

HB

10

<TARGET><BILL>HB 10</BILL><SUBJECT>HB
10</SUBJECT><COMM>HJUD28</COMM></TARGET>

Alaska State Legislature

House of Representatives



Member:
Judiciary
Rules
Legislative Council
Military & Veterans Affairs

Representative Max F. Gruenberg, Jr.
House District 14
Anchorage (Russian Jack, College Gate, Nunaka Valley)
House Democratic Floor Leader


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Rep.Max.Gruenberg@legis.state.ak.us

MEMORANDUM

TO: Rep. Wes Keller, Chair
House Judiciary Committee

FROM: Rep. Max Gruenberg 

DATE: February 20, 2013

RE: HB 10—Executive Ethics: Family Travel

.....

Please consider this memo as a request for HB 10 to be heard in the House Judiciary Committee. Accompanying this memo are the following documents:

- HB 10 (28-LS0040\A)
- CS HB 10 (STA) (28-LS0040\C)
- Sponsor Statement for C version
- Sectional Analysis for C version
- Explanation of Changes from A to C version
- Legal Opinion from Dan Wayne, Legislative Counsel
- Regulation 9 AAC 52.045

Thank you for considering this request. Please contact my legislative aide, Ted Madsen, at 465-2840 with any questions.

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SPONSOR STATEMENT

HB 10 - EXECUTIVE ETHICS: FAMILY TRAVEL

HB 10 sets forth in statute the substance of the regulations establishing standards for payment of travel expenses for the families of the governor and lieutenant governor. Currently, only minor dependents of the governor and lieutenant governor can have their travel costs paid by the state if certain conditions are met. Under the proposed legislation, adult dependent children who are physically, intellectually, or developmentally disabled may also have their travel costs paid if the same certain conditions are met. The rules are carefully drafted to limit the circumstances under which family members of the governor and lieutenant governor can recover their travel costs.

Please contact my legislative aide, Ted Madsen, at 465-2840, with any comments or concerns.

Thank you for your consideration of HB 10.

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SECTIONAL ANALYSIS HB 10 - EXECUTIVE ETHICS: FAMILY TRAVEL

- Sec. 1.** Deletes definition of “for partisan political purposes.” This definition section is moved to section 3 on page 4, lines 1-6.
- Sec. 2.** Conforming amendment.
- Sec. 3.** Adds new subsections.

Proposed subsection (g) sets forth the rules covering the payment of travel costs for spouses and children of the governor and lieutenant governor. First, it may not be for a partisan political purpose. Second, the state must be repaid the actual costs of transportation or the reasonable cost if the actual cost cannot be determined. The state need not be reimbursed if:

- (a) the family member’s presence is required for official state action, or
- (b) the event is state-sponsored and the person’s attendance is customary, or
- (c) the family member is attending as an official representative of the state,
or
- (d) the family member is invited by the event sponsor before they receive transportation, the invitation and the person’s attendance are customary, the event is related to important state issues, and the governor or lieutenant governor attend.

Proposed subsection (h), discussed above, defines the term “partisan political purpose.”

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EXPLANATION OF CHANGES: HOUSE BILL 10: EXECUTIVE ETHICS "A" VERSION TO "C" VERSION

There were two changes from the A version to the C version.

1. Page 3, line 12 of the A version (page 3, line 5 of the C version) "mental" was changed to "intellectual, or developmental" in accord with an amendment adopted by the committee during the previous hearing on the bill.
2. Page 4, line 7 through page 5, line 9 of the A version; Sections 4 and 5 were removed. There is also a corresponding title change to reflect these deletions.

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MEMORANDUM

February 12, 2010

SUBJECT: Are ethics regulations proposed December 8, 2009, within the scope of the Department of Law's regulation-making authority? (Work Order No. 26-LS1493)

TO: Representative David Guttenberg

FROM: Dan Wayne 
Legislative Counsel

You have asked if the Executive Branch Ethics Act regulations proposed by the Department of Law on December 8, 2009, are within the department's regulation-making authority or if the changes proposed would first require a change in statute by the legislature.

The Administrative Procedure Act says, at AS 44.62.020:

Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

In this instance, the department's regulation-making authority comes from AS 39.52.950, which says:

The attorney general may adopt regulations under the Administrative Procedure Act necessary to interpret and implement this chapter.

I see two places where this limited authority may be exceeded by the proposed regulations. Proposed 9 AAC 52.045 would allow the state to pay the transportation expenses of family members of the governor and lieutenant governor, even though the Act, at AS 39.52.120, prohibits that type of payment. The attorney general has previously covered this in a September 30, 2004, opinion, that said:

For purposes of the Ethics Act, it is irrelevant that it does not cost the state more to fly the King Air with more of its seats occupied. The focus of the Ethics Act is on the benefit being conferred on the administration official

who would not have to pay the cost of a commercial air ticket to fly his or her spouse to a location, not the cost to the state.

Therefore, under current law, the Ethics Act precludes the spouses of administration officials from flying on the King Air unless the official reimburses the state the cost of a coach fare ticket for the spouse.

...

An amendment to the Ethics Act would be required to enable the Governor to allow spouses of administration officials to accompany the official on King Air flights free of charge.

Op. Attn'y Gen. (September 30, 2004); *redated for publication March 9, 2007*; 2007 Alas. AG LEXIS 5. Under the facts of this opinion there was no additional cost to the state in transporting the accompanying spouse. The 2004 opinion did not address the proposition, which the proposed 9 AAC 52.045 seems to rest upon, that the offices of governor and lieutenant governor should be considered apart from other administrative offices, as a matter of public policy, for the purpose of determining whether the state receives a benefit from the governor and lieutenant governor being accompanied by their spouses or children when traveling on state business.

