

HB

348

SENATE COMMITTEE REPORT

DATE: 4/14/10

FURTHER:

Rules

DATE TURNED
IN TO OFFICE:

4/15/10

Judiciary Committee considered CS FOR HOUSE BILL NO. 348(JUD)

HB 348 PERSONNEL BOARD MEMBERSHIP

"An Act relating to the membership of the state personnel board."

and recommends:

- be replaced with SCS or CS _____ (_____)
- adopt previous SCS or CS _____ (_____)
- attached amendment(s)
- adopt _____ Letter of Intent
- further referral to _____ Committee

SENATE BILL:
 Same Title
 New Title

HOUSE BILL:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

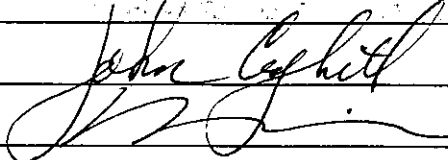
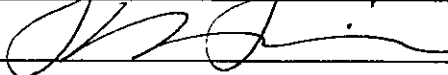
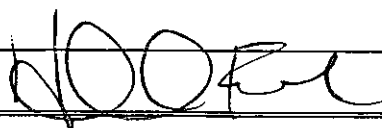
NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
Admin	03/08/10			X	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Coyhill		✓		
	Wielechowski	✓			
CHAIR: 	Noor	✓			

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

LABOR & STATE AFFAIRS SECTION

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April 14, 2010

The Honorable Hollis French
Alaska State Senate
Alaska State Capitol, Room 417
Juneau, Alaska 99801-1182

Re: CSHB 348 (JUD)

Dear Senator French:

The Department of Law has had an opportunity to review CSHB 348(JUD). As was explained during testimony by Assistant Attorneys General Mike Ford and Bill Milks this morning at the Senate State Affairs Committee, there is a significant separation of powers issue that should be considered as it raises questions regarding the constitutionality of the bill. This issue is discussed below.

Section 1 of the bill provides that "(t)he governor may make an appointment only from a list of at least three nominees selected by the chief justice of the Alaska Supreme Court, subject to the right of the governor to request additional nominations." Additionally, Section 1 provides that in making appointments, "the governor shall ensure that the board has at least one member of the political party that had the largest number of registered voters and one member of the political party that had the second largest number of registered voters at the time of the most recent general election at which a governor was elected." Currently, under AS 39.25.060(a), members are appointed by the governor and confirmed by the legislature.

Article III of the Alaska Constitution provides that the executive power of the state resides with the governor. Sections 25 and 26 of Article III address the governor's power of appointment. Section 25 states:

The head of each principal department shall be a single executive unless otherwise provided by law. *He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session,* and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the secretary of state. The heads of

all principal departments shall be citizens of the United States.
(Emphasis added).

Section 26 states:

When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, *its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session*, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.
(Emphasis added).

The Alaska Supreme Court addressed the issue of the governor's power of appointment and the extent to which the legislature can place restrictions on the governor's appointment of executive branch officials in *Bradner v. Hammond*, 553 P.2d 1, 6-7 (Alaska 1976). In *Bradner*, the legislature passed a statute providing that the governor's appointments of deputy heads of each principal executive branch department and 19 specific directors of divisions were subject to legislative confirmation. The question before the Court was whether the statute's requirement that these officials be subject to legislative confirmation was unconstitutional. The Alaska Supreme Court held that the statute violated the separation of powers requirements of Alaska's Constitution because it infringed on the governor's power of appointment under Article III and exceeded the limited authority granted under the Constitution to the legislature in reviewing the appointment of executive officers.

The Court in *Bradner* held that "the appointment of executive officers is an executive function" and that "under Alaska's constitution confirmation is a specific attribute of the appointive power of the executive." *Id.* at 7. The Court considered whether or not Sections 25 and 26 of Article III "describe the outer limits of the legislature's confirmation authority." *Id.* The Court found that the provisions of Sections 25 and 26 "are clear and unambiguous" and that these provisions "delineate the full extent of the constitution's express grant to the legislative branch of checks on the governor's power to appoint subordinate executive officers." *Id.* The Court further commented that "sections 25 and 26 mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government." *Id.* at 7. Based on *Bradner*, it appears clear that the limitation on the executive's power of appointment in section 1 presents a significant constitutional issue.

The Department of Law is aware that there are a number of statutes that require that the governor make appointments to commissions or boards from lists of

nominees. *E.g.*, AS 41.21.163 (governor required to appoint members from nominations submitted by certain village and city councils); AS 23.15.550(a)(6)(governor required to appoint four representatives of organized labor from lists submitted by unions); AS 41.35.310(5)(governor required to appoint two persons from a list of recommended nominees submitted by Alaska Historical Society); AS 44.29.300(3)(D)(governor required to appoint one person recommended by Alaska Federation of Natives); AS 15.13.020(b)(governor required to appoint two members of each of the two political parties whose candidate for governor received the highest number of votes in recent election, based on a list submitted by each party).

The Department of Law, however, has issued opinions advising governors to resist legislative encroachment on their appointment power. In 1980, the Department of Law considered the nomination process for the Alaska Public Offices Commission: "The statutory requirement that the governor limit his choice of appointees to those nominated by the two major political parties clearly and unduly interferes with his power of appointment under section 26." 1980 Inf. Op. Att'y Gen. No. J-66-749-80, 1980 WL 27763 (June 2, 1980) (citations omitted). In 1987, the Department opined that requiring boards and commissions appointees to be registered to vote was probably unconstitutional: "Both sections 25 and 26 of article III require only that appointees be United States citizens, not that they be Alaska citizens or registered voters of this state. Given that appointment is an executive function, the legislature is limited in its ability to restrict the governor's appointment power." 1987 Inf. Op. Att'y Gen. No. 663-87-0555, 1987 WL 121097 (June 1, 1987). In 1996, an opinion of the Department revealed that for 21 years the governor's office had declined to comply with the statutory requirement of legislative confirmation for members of the Alaska Commission on Postsecondary Education in partial reliance on *Bradner*. 1996 Inf. Op. Att'y Gen. No. 883-96-0063, 1998 WL 915884 (May 24, 1996). *See also* 1980 Inf. Op. Att'y Gen. No. J-66-739-80 1980 WL 27759 (May 28, 1980) (Attorney General noted that if the council at issue was not largely advisory, the method by which appointments are made from nominees of village councils, a city council, and a non-profit corporation would likely be unconstitutional).

The Department of Law has determined in limited circumstances that restrictions on the appointment power of the governor are constitutional where the legislation provides that appointees possess reasonable relevant qualifications for a particular board or commission. For example, the Attorney General advised regarding legislation creating a council on domestic violence and sexual assault which contained some restrictions on individuals eligible for appointment to the council and stated that "reasonable qualifications may unquestionably be prescribed by law." 1981 Op. Att'y Gen. No. 66-698-81, 1981 WL 38632 (April 23, 1981). In another case, the Attorney General addressed qualifications for appointees to boards and commissions and

the requirements of Article III, section 26 and stated that it was probable "that technical, professional, occupational, or other like qualifications can be imposed without violating the constitution." 1979 Op. Att'y Gen. No. 663-80-0085, 1979 WL 23038 (August 13, 1979). A number of statutes establishing boards and commissions do contain requirements that members meet certain qualifications in order to be eligible for appointment. See e.g., AS 08.04.020(a); AS 37.10.270; AS 44.29.115(4); AS 47.45.200(b).

