

# MEMORANDUM

State of Alaska

Department of Law

TO: Nancy Welch, Executive Director,  
Alaska Natural Resource  
Conservation and Development  
Board

DATE: March 3, 2004

FILE NO.: 661-04-0439

TEL. NO.:

FROM: Dennis Wheeler   
Assistant Attorney General  
Natural Resources Section

FAX:

SUBJECT: Ethics issues regarding Soil and  
Water Conservation Districts (AS  
41.10)

You have asked the following:<sup>1</sup>

1. Is the Executive Director of the Natural Resource Conservation Development Board (NRCDB) the designated ethics supervisor for the local Soil and Water Conservation District (SWCD) board members?
2. Can a (potential) SWCD board member be a paid district employee for the same SWCD, without violating the Ethics Act (AS 39.52)?
3. Can a (potential) SWCD board member be under contract to the district for professional services without violating the Ethics Act?
4. Can a paid SWCD employee or an individual under contract to a SWCD also serve as a NRCDB member appointed by the Governor?
5. Can the employee of one SWCD district serve on the board of another SWCD?

Subject to the discussion below, the answer to questions 1.- 4. is no. The answer to question 5. is yes.

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<sup>1</sup> Under AS 39.52.240(a) either a designated supervisor or a board or commission can request an opinion from the Attorney General. Since you are not a designated supervisor for purposes of your first question, I do not view your request as falling under AS 39.52.240, but as a request for general guidance appropriately handled by memorandum.

## **Background.**

The Soil and Water Conservation Districts (SWCDs) are organized under AS 41.10 and are state agencies.<sup>2</sup> Each district is governed by a board of supervisors who are elected by qualified land users, as defined in AS 41.10.140. The areas of the State not covered by a particular district are treated as one district, commonly referred to as the state-wide district. This district is governed by the Natural Resources Conservation and Development Board (NRCDB), which has other statutory duties as well. In recent years the districts have begun receiving substantial federal monetary support with which they have been able for the first time to hire paid support staff. The federal money is passed through a nonprofit corporation called the Alaska Association of Conservation Districts (AACD) which was incorporated by the SWCDs in 1998. The AACD board of directors is made up of the chairs, or a designee, of each SWCD. The AACD holds itself out as the “employer of record” for the employees used by the districts.

### **Question 1. Are the SWCD board members under the scope of my responsibility as Designated Ethics Supervisor for the NRCDB?**

As Executive Director of the NRCDB, you are the designated supervisor as that term is defined under AS 39.52.960(8)(D) for the staff of the NRCDB board and not the board itself. Under AS 39.52.960(8)(E), the chair or acting chair of each board or commission is the designated supervisor for the board or commission members and executive directors. Therefore, the chair of the NRCDB and the chair for each district is the designated supervisor for the NRCDB and each district board, respectively.<sup>3</sup>

### **Question 2. Can a (potential) SWCD board member be a paid district employee without violating the Ethics Act?**

Under the Ethics Act, the legislature has generally permitted board or commissioner members to also hold positions as public employees:

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<sup>2</sup> Memorandum dated March 12, 1992 (Atty. Gen. File No. 663-92-0382).

<sup>3</sup> I note that under AS 39.52.960(8)(G) the governor can designate a public officer to act as the supervisor if the name and position of the officer designated has been reported to the attorney general. I have not researched whether this provision can override or circumvent either (8)(D) or (8)(E), although the statute does use the word “or” after (F), which suggests the Governor’s power might include designating in the alternative to (8)(D) or (8)(E). Even if possible, I am not aware that such a delegation has taken place.

AS 39.52.010. *Declaration of policy.*

....

(b) The legislature declares that it is the policy of the state, when a public employee is appointed to serve on a state board or commission, that the holding of such offices does not constitute the holding of incompatible offices unless expressly prohibited by the Alaska Constitution, this chapter and any opinions or decisions rendered under it, or another statute.

This office has previously issued a memorandum on the application of the Executive Ethics Act (AS 39.52) to the SWCDs.<sup>4</sup> I have reviewed the opinion and current laws and see no reason to modify the conclusions in the memorandum. Thus, the conclusion of that memorandum that “the [SWCD] boards of supervisors . . . are within the executive branch and subject to the Ethics Act” is still valid. The board members are defined as public officers under the Act.<sup>5</sup>

One of the express prohibitions which would make being a board or commission member and a public employee “incompatible” is found in AS 39.52.150(a), which prohibits a public officer from making any attempt to “acquire, receive, apply for, be a party to, or have a personal or financial interest in” a state contract.

