

April 19, 2012

BY U.S. MAIL AND EMAIL

James Heston D. C.
Chair, Board of Chiropractic Examiners
Corporations, Business, and Professional Licensing
Department of Commerce & Community Economic Development
P.O. Box 110806
Juneau, AK 99811-0806

Re: Request for Advisory Opinion:
Honorariums and Continuing Education Credit for National Board Service
AGO File No.: AN2010100306

Dear Dr. Heston:

This advisory opinion responds to your March 16, 2011 email request for advice regarding whether the Executive Branch Ethics Act permits the professional members of the Board of Chiropractic Examiners to receive an honorarium payment, as well as continuing education credit, for serving as examiners in administering practical examinations for the National Board of Chiropractic Examiners to candidates for licensure. As chair and designated ethics supervisor for the state board, you are entitled to advice concerning the application of the Ethic Acts under AS 39.52.240(a).

You explain that the board was advised in the past that a board member's acceptance of the honorarium would violate the Ethic Act. You report that under an agreement with NBCE, board members serve as examiners twice a year for practical examinations given at various locations throughout the lower 48 states. NBCE pays the honorarium to the State of Alaska with reimbursement for a participating member's travel expenses, but the state does not pay the honorarium amount to the member. In addition, the board was advised that its members may not receive continuing education credit for their participation for the same reason. You directed our attention to comments in the minutes of the board's April 2006 meeting. You report that Alaska is the only state that does not permit state board members who volunteer to assist NBCE to accept the honorarium and receive continuing education credit.

We have not found any prior written advice from this department on this subject. As explained below, we have concluded that acceptance of the honorarium and continuing education credit related to NBCE activities does not violate the Ethics Act under the circumstances.

I. BACKGROUND

A. Board of Chiropractic Examiners

The Board of Chiropractic Examiners is established under AS 08.20.010 and is subject to the state's centralized licensing statute.¹ It consists of 5 members appointed by Governor for a four-year term.² The members must include four licensed chiropractic physicians who have practiced chiropractic care in Alaska for not less than two years and one public member with no direct financial interest in the health care industry. In the recent past several years, the board has had three to four meetings per year lasting one to two days. Its members serve without pay but are entitled to receive standard travel and per diem to attend board meetings.³

Similar to other Alaska licensing boards, this board regulates and controls applications, licenses, and permits of the chiropractic profession in Alaska.⁴ It sets the requirements that must be met to have a license.⁵ It has established continuing education requirements for license renewal.⁶ And it investigates violations of the licensing requirements and takes disciplinary action.⁷

¹ The board is established in the Department of Commerce and Community Development and receives staff support from the Division of Corporations, Business and Licensing (hereafter Licensing Division).

² See AS 08.01.010(9).

³ AS 08.20.020.

⁴ AS 08.20.100 – AS 08.20.185; 12 AAC 16.030 - .270.

⁵ See 12 AAC 16.030 - .205.

⁶ 12 AAC 16.280 - .390. Chiropractic licenses are renewed on a biennial basis. The fee for license renewal is \$450. AS 08.01.065; AS 08.20.180; 12 AAC 02.150(a)(2).

⁷ See AS 08.01.070; AS 08.01.075.

B. National Board of Chiropractic Examiners

NBCE is the principal testing agency for the chiropractic profession. It has developed and administers standardized tests nationwide in collaboration with state licensing agencies.⁸ To be licensed as a chiropractor in Alaska, among other requirements, an applicant must pass the NBCE examination, which currently has four parts.⁹

In 1998, the Alaska board adopted regulations and entered into an agreement with the NBCE to require Part IV of the NBCE examination for licensing in Alaska. Part IV is a practical examination focusing on diagnostic imaging, chiropractic technique and case management. It is administered twice annually at multiple locations throughout the United States.¹⁰ As it is labor intensive, it takes about 1200 support personnel to administer the examination.¹¹

Under its agreement with NCBE, the state board committed to participate in the administration of the Part IV examination at NBCE expense by participating on test writing committees and providing licensed practitioners to serve as examiners.¹² In practice, NBCE requests for committee participants and examiners have asked the state to recommend licensed chiropractors who are members of the state board or its executive director (if licensed) to serve as examiners.¹³ NBCE reimburses a state's representatives for the lowest round-trip coach airfare, hotel room and tax, and reasonable ground

⁸ See generally <http://www.nbce.org>.