In conclusion, it appears clear based on the language of Article III, sections 25 and 26 and the Alaska Supreme Court's decision in *Bradner* that there is a very strong argument that the restrictions on the governor's power of appointment contained in this bill are unconstitutional. The restrictions on appointment to the personnel board do not involve establishing relevant qualifications for service on the board. Instead, the bill simply inserts the chief justice into the appointment process and mandates that the governor select from a list selected by the chief justice. Additionally, the bill requires that at least two members be appointed from particular political parties. For these reasons, the Department of Law wishes to inform the Committee of these important legal issues.

If you need additional information on this matter, please contact the undersigned at 465-3600.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:



William E. Milks
Assistant Attorney General

cc:

Honorable Bob Lynn, Chair, House State Affairs
Michael Ford, Legislative Liaison, Department of Law
Deborah Behr, Chief Assistant Attorney General, Department of Law
Jerry Gallagher, Legislative Director, Office of the Governor
Nicki Neal, Director of Division of Personnel, Department of Administration

AMENDMENT # 1

OFFERED IN THE SENATE
TO: CSHB 348(JUD)

French

Withdrawn

1 Page 1, line 6:

2 Delete "selected"

3 Insert "submitted"

4

5 Page 1, line 8, following "nominations.":

6 Insert "If the chief justice declines to submit additional nominees, the governor
7 shall appoint a nominee from a list of nominees previously submitted by the chief justice
8 for the vacancy."

9

10 Page 1, line 12:

11 Delete "at which a governor was elected"

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MEMORANDUM

April 14, 2010

SUBJECT: Membership of the State Personnel Board
CSHB 348(JUD) (Work Order No. 26-LS1360\S)

TO: Senator Hollis French
Chair of the Senate Judiciary Committee
Attn: Cindy Smith

FROM: Alpheus Bullard *RAB*
Legislative Counsel

You asked that I address separation of powers concerns raised by the committee substitute described above.

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CSHB36(JUD) provides that the governor would be required to appoint nominees from a list of at least three qualified persons submitted by the chief justice of the Alaska Supreme Court. This requirement, that the governor appoint board members from a list of persons selected by the chief justice, subject to the right of the governor to request additional nominations, raises a constitutional question as to whether the legislature may so constrain the governor's ability to choose whom to appoint to an executive board.

The power to appoint members of state boards, commissions, and councils is an executive function to be exercised by the governor. In Bradner v. Hammond, 553 P.2d 1, 5 - 6 (Alaska 1976), the Alaska Supreme Court recognized that the Alaska constitution envisioned a strong executive and "that the appointment of executive officers is an executive function. . . ." The legislature may prescribe qualifications for the members of boards and commissions that are reasonably related to either the position or to the aim of the legislation and do not interfere with the governor's appointment power or with qualifications set out in the constitution. Various state courts have reached this same conclusion and have upheld legislative designations of qualifications for public offices, such as memberships on a board or commission. See, e.g., State v. Matassarin, 217 P. 930 (Kansas 1923); State v. Eischen, 76 N.W.2d 385 (Minn. 1956); Humane Society of the United States v. New Jersey Fish and Game Council, 362 A.2d 20 (1976); Hurd v. Freeland, 442 P.2d 344 (Okla. 1966); State v. Wells, 112 N.W.2d 601 (S.D. 1961); State v. Millsap, 605 S.W.2d 366 (Tex. App. 1980).

However, the Department of Law, which has generally taken a position very protective of the governor's prerogatives, has asserted that the legislature may not restrict the governor's appointment powers, such as by requiring the governor to select from a list of

Senator Hollis French

April 14, 2010

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names provided by particular groups.¹ The Department of Law has repeatedly argued that such limitations on the governor's appointment power are unconstitutional infringements upon the governor's authority. Letter to Walter J. Hickel, Governor, from Charles E. Cole, Attorney General, June 11, 1991 (file no. 883-91-0071); 1981 Inf. Alaska Atty. Gen. Op. (file no. J-66-698-81), April 23; 1980 Inf. Alaska Atty. Gen. Op. (file no. J-66-164-80), September 17. However, courts in other states have held that statutes requiring a governor to make appointments to a state board from a list of nominees submitted by other parties are constitutional. Kentucky Association of Realtors v. Musselman, 817 S.W.2d 213 (Ky. 1991); Opinion of the Justices, 316 A.2d 174 (N.H. 1974); Seidenberg v. New Mexico Board of Medical Examiners, 452 P.2d 469 (N.M. 1969); Hurd v. Freeland, 442 P.2d 344 (Okla. 1966); Marks v. Frantz, 298 P.2d 316 (Kan. 1956); Ingard v. Barker, 147 P. 293 (Id. 1915).

Nonetheless, at least three Alaska attorney general opinions or letters of advice have accepted that the legislature may prescribe reasonable qualifications for gubernatorial appointments to boards or commissions. 1981 Inf. Alaska Atty. Gen. Op. (file no. J-66-698-81), April 23; Memorandum to Governor Hammond from R. Pegues, August 13, 1979; 1988 Inf. Alaska Atty. Gen. Op. (file no. 883-88-0079), May 24.

In this instance, I cannot say how a court would interpret the reasonableness of a statutory requirement that the governor appoint members of the board from lists of nominees chosen by the chief justice of the Alaska Supreme Court.

If you have questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:plm
10-238.plm

¹ Note however that certain members of several state boards and commissions are currently chosen by the governor from lists submitted by other persons. These boards and commissions include the Professional Teaching Practices Commission (AS 14.20.410), the Alaska Public Offices Commission (AS 15.13.020), the Alaska Historical Commission (AS 41.35.310), the State Officers Compensation Commission (AS 39.23.500), the Workforce Investment Board (AS 123.15.550), and the Alaska Retirement Management Board (AS 37.10.210).

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Public Safety



A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

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Sponsor Statement for CSHB 348(JUD) **"An Act relating to membership of the state personnel board."**

By Representative Bob Lynn

CSHB 348(JUD) brings a broader representation to the Personnel Board so it can operate, or at least appear to operate, with greater independence when addressing complaints, and carrying out its other powers and duties under AS 39.52 Alaska Executive Branch Ethics Act.

The bill increases board membership from three to five members, allowing the governor to make an appointment from a list of at least three nominees selected by the Chief Justice of the Alaska Supreme Court, subject to the right of the governor to request additional nominations. It also ensures that the board has at least one member of the two parties that had the largest number of registered voters in the most recent election for governor.

The Personnel Board, as currently constructed, lends itself to criticism that it's a creature of the governor rather than an independent body when it comes to investigating Executive Branch ethics complaints. As we know, perception can be the same as reality in the public eye.

HB 348 also prohibits certain conduct by board members that can lead to conflicts of interest or at least an appearance of conflict, such as: campaigning for elective office; being an officer of a political party or political group; lobbying; employing a lobbyist; or assisting in lobbying.

Like other ethics-related measures, the purpose of this bill is to build a better foundation of trust between the people of Alaska and those they elect to public office.

Alaska State Legislature

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State Affairs Committee

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Judiciary Committee
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Military & Veterans Affairs Committee

Finance Subcommittees
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Military and Veterans' Affairs
Public Safety



A Communication From
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District 31 Anchorage

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Sectional Analysis for CSHB 348(JUD)

"An Act relating to membership of the state personnel board."