“State contract” is not defined in AS Title 39, but the regulatory definition provides that employment contracts are included.<sup>6</sup> The most recent opinion from this office on employment contracts is 1997 Alaska Op. Atty. Gen. (Inf.) 87, File No. 663-96-0257.<sup>7</sup> In that opinion, a state board member desired to be the board’s executive director. Because employment as an executive director is a contract as that term is used in AS 39.52.150 and a “state contract” under 9 AAC 52.900(8) (now 9 AAC 52.990(8)), the opinion concludes that the board member had to resign from the board prior to applying for the executive director position.

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<sup>4</sup> Memorandum dated February 3, 1992 (Atty Gen. File No. 663-92-0301).

<sup>5</sup> AS 39.52.960(21)(B).

<sup>6</sup> 9 AAC 52.990(8).

<sup>7</sup> Also worth noting are opinions 1988 Alaska Op. Atty. Gen. (Inf.) 69, File No. 663-88-0297; 1989 Alaska Op. Atty. Gen. (Inf.) 57, File No. 661-89-0535; and 1987 Alaska Op. Atty. Gen. (Inf.) 241, File No. 63-88-0109

Here, the question is whether the employment contract at issue is a “state contract”. If the contract is between the employee and the AACD, it may not be a “state contract”. If the contract is with the local district, it is a “state contract” under the Ethics Act. In the particulars of this matter, there are three pertinent facts involved:

1. The districts are state agencies<sup>8</sup> and thus contracts with them are state contracts.
2. The current written contract provides that the SWCDs are the employer and, as such, can terminate the contracts. The board of supervisors of each district has apparently exercised the power to hire, supervise, and fire district employees since the positions were created and funded, even though the AACD holds itself out as the “employer of record” and pays the employee.<sup>9</sup> Under the AACD Guidelines, the SWCDs' power is somewhat diluted in that termination, for example, apparently requires some concurrence from AACD staff and the decision can be appealed to the AACD Board of Directors.<sup>10</sup> However, the AACD board is made up solely of the chairs of the district boards, so on any given appeal at least one AACD board member hearing the appeal is also a member of the SWCD board that made the decision to terminate.<sup>11</sup> And although the AACD pays the employee, the payment is solely out of funds designated for the local district – AACD is merely a pass-through.
3. Under the AACD guidelines, the local districts are responsible for creating the employee position, defining the employee’s duties, and day to day supervision of the employee. This includes determining whether an employee is permanent or temporary, full time or part time, their hours of work and even their hourly pay. In addition, the Guidelines state as follows:

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<sup>8</sup> Memorandum dated March 12, 1992, Atty. Gen. File No. 663-92-0382.

<sup>9</sup> Draft AACD Supervisor/Personnel Policy and Procedure Guidelines dated March 2000. This draft was officially adopted by the AACD and the moniker “draft” does not accurately describe its status as an official procedure manual for the AACD.

<sup>10</sup> Probationary employees can be fired by the district board without concurrence from AACD staff and without a right of appeal to the AACD board.

<sup>11</sup> I assume for purposes of this memorandum that the local district member would recuse themselves from participating in the appeal, but the opportunity for undue influence on the other board members is readily apparent. Recusal may not cure this problem.

Guidelines addressed in this manual do not constitute a contract of employment, however information contained herein may be used by Soil and Water Conservation Districts in Alaska as terms and conditions of employment.