⁹ AS 08.20.120(a)(6); 12 AAC 16.037. An applicant who has been in practice for five continuous years may substitute another examination for one part of the NBCE examination.

¹⁰ <http://www.nbce.org/practical/overview>.

¹¹ http://www.nbce.org/pdfs/partiv_faq.

¹² The agreement reads in part: "It is further agreed that the state will appropriately assist the NBCE via participation on the test selection committee and by identifying licensed practitioners who are qualified to serve as examiners."

¹³ You advised that, based on your participation, although all state boards send members to serve as examiners, many non-board member practitioners also serve as examiners at the various locations.

transportation expenses, and pays an “honorarium” for service on test writing committees and to examiners.

The honorarium for examiners is \$50 for an orientation session on the evening before the examination and \$125 per exam rotation, generally three per day for one or two days. Alaska participants make their own travel arrangements and submit the documentation to NBCE, which then pays the state the amount of the travel expenses and the honorarium. These funds are deposited in a general state account; the Licensing Division reimburses the members for their travel expenses, but has not paid the participating members the honorarium amount.

Also, following an examination administration, NBCE sends a letter to each participating professional outlining the hours and character of participation.¹⁴ The letter you received relating to the November 2011 examination, which you provided as an example, states that prior to each exam, each examiner is “given training in the areas of case history interview, orthopedic and neurological testing, physical examination, and chiropractic adjusting technique.” They are also trained in “other work and test-related areas such as ‘Diversity in the Workplace.’” It also describes the primary duty of the examiners as fairly and objectively evaluating the chiropractic clinical skills of between 75 and 150 candidates seeking licensure. The letter states the time devoted to each component and advises that it is up to the professional to confirm appropriate continuing education credit with his or her own licensing board.

II. GENERAL PRINCIPLES FOR APPLYING THE ETHICS ACT

In adopting the Ethics Act, the Alaska Legislature desired to promote high ethical standards so that the public’s business is conducted in a manner that preserves the integrity of the governmental process and avoids conflict of interest. Compliance with the code of ethics is an individual responsibility and every public officer thus has the responsibility to avoid improper conduct and prevent improper behavior by colleagues.¹⁵

The legislature expressly recognized in AS 39.52.110(a) that those who serve the state retain their rights to interests of a personal or financial nature and are entitled to engage in independent pursuits, so long as those interests and pursuits do not interfere with the faithful discharge of state responsibilities. Thus, it directed that ethical standards for

¹⁴ We understand that similar letters are sent relating to committee work, which may also satisfy continuing education requirements in some jurisdictions.

¹⁵ AS 39.52.010(a).

public officers “need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.”¹⁶ And it provided guidance for determining when no substantial impropriety as to a specific matter exists, even though the circumstances suggest a violation of the Ethics Act.¹⁷ Also, the Act speaks principally to actual conflicts of interest, not the appearance of conflict alone.¹⁸

The members of most State of Alaska boards are Alaska citizens who volunteer their time to serve on a board because they have an interest in the board’s mission, they have business or are employed in the field overseen by the board or they have another personal connection to the subject area. In the case of licensing boards, such as the Board of Chiropractic Examiners, the legislature has required that the board’s makeup include licensed practitioners. Thus, board members may have actual conflicts when participating in board actions and the Ethics Act establishes procedures for addressing those conflicts and permitting boards to efficiently conduct their business.¹⁹

When applying the Ethics Act to potential conflicts of board members representing specific groups, such as employer/labor or professional/industry, by mandate of the legislature, we have long recognized that the legislature must have contemplated that such member would, “to some degree, promote the interest of the group that he or she represents”.²⁰ We have said that such “members have a duty to consider more than naked self-interest; this duty compels the members to recognize that self-interest will ultimately be served by promoting the health of the industry as a whole.”²¹

¹⁶ AS 39.52.110(a)(3).