Section 1. Amends AS 39.25.060(a) to increase the membership on the Personnel Board from three to five members. The governor may make an appointment from a list of at least three nominees selected by the chief justice of the Alaska Supreme Court, subject to the right of the governor to request additional nominations. It ensures that the board has at least one member of the two parties that had the largest number of registered voters in the most recent election for governor.

Section 2. Amends AS 39.25.060(b) to increase the number of board members who can be of the same political party from two to three of the five-member board.

Section 3. Adds new section AS 39.25.064 that prohibits board members from certain activities that relate to possible conflicts of interest or at least an appearance of conflict.

Section 4. Amends AS 39.25.070 to add conforming language stating that three members constitute a quorum and three affirmative votes are required for final action on matter.

Section 5. Amends the uncodified law by adding a new section stating that a member of the personnel board serving on the effective date of this Act remains in office for the duration of the term which appointed and confirmed. Within 60 days of the effective date, the chief justice of the Alaska Supreme Court shall submit to the governor a list of at least six nominees for the two additional seats on the personnel board. The governor shall appoint one member to a five-year term and one member to a six-year term.

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MEMORANDUM

February 8, 2010

SUBJECT: Membership of the State Personnel Board
(Work Order No. 26-LS1360\A)

TO: Representative Bob Lynn
Attn: Mike Sica

FROM: Alpheus Bullard *AB*
Legislative Counsel

This memorandum accompanies the work order described above.

You asked for a bill that would make the appointment of Personnel Board (board) members under AS 39.25.060(a) similar to the manner in which public members are appointed to the Select Committee on Legislative Ethics under AS 24.60.130(b). You asked that the bill also include provisions addressing (1) the removal of board members, (2) the filling of vacancies and unexpired terms, (3) conflicts of interest, and (4) alternate members. I have a few comments.

Board members; increased membership and a constitutional concern relating to member appointment

The draft increases the number of board members (from three) to five,¹ making the membership of the board more difficult to "capture," and provides that the governor would be required to appoint nominees from a list of at least three qualified persons submitted by the chief justice of the Alaska Supreme Court. Note that this requirement that the governor appoint board members from a list of persons selected by the chief justice, subject to the right of the governor to request additional nominations, raises a constitutional question as to whether the legislature may so constrain the governor's ability to choose whom to appoint to an executive board.

¹ Mike Sica of your staff clarified that the intent of the legislation related to making sure that the board did not operate, or appear to operate, as a rubber stamp in investigating and addressing complaints concerning the governor. More members makes it less likely that (1) a majority of the board would be appointed by a sitting governor and (2) that the membership of the board would be of a single mind in any board proceeding. Because I increased the number of board members, I did not include a provision for alternate members.

Representative Bob Lynn
February 8, 2010
Page 2

The power to appoint members of state boards, commissions, and councils is an executive function to be exercised by the governor. In Bradner v. Hammond, 553 P.2d 1, 5 - 6 (Alaska 1976), the Alaska Supreme Court recognized that the Alaska constitution envisioned a strong executive and "that the appointment of executive officers is an executive function. . . ." The legislature may prescribe qualifications for the members of boards and commissions that are reasonably related to either the position or to the aim of the legislation and do not interfere with the governor's appointment power or with qualifications set out in the constitution. Various state courts have reached this same conclusion and have upheld legislative designations of qualifications for public offices, such as memberships on a board or commission. See, e.g., State v. Matassarini, 217 P. 930 (Kansas 1923); State v. Eischen, 76 N.W.2d 385 (Minn. 1956); Humane Society of the United States v. New Jersey Fish and Game Council, 362 A.2d 20 (1976); Hurd v. Freeland, 442 P.2d 344 (Okla. 1966); State v. Wells, 112 N.W.2d 601 (S.D. 1961); State v. Millsap, 605 S.W.2d 366 (Tex. App. 1980).

However, the Department of Law, which has generally taken a position very protective of the governor's prerogatives, has asserted that the legislature may not restrict the governor's appointment powers, such as by requiring the governor to select from a list of names provided by particular groups. The Department of Law has repeatedly argued that such limitations on the governor's appointment power are unconstitutional infringements upon the governor's authority. Letter to Walter J. Hickel, Governor, from Charles E. Cole, Attorney General, June 11, 1991 (file no. 883-91-0071); 1981 Inf. Alaska Atty. Gen. Op. (file no. J-66-698-81), April 23; 1980 Inf. Alaska Atty. Gen. Op. (file no. J-66-164-80), September 17.

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In this instance, I cannot say how a court would interpret the reasonableness of a statutory requirement that the governor appoint members of the board from lists of nominees chosen by the chief justice of the Alaska Supreme Court.

Quick notes

I included a provision, sec. 3 of the draft bill (prohibited conduct by board members and board employees and contractors), that relates to possible conflicts of interest and appearances of a conflict of interest. Is this what you had in mind? Please advise.

I did not prohibit a member appointed by the governor from participating in a proceeding that involved that same governor. Such a provision seemed unnecessary given that members are appointed from lists submitted by the chief justice.

Representative Bob Lynn
February 8, 2010
Page 3

I hope that this draft bill is consistent with your intent. If you have questions, or if I can be of further assistance, please do not hesitate to contact me.

TLAB:ljw
10-062.ljw

Enclosure

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A Communication From
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Explanation of Changes in CSHB348 (JUD)

From original Version R to current Version E

Section 3: Amended the proposed section on prohibited conduct to include the word, "**political**," after the word, "**or**," on Page 2, line 14 in the latest Version E.

Section 3: Amended the proposed section on prohibited conduct to change and re-format Version R subsection (3) from **(3) lobby, employ, or assist a lobbyist** to now read in Version E on Page 2, lines 16-18:

- (3) lobby;**
- (4) employ a lobbyist; or**
- (5) assist in lobbying.**

From original Version E to current Version S

Section 1: Amended the section so that in appointing members to the personnel board, the governor ensures that at least one member be from the political party that had the largest number of **registered voters** (rather than votes) and that one member be from the political party with the second largest number of **registered voters** (rather than votes) at the time of the most recent general election at which a governor was elected.

Section 3: Amended section to delete board **employees** and **contractors** from the prohibited conduct section that applies to board members.

Section 3: Amended section to add the definitions of "**political group**" and "**political party**" as defined in AS 15.13.400.



House passes ethics panel bill without changes

Thursday, April 08, 2010

Story last updated at 4/8/2010 - 10:46 am

House passes ethics panel bill without changes

By Jeremy Hsieh | The Associated Press

JUNEAU - Same bill, different outcome.

The Alaska House passed a bill dealing with an executive branch ethics panel without changes by a nearly 3-to-1 margin Wednesday. It failed Monday in a 19-18 vote, but the vote was held for reconsideration.

The bill now goes to the Senate.

The bill would limit a governor's selection of members to the Personnel Board to names forwarded to him by the chief justice of the Alaska Supreme Court. The chief justice must nominate at least three people, but the governor can request more nominees indefinitely. It bars members from holding some political party and lobbyist roles. It also expands the board from three to five members.

It's intended to address possible conflicts of interest on the board, which arbitrates executive branch ethics complaints.

Reps. Max Gruenberg, D-Anchorage, and David Guttenberg, D-Fairbanks, flipped their votes at the last minute on Monday - stopping the bill - to try to bully through an amendment on reconsideration to further limit the governor's role in selecting board members. They weren't able to get enough votes to resurrect the failed amendment.

Minority Leader Beth Kertulla, D-Juneau, said putting restrictions on a governor's right to request unlimited nominees is important "for all of us who've lived through something similar."