Based on these facts, for purposes of the Ethics Act, the employment contract is a state contract.<sup>12</sup>

I understand that most, if not all, the employment contracts are competitively solicited such that the exception found in AS 39.52.150(b) may apply. This office previously stated in the memorandum dated February 3, 1992, *supra*, that a SWCD board member may not bid on SWCD contracts. In that matter, the contract was for a competitive bid on a drainage project for the district. The memorandum noted that under AS 39.52.150(b) the prohibition in .150(a) does not apply to public officers unless the officer is “employed” by the agency soliciting the contract bids or takes official action on the award, execution or administration of the contract. In concluding that the board members were prohibited from bidding on district contracts, the memorandum relied on a 1986 informal attorney general opinion which determined that board members are “employed” by their respective boards for purposes of the Ethics Act. So, even if the board member was recused and took no “official action” as that term is used under the Act, board members still cannot bid on state contracts. I conclude that a board member may not “apply for” or “receive” a contract for employment with their district.<sup>13</sup>

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<sup>12</sup> Although I have determined that the employment contract is a state contract for purposes of the Ethics Act, it must be noted that the districts have no authority to hire employees on behalf of the state outside of the normal classification and recruitment process. For example, the employees have not been classified or recruited in accordance with state employment provisions. The employees should not be considered state employees for other purposes beyond what is discussed in this memorandum without consultation with the Department of Law.

<sup>13</sup> There are other reasons not covered here, both practical and ethical, for not allowing a board member to be an employee. For instance, assuming the board terminated the employee, the now former employee would still be on the board – a potentially awkward and disruptive situation. That board member would then be participating in hiring their replacement. See, also the general ethical prohibitions in AS 39.52.120.

**3. Can a (potential) board member be under contract to the district for professional services without violating the Ethics Act?**

This question was answered by the February 3, 1992 memorandum, *supra*, which concluded that board members cannot bid on district contracts. A board member cannot apply for or receive a contract with the district.

**4. Can a paid SWCD employee or an individual under contract to a SWCD also serve as a NRCDB member appointed by the Governor?**

a. Where the employee or contractor would be working for the state-wide district governed by the NRCDB, the answer is the same as in Question 3. – no.

b. Where the employee or contractor is working for another district, the answer is that the employee of the local district or the contractor should not be appointed to the NRCDB.

Being on a board and also working for the state is contemplated within the policy articulated in AS 39.52.010(b), *supra*.

The question under the statute is whether such service is “incompatible”. There are two scenarios where this may occur. First, the NRCDB serves in an advisory capacity to the Commissioner of DNR under AS 41.10.100 and to the SWCD under AS 41.10.100(b)(5). The advice flows from the NRCDB to the SWCDs’ boards of supervisors. I do not see this scenario as raising any significant ethical issues for either the public employee or the contractor.

Second, the NRCDB has also been delegated the Commissioner’s authority under AS 41.10.110 and AS 41.10.130.<sup>14</sup> The NRCDB’s powers under AS 41.10.110 are limited to its own state-wide district. Although the NRCDB has significant authority under AS 41.10.130 to prescribe the duties of the local districts, this does not appear to extend to direct control of employment or contracting decisions made by the local districts since these districts enjoy their own authority under AS 41.10.110, delegated

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<sup>14</sup> AS 41.10.110 was delegated by memorandum dated January 25, 1993 and is a delegation to each district board, of which the NRCDB is one (the state-wide district). It is not clear when AS 41.10.130 was first delegated to the NRCDB, but a continuing delegation was affirmed by Commissioner Shively in a memorandum dated September 20, 1999.

directly to them by the commissioner. Thus, there is no direct statutory prohibition in AS 41.10.

Nevertheless, there may be instances where conflicts do arise, which could implicate many of the provisions in AS 39.52.120, .140. or .150. For example, in the event of a dispute between the local board and the NRCDB, the employee or contractor may have split loyalties. Additionally, as happened recently with the Upper Susitna SWCD, the NRCDB may find itself running a local district, which would trigger the conflict discussed above regarding direct supervision of an employee who is also a member of the NRCDB. In similar cases, this office has allowed a Department of Law employee to be on the Dental Board and recommended against allowing a Board of Education member from being a legislative counsel.<sup>15</sup> Here, the relationship between the NRCDB and the local districts is most analogous to the Board of Education situation, representing a high potential for problems, but no direct prohibition. I would not recommend appointing an employee or contractor of a local district to the NRCDB or allowing a NRCDB member to apply for or accept employment by a local district or bid on district contracts.

**5. Can the employee of one SWCD district serve on the board of another SWCD?**

Yes. The Ethics Act does not appear to contain a prohibition for this scenario.

DAW:kkd

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<sup>15</sup> 1987 Alaska Op. Atty. Gen. (Inf.) 241; 1989 Alaska Op. Atty. Gen. (Inf.) 57.