¹⁷ AS 39.52.110(b), (c) & (d).

¹⁸ 9 AAC 52.010; *1993 Inf. Op. Att’y Gen.* (Jan. 1; 663-93-0113), 1993 WL 595769 (Alaska A.G.) at *2-3, 5. While we evaluate potential conflicts violations of the Ethics Act based on the actual facts, we nevertheless advise public officers to be sensitive to the appearance of conflict to protect the integrity of their actions and ensure that the public correctly understands the basis of official actions.

¹⁹ *See* AS 39.52.160(b); AS 39.52.220; 9 AAC 52.120.

²⁰ *See 1992 Inf. Op. Att’y Gen.* (Jan. 1; 663-92-0180), 1991 WL 561443, at *3-5.

²¹ *Id.*

We also presume that public officers conduct their official duties honestly and impartially.²² But we recognize that an officer's personal interest in a matter may be so significant that it overcomes that presumption. So, when evaluating a potential conflict, we must balance the legislature's expressed intent that a member represent the interest of the specified industry or profession or provide expertise regarding a specific subject with the effect of the action on the member's particular interest.

III. ANALYSIS OF POTENTIAL VIOLATIONS

A. General Considerations About the NBCE Service

In applying the Ethics Act to the NBCE service mandated by the state's agreement with NBCE, there are several important aspects of the circumstances that should be considered, in addition to the general principles outlined in the previous section.

First, the board consists of five members, but only four, the licensed professionals are required to volunteer extra personal time to meet the NBCE requirements for state board member examiners and committee members. Thus, a member assists NBCE because of his or her professional credentials, not just his or her status as a state board member.

Second, service as an NBCE examiner requires a licensed board member to commit four to five days of personal time, including travel to and from Alaska. Thus, each Alaska board member likely volunteers that additional time a minimum of once a year over his or her four-year term, in addition to the time committed to regular state board meetings.

Third, the state's use of the NBCE examination for licensing Alaska practitioners benefits the state as it does not have to formulate and administer its own examinations and benefits the profession and the state because it permits the state to license chiropractors meeting nationally accepted standards.

Fourth, the state has apparently been profiting from the licensed board members' NBCE volunteer service because it retains the honorarium payments.

Fifth, the licensed board members' service as examiners or on the test writing committees for the NBCE does not require a member to take any official action under the

²² See *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) (agency personnel and procedures presumed to be honest and impartial absent showing of actual bias or prejudgment); *Earth Resources Co. of Alaska v. State, Dep't of Rev.*, 665 P.2d 960, 962 n.1 (Alaska 1983) (same) (citing *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975)).

state centralized licensing statutes and regulations or those specific to the Board of Chiropractic Examiners.

In our opinion, the honorarium and continuing education credit may be fairly characterized in two ways, neither of which suggests receipt of an improper benefit. On the one hand, they are incidental to being a state board member. Through the state agencies benefitting from its services, NBCE seeks support from members of the chiropractic profession and pays an honorarium. The dictionary definition of “honorarium” is a payment in recognition of acts or professional services for which custom or propriety forbids a price to be set.²³ Here, it is provided in recognition of chiropractors’ contributions to their profession. Also, we assume that in most, if not all jurisdictions, licensed chiropractors must undertake continuing education for license renewal, which benefits the profession and the state’s citizenry. NBCE service may be accepted for continuing education credit if it meets the standards and criteria adopted by a state. These benefits again result directly from the essential requirement that the examiner be a member of the profession, not from the person’s status as a state board member.