It was a reference to former Gov. Sarah Palin snubbing her last year. Palin refused to appoint Kertulla to fill an empty Senate seat after Democrats broke from tradition of nominating three candidates, sending only Kertulla's name to Palin for the open seat. Kertulla had been critical of the governor after Palin was chosen as Republican John McCain's running mate in the 2008 presidential election.

Juneau's Senate district went without representation for about half the legislative session as Palin cycled through additional nominees before naming Dennis Egan to the seat on the last day of the legislative session.

The failed amendment on the Personnel Board bill would have limited a governor to the chief justice's first set of at least three nominees and a second set of up to three nominees.

Bill sponsor Bob Lynn, R-Anchorage, said such a restriction leads to questionable legal territory

regarding separation of powers.

"This is not a perfect bill, but is significant improvement over the status quo," Lynn said. "I'm going to vote a conservative and progressive 'yes' on this bill."

Rep. Mike Doogan, D-Anchorage, had initially proposed the failed amendment and broke from his party voting against the overall bill.

The Personnel Board primarily deals with lower-level state employees where the conflict of interest issue the bill addresses is irrelevant, Doogan said.

The executive branch's elected officials, the governor and lieutenant governor, don't fit, and a better solution may be to lump all elected officials under one ethics panel, he said.

adn.com

Anchorage Daily News

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Personnel board appointments get another look

By SEAN COCKERHAM
scockerham@adn.com

(03/16/10 18:11:01)

Alaska legislators are talking about changing the law so governors can no longer appoint whoever they want to the state personnel board, the panel that dismissed ethics complaints against then-Gov. Sarah Palin on "Troopergate" and many other matters.

Anchorage Republican Rep. Bob Lynn, who has been supportive of Palin, sponsored a bill that would make the governor pick from a list submitted by the chief justice of the state supreme court. Lynn said it would reassure the public.

"It helps protect and insulate the governor from what could be, and usually is, unfair criticism from the public that you have the fox watching the hen house," Lynn said Tuesday, as the bill passed its first committee.

Anchorage Democratic Rep. Les Gara, no fan of Palin's, favors Lynn's House Bill 348. Gara said he thinks some of the people filing ethics complaints against Palin went overboard. But he said the current system casts a lot of doubt about the rulings made by members of the Personnel Board, who he said could be political allies of the governor.

"I did not follow every complaint in any great detail. But you always do wonder whether a personnel board appointed by Republican governors is going to be objective when it looks at conduct by a Republican governor," Gara said.

The three members of the Personnel Board are charged in Alaska law with looking into ethics complaints made against the governor and other members of the executive branch. The current members were all appointed by Republican governors, although two of them aren't registered with a political party.

The board members have six-year terms and only one, Alaska Christian College President Keith Hamilton, was appointed by Sean Parnell, the current governor. Board member Debra English was reappointed by Palin in 2008 and Al Tamagni was appointed in 2006 by Frank Murkowski.

Lynn said he does not think there's been a problem with the Personnel Board. "But there's always the perception out there and, in politics, perception often becomes reality in the public mind," he said.

Current law says only that the board members can't be state employees and no more than two of the three of can be registered with the same political party. They are appointed by the governor and then confirmed by the Legislature.

Lynn's bill would expand the board to five members. He said that would provide more of a broad range of opinion. The panel would also need to include at least one member from each of the top two political parties in the state.

The governor would be required to pick from a list of at least three nominees from the chief justice of the Alaska Supreme Court, although the governor could reject the entire list and ask the chief justice for another.

Gara said called that a loophole and said the governor shouldn't get to keep asking for new nominees over and over if he or she doesn't like the slate presented. But Lynn described it as a way to deal with potential separation of powers issues involved in the Legislature reducing a governor's ability to make appointments .

The attorney general's office raised the separation of powers issue Tuesday. But the Parnell administration didn't object to the bill as it passed from the House State Affairs Committee. The bill next goes to the judiciary committee, chaired by Fairbanks Republican Rep. Jay Ramras. Ramras last year deemed a "whitewash" the report commissioned by the personnel board that found Palin not responsible for any wrongdoing in the so-called Troopergate affair.

Zane Henning, who had two ethics complaints against Palin dismissed, last month testified to a legislative committee that elected officials rather than a governor's appointees should oversee the complaints. His concern seemed to resonate with some legislators. "I'm just wondering is there maybe too close of a relationship there," Sen. Kevin Meyer, R-Anchorage, asked during that hearing.

Assistant Attorney General Judy Bockmon said an independent counsel investigates ethics complaints against the governor, lieutenant governor or attorney general in an effort to separate the Personnel Board from those high-level officials.

The outcome of at least one Personnel Board case from the Palin era remains a mystery. Independent Counsel Tom Daniel on July 14 found "probable cause" that Palin's legal defense fund violated state ethics law. But the board has taken no public action and the fund's Web site still solicits donations.

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Palin critics question ethics rules proposals**PALIN ERA: New regulations would address traveling on the state's dime, paying legal bills.**By LISA DEMER
ldemer@adn.com

(02/08/10 22:44:25)

JUNEAU -- A legislative committee on Monday took up ethics issues that erupted during the Palin administration, but it's not clear whether the panel intends to take any action.

Attorney General Dan Sullivan has proposed state rules establishing when it's appropriate for the state to pay for the travel of family members of the governor or lieutenant governor. Another proposal sets out when the state should pay legal bills for state officials defending against ethics complaints.

Former Gov. Sarah Palin was hit with numerous ethics complaints during her 2 1/2 years in office. She said she quit in part because of what she called frivolous ethics complaints and personal legal bills amounting to an estimated \$600,000.

Most of the ethics complaints against Palin were dismissed. But she settled one by reimbursing the state more than \$8,000 for her children's air travel.

Some parts of the package Sullivan is proposing go beyond the Palin-era controversies. For instance, another proposed rule change would do away with a requirement for state officials to disclose as gifts any travel for state business paid by others. But they still would have to file travel reports, which would be public.

Sullivan is trying to make the changes through new state regulations, which don't need legislative approval.

Oversight comes from the joint House-Senate Administrative Regulation Review Committee, which examines regulations to make sure they are allowed under state law.

The panel agreed to hold a public hearing on the ethics measures after being pushed by Palin critic Andree McLeod. House leaders also requested it, said state Rep. Wes Keller, R-Wasilla, who is the committee chairman.

LEGAL FEES, FAMILY TRAVEL

Under the proposed rules, the state could cover the costs of defending a public official against ethics complaints if the official were exonerated, Assistant Attorney General Judy Bockmon told the committee.

Travel would be covered if the presence of a family member is required for state business or has a public purpose. The proposal says that would include a state-sponsored event that the family of the governor or lieutenant governor usually attends, or an event in which the family member is representing the state.

State Rep. David Guttenberg, D-Fairbanks, asked Bockmon whether state law gives any guidance on paying for family travel.

It doesn't, she said.

In that case, why try to decide when it's appropriate -- maybe it shouldn't be permitted at all, Guttenberg responded.

That's up to the Legislature, Bockmon said. There might be value to the state for the family to attend. It depends on the nature of the event.

State Rep. Carl Gatto, R-Palmer, said it might just save worry and time for a governor with young children to bring them along.

CRITICS TESTIFY

McLeod, who filed a number of ethics complaints against Palin and her staff, urged the committee to reject the changes.

