

LEGAL SERVICES

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MEMORANDUM

March 30, 2016

SUBJECT: Constitutionality of HCS CSSB 125()
(Work Order No. 29-LS1250I)

TO: Representative Mike Chenault
Attn: Donald Bullock

FROM: Emily Nauman
Legislative Counsel 

Attached please find the abovementioned draft bill. Members of the legislature sitting on an uncompensated and nonvoting seats on the board of the Alaska Gasline Development Corporation (AGDC) may violate the separation of powers and dual office holding provisions of the Constitution of the State of Alaska.

Dual Office Holding

A member of the legislature is prevented from holding dual offices under the first sentence of art. II, sec. 5, Constitution of the State of Alaska, which reads:

DISQUALIFICATIONS. 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.

Emphasis added. The Department of Law (department) has taken the position 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."¹ The department's position then is that a legislator may not serve on a state board, even if that service is without compensation because the membership on the board

¹ 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).

would constitute an office of the state.² 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." Under this view, if a legislator was not compensated for the position, there is not a violation of art. II, sec. 5. Each interpretation is equally valid. Even the department seems to have conceded that the prohibition on dual office holding may not be absolute, concluding in another opinion that "[i]t is not our opinion that . . . the prohibition against dual-office holding absolutely forbids the formation of inter-branch committees."³ Thus, without additional guidance from the courts, it may be impossible to know whether uncompensated legislators serving on the AGDC board is unconstitutional under the dual office holding provision of the Constitution of the State of Alaska.

Separation of Powers

Under the separation of powers doctrine, the legislature makes the laws, the executive implements them, and the judiciary interprets and applies them in specific situations. There is no formal statement of the separation of powers doctrine in the Alaska Constitution. As in the United States Constitution, it is implied from the creation of the three branches of government and the powers assigned to them.⁴ If HCS CSSB 125() allows legislators to execute laws through their position on the AGDC board, a separation of powers problem likely arises. However, the legislative board members are nonvoting,⁵ making the crux of the issue whether the board members are able to exert influence on executive branch actions even though they are nonvoting. The bill is clear that the legislative members are not to appoint staff, are not to be counted towards a quorum, may not manage assets and businesses of AGDC, and cannot participate in the procurement decisions of the board. Legislative members are, however, allowed into executive sessions of the board.

The department has fairly consistently opined that a legislator sitting on an executive branch board violates the separation of powers principle.⁶ In regard to the state bond committee, the department found that "[t]he State Bond Committee is within the executive branch and performs executive functions. Accordingly, membership on the

² This position was reasserted in a memo regarding CSSB 125(RES) dated March 20, 2016, from Jerry Juday, Assistant Attorney General, to Darwin Peterson, Office of the Governor. I understand your office has a copy of this memo.

³ 1977 Inf. Alaska Att'y Gen. Op., file no. J-66-265-78 (November 16).

⁴ See *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (1975) ("this state does recognize the separation of powers doctrine").

⁵ A similar but more accurate term, rather than *ex officio*.

⁶ 1980 Inf. Alaska Att'y Gen. Op., file no. J-66-212-81 (September 24).

committee by members of the legislature would violate the separation of powers doctrine."⁷ The department reached a similar conclusion with regard to legislative members of the Alaska Statehood Commission.⁸ Neither of these opinions appear to be related to legislators serving on a board as nonvoting members, thus they should not be read to conclusively resolve the issue at hand under HCS CSSB 125().

Because there is no state precedent on the constitutionality of nonvoting legislative members, guidance may be gleaned in precedent from other states. When responding to the specific issue of nonvoting legislative members on the AGDC board,⁹ the department cited an Arkansas case that struck down legislative board members as a violation of the separation of powers principal.¹⁰ However, South Carolina has a well carved out "ex officio exception."¹¹ Given the split in how other states treat nonvoting legislative members, perhaps nothing can be relied upon to divine the outcome in this state.

As mentioned in the dual office holding portion of this memo, the department has opined:

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 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.^[12]

⁷ 1977 Inf. Alaska Att'y Gen. Op., file no. J-66-265-78 (Nov. 16) (internal citations omitted).

⁸ 1980 Inf. Alaska Att'y Gen. Op., file no. J-66-212-81 (September 24).

⁹ See footnote 2.

¹⁰ The memo cites *State Board of Workforce Education and Career Opportunities v. King*, 985 S.W.2d 731 (Ark. 1999).

¹¹ *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640 (S.C. 2013). It has a particularly interesting discussion of both the dual office holding and separation of powers issues. Note that South Carolina, as the court notes, is historically a strong legislative branch state. Alaska, on the other hand, was designed as a strong executive branch state.

¹² 1977 Inf. Alaska Att'y Gen. Op., file no. J-66-265-78 (November 16) (citations omitted).

AGDC, however, is not an advisory council, as described above. Whether or not AGDC would be "deciding upon and acting on" a matter is not debatable, there is no question that the corporation will be applying the law. However, it may be possible that a court could take the logic in the abovementioned opinion and apply it to sitting nonvoting legislative board members: the violation of the separation of powers doctrine may be resolved in favor of the legislature because the legislators serve in a nonvoting, essentially advisory capacity. This position is supported in the bill which, in every possible statute, reiterates that decisions related to the execution of laws are left only to the voting members of the board. It is very possible that a court could find that a nonvoting legislature board member does not exert any special influence simply because of his or her position on the board.¹³

What is clear is that the issue of nonvoting legislative members on executive branch boards is unsettled. The only sure resolution is a decision by the Alaska Supreme Court. I would certainly warn that there is a risk involved in placing nonvoting legislative members on the AGDC board, as the board is serving an executive branch function. However, I do not believe the risk is great enough that I would advise removing the legislative board members from the bill. As an advocate for the legislature I note that several other state boards have legislative members including some public corporations, like AGDC.¹⁴ Without a challenge, they have and will continue to serve in accordance with statute.

I hope you found this memo helpful. If I may be of further assistance, please advise.

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Attachment

¹³ In addition, there may be a legitimate argument that legislators on the board of a state corporation are less constitutionally offensive due to the special status of state corporations. If you would like more information on this potential argument, please let me know. Reviewing *South Carolina Public Interest Foundation* (footnote 10) may be especially helpful as well.

¹⁴ There are two nonvoting legislative members on the board of the Knik Arm Bridge and Toll Authority. There are two members of the legislature serving as ex officio nonvoting members of the board of directors of the Alaska Aerospace Corporation. There are two members from the legislature serving on the Alaska Commission on Postsecondary Education. There are two ex officio legislative members serving on the Alaska Health Care Commission. There are two nonvoting members, serving ex officio, on the board of the Alaska Criminal Justice Commission. There are two legislators serving as ex officio nonvoting members on the Alaska Tourism Marketing Board (which has the authority to "execute a destination tourism marketing campaign."). In addition, there are numerous legislators sitting on the boards of other advisory commissions, note that because they are advisory boards, the department has taken the position that there is no separation of powers concerns.