The 2004 opinion said that AS 39.52.120 prohibits a public officer from securing or granting an unwarranted benefit for a spouse. "Unwarranted benefits" have been defined in existing regulations, at 9 AAC 52.040, as benefits that deviate from normal procedure and are improperly motivated. "Improper motivation" means, as defined by 9 AAC 52.990(b)(4), giving primary consideration to a person's relationship with a public officer. The 2004 A.G. Opinion reasoned that if a spouse of an administration official accompanies the official on a state trip without having to pay, there is a benefit to the spouse, and "[t]he primary consideration in granting the benefit would be the spouse's relationship with the administration official and the official's relationship with the Governor -- precisely the type of motivations that are prohibited by the Ethics Act."

In proposed 9 AAC 52.045, the accompanying spouse or child would have to demonstrate that the spouse's or child's transportation is of benefit to the state. However, as can be seen from existing regulations already adopted by the department, the department's past interpretation of AS 39.52.120 regarding state payment of family transportation costs does not, on balance, support a "benefits the state" exception to the prohibition. In fact, 9 AAC 52.040(b), which is not being amended by the proposed regulations, says that a public officer may not grant an unwarranted benefit "regardless of whether the result is in the best interest of the state." Although the proposed 9 AAC 52.045 appears to be in conflict with existing 9 AAC 52.040(b), that does not mean that a court would invalidate the proposed regulation. A court may or may not determine that a "benefits the state" exception allowing spouses and children of the governor and lieutenant governor to be transported with the governor without

Representative David Guttenberg
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reimbursement of transportation costs, exceeds the scope of AS 39.52.120; I am not able to predict which way the court would go on that question.

The proposed regulations would allow an exception to the prohibition for a spouse or child if the presence of the spouse or child is required for state business or if the purpose of transportation of the spouse or child is performance of a customary or ceremonial duty as an "official representative of the state." There is no legal authority to suggest that a person who is not a public employee or public official can be an "official representative" of the state. Being the spouse or child of a public officer does not legally confer official representative status on a person, and it follows from this that if the governor's or lieutenant governor's family member does serve the state it is in an unofficial role. I would note, nonetheless, that the governor's and lieutenant governor's families do serve a ceremonial role that is much more significant than the role served by the families of other administrative officials. The proposed regulations could be upheld on this basis if challenged.

The proposed regulations would also provide for reimbursement of private legal expenses incurred by public officers who are exonerated of allegations in an ethics complaint. The Executive Branch Ethics Act is silent with respect to legal representation of a public officer by private counsel during a complaint proceeding. The attorney general acknowledged the Act's silence on this point but argued, in a recent opinion, that public officers exonerated in ethics complaint proceedings should be reimbursed for private legal expenses incurred because it is consistent with the public's best interest and consistent with the state's general policy of paying legal expenses for public officers who defend against civil or criminal allegations arising from their service to the state.¹ A court might agree with this policy argument and still find that the legal expense reimbursement provisions of the proposed regulations go beyond the scope of the authority, granted to the Department of Law by AS 39.52.950 to adopt regulations "necessary to interpret and implement this chapter."

The legislature might appropriately choose to consider the public policy issues presented by these regulations and attempt to resolve them with legislation. Please let me know if you would like a bill drafted.

DCW:ljw
10-086.ljw

¹ Op. Attn'y Gen. file no. AN2009102807 (August 5, 2009); 2009 Alas. AG LEXIS 8.

9 AAC 52.045. Transportation of family members of governor and lieutenant governor

Statute text

(a) The use or authorization of use of state money or other state resources for transportation of a family member of the governor or lieutenant governor does not violate AS 39.52.120(a) or (b)(3) if transportation is provided to an event at which the family member's presence benefits the state. The presence of a family member of the governor or lieutenant governor benefits the state if the family member's presence

(1) is required for official action of the state; or

(2) has a public purpose related to the governor's or lieutenant governor's official duties, including

(A) attending a state-sponsored event that the family of the governor or lieutenant governor customarily attends;

(B) attending an event at which the family member serves as an officially designated representative of the state; or

(C) accompanying, as an invited guest, the governor or lieutenant governor to an event related to issues important to the state when the family member's attendance is appropriate for the event, such as youth- or family-related events.

(b) For purposes of AS 39.52.120(a) and (b)(3) and (a) of this section, transportation of a family member to attend a political or campaign event held for partisan political purposes does not benefit the state.

(c) For purposes of AS 39.52.120(a) and (b)(3), the use or authorization of use of state money or other state resources for transportation of a family member that does not benefit the state is presumed insignificant if the governor or lieutenant governor pays the state the cost of the family member's transportation. Except for transportation by state aircraft for partisan political purposes under AS 39.52.120(f), the agency that authorized or paid for the travel shall determine the cost of the transportation based on either

(1) the actual fare paid; or

(2) the fare for equivalent commercial transportation, if the travel was by state aircraft, vessel, or vehicle.

(d) in this section,

- (1) "child" has the meaning given in AS 39.52.960;
- (2) "family member" means a spouse or minor child of the governor or lieutenant governor;
- (3) "for partisan political purposes" has the meaning given in AS 39.52.120(b)(6).

History: Eff. 12/22/2010, Register 196

Authority: AS 39.52.120

AS 39.52.950