"Are these changes valid? Do they improve the standards of public service? Do they promote the faith and confidence of the people in this state in their public officers? I submit that they do not," McLeod told the legislative committee.

McLeod said private citizens with questions about whether a public official has crossed a legal or ethical line can't get ethics opinions the way state employees can. So the public has no recourse except filing complaints to get answers, she said.

The Executive Branch Ethics Act is important, and the attorney general shouldn't be trying to change the law, another Palin critic, Zane Henning, told the committee. The Legislature should make any needed changes, he said.

"I object to the entire process that is being pushed through here," Henning said.

The ethics law needs reform, but not in the way the attorney general wants, Henning said. Elected officials, not the governor-appointed Personnel Board, should oversee ethics complaints against state officials, he said.

Both of his complaints against Palin were dismissed. One involved an interview about the vice presidential campaign that she gave to Fox News in her state office; the other concerned the fact she collected state expense payments while living in her own home in Wasilla.

ARM'S-LENGTH INVESTIGATORS

Henning's concerns about the Personnel Board seemed to resonate with legislators.

"I'm just wondering is there maybe too close of a relationship there," state Sen. Kevin Meyer, R-Anchorage, asked during the hearing.

Bockmon told the committee an independent counsel investigates ethics complaints against the governor, lieutenant governor or attorney general in an effort to separate the Personnel Board from those high-level officials.

The committee can't halt the regulations from taking effect during the annual legislative session,

but can express disapproval and propose new laws to override any objectionable regulations.

The Department of Law has solicited public comment and held a hearing on the ethics changes, Bockmon said. The period for comment has ended and the department must now decide what to do. It could adopt the provisions as is or with minor changes, or let the matter drop with no action.

The committee hasn't yet decided how to proceed, Keller said.

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Costs of dismissed Palin ethics complaints pile up

Personnel board member says tab is "close to about a third of a million dollars."

By SEAN COCKERHAM

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(05/27/09 21:57:12)

The Alaska Personnel Board, clearly frustrated with the pile of ethics complaints filed against Gov. Sarah Palin, wants to publicize the cost of dealing with them.

The personnel board members decided at a Wednesday meeting to work with the attorney general's office on how to make public the cost of addressing each ethics complaint, without violating the board's confidentiality rules.

"We've spent pretty close to about a third of a million dollars, and it's getting to be really expensive," said Al Tamagni, a member of the board.

Also Wednesday, the three-member board dismissed another complaint, this one involving Palin and her political action committee, and heard testimony from a woman who asserted fear of retaliation has prevented her from filing a complaint against the governor.

The governor's office said it is the 13th ethics complaint against Palin or her staff that has been resolved without finding of an executive ethics act violation. But Palin has agreed to reimburse the state in order to settle an ethics complaint over 10 state-paid trips taken by her children. A "few more" complaints are pending a decision by the personnel board, the governor's office said.

Andree McLeod, an Anchorage activist who has filed multiple ethics complaints against Palin and her staff, said after the meeting that the board is trying to squash accountability by saying it costs too much.

"The whole way to mitigate all this is for Palin to behave ethically," said McLeod, who filed the complaint that was dismissed by the board on Wednesday.

Valerie Henning told the board that fear of a backlash has prevented her from filing a complaint against the governor's practice of collecting per diem for time spent at her home in Wasilla. Henning's husband, Zane, earlier had an ethics complaint dismissed by the board. His complaint alleged Palin violated ethics law by holding national television interviews concerning her run for vice president from the governor's office.

Valerie Henning brought up to the board the statement that Palin's chief of staff, Mike Nizich, made on April 22 after the filing of an ethics complaint against Palin that was released to the press.

"I hope that the publicity-seekers will face a backlash from Alaskans who have a sense of fair play and proportion. I served six previous governors, and I've never seen anything like the attacks against governor Palin," Nizich said in a press release distributed by the governor's office.

Valerie Henning tried to get board members to suggest some alternative to making the ethics complaint, saying "I'm afraid of retaliation, basically."

Palin spokesman Bill McAllister said Nizich was simply asking that Alaskans who have a "sense of fair play and proportion" speak up about what's going on.

"I don't know what she means by retaliation, but certainly some people have been raising their voices in protest of this abuse of the ethics act," McAllister said. "People make these allegations against the governor and they keep getting dismissed and dismissed and dismissed, and some people are saying 'What's going on here?'"

Pro-Palin bloggers have assailed "ankle biter" ethics complainants in writing and KBYR talk radio host Eddie Burke has gone after McLeod on his show, saying he was going to hunt down evidence she was motivated by not getting a state job.

One of the personnel board members, Tamagni, last fall asked a state attorney if the board could charge attorney fees for Alaskans who file "a frivolous or meritless" ethics complaint. It's not clear how the state would judge a complaint frivolous, but charging for them would require changing the law.

Personnel board members spoke Wednesday about possibly pursuing changes in the law regarding their ethics complaint procedures -- such as changing the "thresholds for investigations."

Ethics complainants in the audience asked board chair Debra English for detail after the meeting, but she curtly brushed them off, saying the meeting was over and she wasn't going to say more.

English also refused to answer when a Daily News reporter asked what the board had in mind. She said the reporter should have come before the board and given public testimony in order to get any questions answered from its members.

Members of the personnel board are volunteers appointed by the governor, although all three of the current members were in place when Palin took office in 2006. Palin last year reappointed English to a six-year term but hasn't had a role yet in either of the two other positions, which have terms expiring in 2010 and 2012.

The governor also has the power to remove members of the personnel board, but only for cause.

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Chapter 13: State Election Campaigns

Sec. 15.13.400. Definitions.

In this chapter,

(8) "group" means

(A) every state and regional executive committee of a political party; and

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate;

(15) "political party" means any group that is a political party under AS 15.60.010 and any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct;

Chapter 60: General Provisions

Sec. 15.60.010. Definitions.

In this title, unless the context otherwise requires,

(23) "party district committee" means the political party committee that performs the executive function for a region representing an area larger than a precinct and smaller than the state;

(24) "political group" means a group of organized voters which represents a political program and which does not qualify as a political party;

(25) "political party" means an organized group of voters that represents a political program and

(A) that nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election or has registered voters in the state equal in number to at least three percent of the total votes cast for governor at the preceding general election;

(B) if the office of governor was not on the ballot at the preceding general election but the office of United States senator was on that ballot, that nominated a candidate for United States senator who received at least three percent of the total votes cast for United States senator at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States senator at that general election; or

(C) if neither the office of governor nor the office of United States senator was on the ballot at the preceding general election, that nominated a candidate for United States representative who received at least three percent of the total votes cast for United States representative at that general election or has registered voters in the state equal in number to at least three percent of the total votes cast for United States representative at that general election;

Sec. 39.25.060. Personnel board.

(a) The personnel board is composed of three members appointed by the governor and confirmed by the legislature meeting in joint session. The term of office of a member is six years. A vacancy in an unexpired term shall be filled by appointment by the governor for the remainder of the term. The appointment is subject to confirmation in the same manner as a full-term appointment.

(b) Members of the board may not be employees of the state. Not more than two members of the board may be members of the same political party.

(c) A board member may be removed by the governor only for cause.

(d) A member of the board may receive a per diem allowance and transportation expenses incurred in carrying out the member's duties.

Sec. 39.25.070. Powers and duties of personnel board.

