine highway system."<sup>2</sup> The language does not necessarily apply to a specific division or section within the department, but to the Alaska marine highway system (AMHS) in general. The intent of the statute seems to be that the commissioner must consult the board regarding the candidates for the position, even if the position is not titled "director" or "deputy commissioner".<sup>3</sup> One could also argue that the section refers generally to the "director"

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<sup>1</sup> The full language of AS 19.65.180(a) is:

After the commissioner of transportation and public facilities has considered one or more candidates for the position of director or deputy commissioner of the Alaska marine highway system, the commissioner shall confer with the board regarding that candidate or those candidates before making an appointment to that position. The selection of those candidates shall be without regard to political affiliation.

<sup>2</sup> AS 19.65.180(a).

<sup>3</sup> The committee minutes support this interpretation. When discussing the language of this statute, staff to the sponsor stated that both director and deputy commissioner were

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or "deputy commissioner" of the division or other segment of the department with responsibility for management of the AMHS.

Constitutionality of Consultation Requirement

Even if the department is still required to consult with the board, the consultation requirement itself might be unenforceable as it infringes on the power of the executive. The Alaska Supreme Court has held "that the appointment of executive officers is an executive function."<sup>4</sup> The governor's power cannot be shared with another entity, including the legislature or a board, unless specifically provided for in the constitution.

The consultation requirement could therefore be invalid on separation of powers grounds. However, because it is only a consultation requirement, and does not require the board to create a list of candidates, or require confirmation of the selection, the statute could be valid. The attorney general seems to support this reasoning, recommending in one case that a requirement that the governor choose from a list of candidates supplied by a council be changed to a consultation requirement.<sup>5</sup> The statute does not require that the commissioner follow the recommendation of the board, only that the commissioner "confer with the board regarding the candidate." Therefore, it is possible that as the statute is only a consultation requirement, it does not infringe on the power of the executive.

If I may be of further assistance, please advise.

HVM:lnd

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included in the bill because the administration had changed the title of the position before, and so both titles were included "to allow for whichever of these positions an administration decides to appoint." House Transportation Committee meeting, pg. 15, March 27, 2008.

<sup>4</sup> *Bradner v. Hammond*, 553 P.2d 1, 6 (1976).

<sup>5</sup> 1981 Inf. Op. Alaska Att'y Gen. (April 23; J-66-698-81).