In addition to the other duties imposed by this chapter, the personnel board shall

- (1) approve or disapprove amendments to the personnel rules in accordance with AS 39.25.140;
- (2) consider and act upon recommendations for the extension of the partially exempt service and the classified service as provided in AS 39.25.130;
- (3) hear and determine appeals by employees in the classified service as provided in AS 39.25.170;
- (4) establish its own rules of procedure; two members constitute a quorum for the transaction of business and two affirmative votes are required for final action on matters acted upon by the board;
- (5) elect a chair from its membership;
- (6) have the power to administer oaths, subpoena witnesses, and compel the production of books and papers pertinent to a hearing authorized by this chapter;
- (7) employ staff members, who shall be in the classified service;
- (8) carry out its powers and duties under AS 39.52.

Sec. 39.25.080. Personnel records confidential; exceptions.

(a) State personnel records, including employment applications and examination and other assessment materials, are confidential and are not open to public inspection except as provided in this section.

(b) The following information is available for public inspection, subject to reasonable regulations on the time and manner of inspection:

(1) the names and position titles of all state employees;

(2) the position held by a state employee;

(3) prior positions held by a state employee;

(4) whether a state employee is in the classified, partially exempt, or exempt service;

(5) the dates of appointment and separation of a state employee;

(6) the compensation authorized for a state employee; and

(7) whether a state employee has been dismissed or disciplined for a violation of AS 39.25.160 (1) (interference or failure to cooperate with the Legislative Budget and Audit Committee).

(c) A state employee has the right to examine the employee's own personnel files and may authorize others to examine those files.

(d) An applicant for state employment who appeals an examination score may review written examination questions relating to the examination unless the questions are to be used in future examinations.

(e) In addition to any access to state personnel records authorized under (b) of this section, state personnel records shall promptly be made available to the child support services agency created in AS 25.27.010 or the child support enforcement agency of another state. If the record is prepared or maintained in an electronic data base, it may be supplied by providing the requesting agency with access to the data base or a copy of the information in the data base and a statement certifying its contents. The agency receiving information under this subsection may use the information only for child support purposes authorized under law.

Article 04. COMPLAINTS; HEARING PROCEDURES

Sec. 39.52.310. Complaints.

(a) The attorney general may initiate a complaint, or elect to treat as a complaint, any matter disclosed under AS 39.52.210, 39.52.220, 39.52.250, or 39.52.260. The attorney general may not, during a campaign period, initiate a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for election to state office.

(b) A person may file a complaint with the attorney general regarding the conduct of a current or former public officer. A complaint must be in writing, be signed under oath, and contain a clear statement of the details of the alleged violation.

(c) If a complaint alleges a violation of AS 39.52.110 - 39.52.190 by the governor, lieutenant governor, or the attorney general, the matter shall be referred to the personnel board. The personnel board shall return a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for election to state office as provided in (j) of this section if the complaint is initiated during a campaign period. The personnel board shall retain independent counsel who shall act in the place of the attorney general under (d) - (i) of this section, AS 39.52.320 - 39.52.350, and 39.52.360(c) and (d). Notwithstanding AS 36.30.015 (d), the personnel board may contract for or hire independent counsel under this subsection without notifying or securing the approval of the Department of Law.

(d) The attorney general shall review each complaint filed, to determine whether it is properly completed and contains allegations which, if true, would constitute conduct in violation of this chapter. The attorney general may require the complainant to provide additional information before accepting the complaint. If the attorney general determines that the allegations in the complaint do not warrant an investigation, the attorney general shall dismiss the complaint with notice to the complainant and the subject of the complaint.

(e) The attorney general may refer a complaint to the subject's designated supervisor for resolution under AS 39.52.210 or 39.52.220.

(f) If the attorney general accepts a complaint for investigation, the attorney general shall serve a copy of the complaint upon the subject of the complaint, for a response. The attorney general may require the subject to provide, within 20 days after service, full and fair disclosure in writing of all facts and circumstances pertaining to the alleged violation. Misrepresentation of a material fact in a response to the attorney general is a violation of this chapter. Failure to answer within the prescribed time, or within any additional time

period that may be granted in writing by the attorney general, may be considered an admission of the allegations in the complaint.

(g) If a complaint is accepted under (f) of this section, the attorney general shall investigate to determine whether a violation of this chapter has occurred. At any stage of an investigation or review, the attorney general may issue a subpoena under AS 39.52.380.

(h) A violation of this chapter may be investigated within two years after discovery of the alleged violation.

(i) The unwillingness of a complainant to assist in an investigation, the withdrawal of a complaint, or restitution by the subject of the complaint may, but need not in and of itself, justify termination of an investigation or proceeding.

(j) The personnel board shall return a complaint concerning the conduct of the governor or lieutenant governor who is a candidate for state office received during a campaign period to the complainant unless the governor or lieutenant governor, as appropriate, permits the personnel board to assume jurisdiction under this subsection. If the personnel board receives a complaint concerning the conduct of the governor or lieutenant governor who is a candidate during the campaign period, the personnel board shall immediately notify the subject of the complaint of the receipt of the complaint, of the suspension of the personnel board's jurisdiction during the campaign period, and of the candidate's right to waive the suspension of jurisdiction under this subsection. The candidate may, within 11 days after the personnel board mails or otherwise sends notice of the complaint to the candidate, notify the personnel board that the candidate chooses to have the personnel board proceed with the complaint under this section. If the candidate does not act within that time or if the candidate notifies the personnel board that the candidate is not waiving the suspension of jurisdiction, the personnel board shall return the complaint to the complainant with notice of the suspension of jurisdiction under this subsection and of the right of the complainant to file the complaint after the end of the campaign period.

(k) A campaign period under this section begins on the later of 45 days before a primary election in which the governor or lieutenant governor is a candidate for state office or the day on which the individual files as a candidate for state office and ends at the close of election day for the general or special election in which the individual is a candidate or on the day that the candidate withdraws from the election, if earlier. For a candidate who loses in the primary election, the campaign period ends on the day that results of the primary election showing that another individual won the election are certified.

Sec. 39.52.320. Dismissal before formal proceedings.

If, after investigation, it appears that there is no probable cause to believe that a violation of this chapter has occurred, the attorney general shall dismiss the complaint. The attorney general shall communicate disposition of the matter promptly to the complainant under AS 39.52.335 (c) and to the subject of the complaint.

Sec. 39.52.330. Corrective or preventive action.

After determining that the conduct of the subject of a complaint does not warrant a hearing under AS 39.52.360, the attorney general shall recommend action to correct or prevent a violation of this chapter. The attorney general shall communicate the recommended action to the complainant and the subject of the complaint. The subject of the complaint shall comply with the attorney general's recommendation.

Sec. 39.52.335. Summary of disposition of complaints and review by personnel board.

(a) When the attorney general initiates or receives a complaint under AS 39.52.310, the attorney general shall immediately forward a copy of the complaint to the personnel board.

(b) Each month, the attorney general shall file a report with the personnel board concerning the status of each pending complaint and the resolution of complaints that have been closed since the previous report.

(c) If a complaint is dismissed under AS 39.52.320 or resolved under AS 39.52.330, the attorney general shall promptly prepare a summary of the matter and provide a copy of the summary to the personnel board and the complainant. The summary is confidential unless the

(1) dismissal or resolution agreed to under AS 39.52.320 or 39.52.330 is public; or

(2) superior court makes the matter public under (h) of this section.

(d) Within 15 days after receipt of a summary under this section, a complainant may file comments with the personnel board regarding the disposition of the complaint.

(e) At its next regular meeting that begins more than 15 days after receipt of a summary under this section, the personnel board shall review the summary and comments, if any, filed by the complainant. The personnel board may compel the attendance of the subject of the complaint or the complainant at the meeting and may compel the production of documents. Attendance may be by teleconference. The attorney general or the attorney general's designee

shall be available to respond to questions from the personnel board concerning the disposition of the complaint.

(f) After review of the summary, the personnel board may issue a report on the disposition of the complaint. If the matter is confidential and the board determines that publication of the name of the subject is in the public interest, the report may include a recommendation that the matter be made public.

(g) If the summary is confidential under (c) of this section,

(1) comments filed by the complainant, if any, are confidential;

(2) the personnel board shall conduct the review of the summary in executive session; and

(3) the personnel board report, if any, is confidential; the personnel board shall make available to the public an expurgated copy of a confidential report with sufficient deletions and editing to prevent disclosure of the identity of the persons involved in the matter.

(h) If the disposition of a complaint is not made public and the personnel board report under (f) of this section includes a recommendation that the matter be made public, an interested party may file an action against the state in superior court requesting that the court make public the complaint, the attorney general's disposition of the complaint, and the personnel board report. The court may order the matter or portions of the matter made public if the court determines that

(1) the dismissal or resolution of the complaint was clearly contrary to the requirements of this chapter;

(2) one or more of the allegations in the information to be released is supported by substantial evidence;

(3) the matter concerns the public interest; and

(4) release of the information will not infringe on any protected rights or liberties of the subject.

Sec. 39.52.340. Confidentiality.

(a) Except as provided in AS 39.52.335, before the initiation of formal proceedings under AS 39.52.350, the complaint and all other documents and information regarding an investigation conducted under this chapter or obtained by the attorney general during the investigation are confidential and not subject to inspection by the public. In the case of a complaint concerning

the governor, lieutenant governor, or attorney general, all meetings of the personnel board concerning the complaint and investigation before the determination of probable cause are closed to the public. If, in the course of an investigation or probable cause determination, the attorney general finds evidence of probable criminal activity, the attorney general shall transmit a statement and factual findings limited to that activity to the appropriate law enforcement agency. If the attorney general finds evidence of a probable violation of AS 15.13, the attorney general shall transmit a statement to that effect and factual findings limited to the probable violation to the Alaska Public Offices Commission. The attorney general and all persons contacted during the course of an investigation shall maintain confidentiality regarding the existence of the investigation.

(b) It is not a violation of this section for a person to contact an attorney or to participate in a criminal investigation.

(c) The subject of the complaint may, in writing, waive the confidentiality protection of this section.

Sec. 39.52.350. Probable cause for hearing.

(a) If the attorney general determines that there is probable cause to believe that a knowing violation of this chapter or a violation that cannot be corrected under AS 39.52.330 has occurred, or that the subject of a complaint failed to comply with a recommendation for corrective or preventive action, the attorney general shall initiate formal proceedings by serving a copy of an accusation upon the subject of the accusation. The accusation shall specifically set out the alleged violation. After service, the accusation is a public document open to inspection. Except as provided in AS 39.52.370 (c), all subsequent proceedings are open to the public.

(b) The subject of the accusation shall file an answer with the attorney general within 20 days after service of the accusation, or at a later time specified by the attorney general. If the subject of the accusation fails to timely answer, the allegations are considered admitted.

(c) If the subject of the accusation denies that a violation of this chapter has occurred, the attorney general shall refer the matter to the personnel board, which shall notify the chief administrative law judge (AS 44.64.010), who shall appoint an administrative law judge to serve as a hearing officer to conduct a hearing.

(d) If the subject of the accusation admits a violation of this chapter, the attorney general shall refer the matter to the personnel board to impose penalties under AS 39.52.410, 39.52.440, and 39.52.450, as appropriate.

Sec. 39.52.360. Hearings.

(a) The hearing officer may convene a prehearing conference to set a time and place for the hearing, and for stipulation as to matters of fact and to simplify issues, identify and schedule prehearing matters, and resolve other similar matters before the hearing.

(b) The hearing officer may administer oaths, hold hearings, and take testimony. Upon application by a party to the hearing, the hearing officer may issue subpoenas under AS 39.52.380.

(c) The attorney general shall present the charges before the hearing officer. At a hearing, the attorney general has the burden of demonstrating by a preponderance of the evidence that the subject of the accusation has, by act or omission, violated this chapter.

(d) The parties to a hearing are the attorney general and the subject of the accusation. The subject of an accusation may be represented by counsel. Each party has an opportunity to be heard and cross-examine witnesses, who shall testify under oath.

(e) The Administrative Procedure Act does not apply to hearings under this section, except as provided in AS 39.52.380.

(f) Technical rules of evidence do not apply, but the hearing officer's findings must be based upon reliable and relevant evidence. All testimony and other evidence taken at the hearing must be recorded and the evidence maintained. Copies of transcripts of the hearing record are available to the subject of the accusation at the subject's expense; however, upon request, a copy of the recording of the hearing must be furnished without charge to the subject of the accusation.

(g) At the conclusion of the formal hearing, the hearing officer may direct either or both parties to submit proposed findings of fact, conclusions of law, and recommendation to be filed within 10 days after the conclusion of the hearing.

(h) Within 30 days after the conclusion of a formal hearing, the hearing officer shall serve a written report on the personnel board and the parties, unless the personnel board grants an extension of time. The report must contain the officer's findings of fact, conclusions of law, and recommendation. The hearing officer shall submit the record to the personnel board.

Sec. 39.52.370. Personnel board action.

(a) Within 10 days after receipt of the hearing officer's report, either party may protest the officer's findings of fact, conclusions of law, and recommendation, and, if a protest is filed, shall serve a copy on the other party. Oral argument before the personnel board must be provided only if requested by either party. The board chair shall set the deadline for submission of requests for oral argument, and set the dates for submission of briefs and oral argument before the board, if requested.

(b) The board may issue subpoenas under AS 39.52.380, and may, for good cause shown, augment the hearing record, in whole or in part, or hold a hearing de novo.

(c) The personnel board shall review each report submitted by a hearing officer and shall either adopt or amend the findings of fact, conclusions of law, and recommendation of the officer. Deliberations of the personnel board must be conducted in sessions not open to the public.

(d) If the personnel board determines that a violation occurred, it may impose the penalties in AS 39.52.410, 39.52.440, and 39.52.450, as appropriate. If the board determines that no violation occurred, the board shall issue a written order of dismissal.

(e) The personnel board secretary shall promptly notify the parties and the public officer's designated supervisor of the board's action.

(f) The subject of the accusation may appeal the personnel board's decision by filing an appeal in the superior court as provided in the Alaska Rules of Appellate Procedure.

Sec. 39.52.380. Subpoenas.

(a) As provided in AS 39.52.310 (g), 39.52.360(b), and 39.52.370(b), the attorney general, independent counsel retained under AS 39.52.310 (c), a hearing officer, the subject of an accusation, and the personnel board may summon witnesses and require the production of records, books, and papers by the issuance of subpoenas.

(b) Subpoenas must be served in the manner prescribed by AS 44.62.430 and Rule 45 of the Alaska Rules of Civil Procedure. Failure or refusal to obey a subpoena issued under this chapter is punishable as contempt in the manner provided by law and court rule. The superior court may compel obedience to the subpoena in the same manner as prescribed for obedience to a subpoena issued by the court.

Sec. 39.52.390. Service.

Service of an accusation must be accomplished in accordance with Rule 4 of the Alaska Rules of Civil Procedure. Service of any other pleading, motion, or other document must be accomplished in accordance with Rule 5 of the Alaska Rules of Civil Procedure.

Article 05. ENFORCEMENT; REMEDIES

Sec. 39.52.410. Violations; penalties for misconduct.

(a) If the personnel board determines that a public employee has violated this chapter, it

(1) shall order the employee to stop engaging in any official action related to the violation;

(2) may order divestiture, establishment of a blind trust, restitution, or forfeiture; and

(3) may recommend that the employee's agency take disciplinary action, including dismissal.

(b) If the personnel board determines that a nonsalaried member of a board or commission has violated this chapter, it (1) shall order the member to refrain from voting, deliberating, or participating in the matter; (2) may order restitution; and (3) may recommend to the appropriate appointing authority that the member be removed from the board or commission. A violation of this chapter is grounds for removal of a board or commission member for cause. If the personnel board recommends that a board or commission member be removed from office, the appointing authority shall immediately act to remove the member from office.

(c) If the personnel board determines that a former public officer has violated this chapter, it shall

(1) issue a public statement of its findings, conclusions, and recommendation; and

(2) request the attorney general to exercise all legal and equitable remedies available to the state to seek whatever relief is appropriate.

(d) If the personnel board finds a violation of this chapter by a public officer removable from office only by impeachment, it shall file a report with the president of the Senate, with its finding. The report must contain a statement of the facts alleged to constitute the violation.

Sec. 39.52.420. Disciplinary action for violation.

(a) In addition to any other cause an agency may have to discipline a public employee, an agency may reprimand, demote, suspend, discharge, or otherwise subject an employee to agency disciplinary action commensurate with the violations of this chapter. This section does not prohibit the review of a disciplinary action in the manner prescribed by an applicable collective bargaining agreement or personnel statute or rule.

(b) An agency may initiate appropriate disciplinary action in the absence of an accusation under this chapter or during the pendency of a hearing or personnel board action.

Sec. 39.52.430. Actions voidable.

(a) In addition to any other penalty provided by law, a state grant, contract, or lease entered into in violation of this chapter is voidable by the state. In a determination under this section of whether to void a grant, contract, or lease, the interests of third parties who could be damaged may be taken into account. The attorney general shall give notice of intent to void a state grant, contract, or lease under this section no later than 30 days after the personnel board's determination of a violation under this chapter.

(b) In addition to any other penalty provided for by law, the state may require a state loan received in violation of this chapter to become immediately payable.

(c) Any state action taken in violation of this chapter is voidable, except that the interests of third parties and the nature of the violation may be taken into account. The attorney general may pursue any other available legal and equitable remedies.

(d) The attorney general may recover any fee, compensation, gift, or benefit received by a person as a result of a violation of this chapter by a current or former public officer. Action to recover under this subsection must be brought within two years after discovery of the violation.

Sec. 39.52.440. Civil penalties.

The personnel board may impose on a current or former public officer civil penalties not to exceed \$5,000 for a violation of this chapter. A penalty imposed under this section is in addition to and not instead of any other penalty that may be imposed according to law.

Sec. 39.52.450. Payment of twice the financial benefit.

The personnel board may, in addition to the civil penalties described in this chapter, require a current or former public officer who has financially benefited

a person in violation of this chapter to pay to the state up to twice the amount that the person realized from the violation.

Sec. 39.52.460. Criminal sanctions additional.

To the extent that violations under this chapter are punishable in a criminal action, that sanction is in addition to the civil remedies set out in this chapter.

LEGAL SERVICES

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MEMORANDUM

April 2, 2010

SUBJECT: Nominations to the state personnel board (Amendment "S.1" for CSHB 348(JUD)) (Work Order No. 26-LS1360\S.1)

TO: Representative Bob Lynn
Attn: Mike Sica

FROM: Alpheus Bullard *AB*
Legislative Counsel

This memorandum accompanies the amendment you requested.

As I expressed in a phone conversation yesterday with Mike Sica, amendment S.1 exacerbates existing separation of powers issues raised by CSHB 348(JUD).¹

As presently drafted, the bill provides that the governor may make an appointment to the state personnel board only from a list of at least three nominees selected by the chief justice, subject to the governor's right to request additional nominations. The constraint placed on the governor's ability to select a nominee *only* from a list of individuals selected by the chief justice is "*subject to the governor's right to request additional nominations.*"

The requirement that nominees be selected by the chief justice in the existing bill can reasonably be interpreted as analogous to a "qualification" for appointment, because the governor may request, in theory, an infinite number of additional nominees from the chief justice. The amendment, which permits the chief justice to refuse to select and submit further nominees, changes the balance of power between the judicial and executive branches of government, in determining who is appointed to the board.²

¹ The separation of powers issues are identified in a February 8, 2010 memorandum to your office (10-062.ljw).

² The Department of Law, which has generally taken a position very protective of the governor's prerogatives, has asserted that the legislature may not restrict the governor's appointment powers, such as by requiring the governor to select from a list of names provided by particular groups. The Department of Law has repeatedly argued that such limitations on the governor's appointment power are unconstitutional infringements upon the governor's authority. Letter to Walter J. Hickel, Governor, from Charles E. Cole, Attorney General, June 11, 1991 (file no. 883-91-0071); 1981 Inf. Alaska Atty. Gen. Op.

Representative Bob Lynn
April 2, 2010
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If the chief justice refuses to select nominees beyond those on the justice's original list, a reasonable question is created as to whether it is the chief justice or the governor who has done more to determine who may be appointed (if the governor is to appoint anyone to fill the position on the board). The amendment shifts the weight of authority in determining who may be appointed to the board further toward the chief justice than what is currently provided by CSHB 348(JUD).

As a secondary issue, what happens if the chief justice elects not to select additional nominees? This eventuality should be addressed.

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

TLAB:ljw
10-234.ljw

Enclosure

(file no. J-66-698-81), April 23; 1980 Inf. Alaska Atty. Gen. Op. (file no. J-66-164-80), September 17. Nonetheless, at least three Alaska attorney general opinions or letters of advice have accepted that the legislature may prescribe reasonable qualifications for gubernatorial appointments to boards or commissions. 1981 Inf. Alaska Atty. Gen. Op. (file no. J-66-698-81), April 23; Memorandum to Governor Hammond from R. Pegues, August 13, 1979; 1988 Inf. Alaska Atty. Gen. Op. (file no. 883-88-0079), May 24.

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A Communication From
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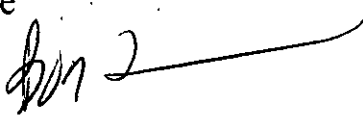
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April 14, 2010

To: Senator Hollis French, Chairman
Senate Judiciary Committee

Fr: Representative Bob Lynn 

Re: CSHB 348(JUD)
"An Act relating to the membership of the state personnel board."

Please schedule a hearing for CSHB 348(JUD) in the Senate Judiciary Committee at your earliest convenience. Attached is the most recent version of the bill (26-LS1360\S).

Also included in the bill packet: a sponsor statement, a sectional analysis, and other background material.

Thank you for considering my request for a hearing on CSHB 348(JUD), which I believe will broaden representation on the Personnel Board so it can operate, or at the very least, appear to operate with greater independence when addressing complaints against Executive Branch officials.