On the other hand, the state board meets its commitment to NBCE by agreeing to designate board members as examiners. Thus, it has expanded the duties of its board members, who volunteer to serve on the board, to include this additional NBCE service. The benefits received result from the state’s agreement and thus should be viewed as authorized benefits for such service as board members.²⁴

B. Application of Ethics Act Provisions to Receipt of Benefits from NBCE Service

These circumstances implicate several provisions of the Ethics Act that, if literally or strictly applied, suggest that acceptance of the benefits violates the Ethics Act. However, the general principles and specific considerations outlined above lead to a different conclusion.

²³ <http://dictionary.reference.com/browse/honorarium?s=t> .

²⁴ This situation is analogous to the state’s pre-approval of discount programs offered by vendors to all state employees. When the Department of Administration approves the program, it determines that receipt of the discount is proper and thus the discount is not a gift that must be disclosed for review under the Ethics Act. Memorandum to Commissioner Hultberg, dated September 6, 2011 (AN2010100308).

Alaska Statute 39.52.120, titled “misuse of official position,” includes prohibitions designed to eliminate conflicts between the personal interests of state officers and the interests of the state.²⁵ Here, there is no such conflict because the member’s participation in his state and professional capacities, as required under the state’s agreement with the NBCE, benefits the board and the state, even though it may incidentally benefit the member. The benefits do not create an incentive to act in any way inconsistent with the duties of state board members. There is no “misuse of official position” involved.

As pertinent here, AS 39.52.120(a) prohibits a public officer from using, or attempting to use, his official position for personal gain. A licensed member’s willingness to fulfill the state’s commitment to NBCE to provide examiners and advance the state’s interests is not an improper action to facilitate receipt of benefits to which the member is not entitled. Rather it is consistent with and a requirement of the board position. Thus it is not a “misuse” of position for personal gain. The member does not violate this provision of the Ethics Act by volunteering to meet the state’s commitment and serving as an NBCE examiner, even though he or she may receive a benefit.

Alaska Statute 39.52.120(b)(2) states that a public officer may not “accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state.”²⁶ The purpose of this provision is to prevent a public officer from having divided loyalty when conducting state business. It prevents state action taken not in the interests of the state, but taken instead to benefit the person paying the compensation and the financial interests of the public officer. Its secondary purpose is to prevent duplicate compensation because the state compensates its employees for doing their jobs. Applying this provision strictly to prevent acceptance of the NBCE honorarium and possible continuing education credit elevates form over substance and serves neither purpose for the prohibition or the goals of the Ethics Act. The state has agreed to the activity. In serving as an examiner, an Alaska board member does not take any official board action under the state licensing statutes. The members’ service supports the common interests of the state, the NBCE, and the chiropractic profession as a whole and Alaska

²⁵ The 2006 board meeting minutes noted AS 39.52.120 as the basis for the members’ ineligibility for continuing education credit.

²⁶ “Compensation” is defined in the Ethics Act to mean “any money, thing of value, or economic benefit conferred on or received by a person in return for services rendered or to be rendered by the person for another.” AS 39.52.960(7). Thus, both the cash honorarium and continuing education credit meet the definition, the latter because the member would have to otherwise fulfill continuing education requirements by attending another continuing education program.

board members are not otherwise compensated for their time. Concluding that the acceptance of these benefits violates AS 39.52.120(b)(2) does not serve the Act's goals.²⁷

In addition, as stated earlier, under the Ethics Act we are mandated to distinguish between minor conflicts and those that are substantial and material. Assuming acceptance of the honorarium and possible continuing education credit represents a conflict, we believe it is a minor one. Balancing the time commitment required of a member to fulfill the state's obligation to NBCE as well as the duties of his official position, the amount of the honorarium is arguably insignificant and thus its acceptance creates no impropriety. And similarly, the possibility that a member may be able to receive continuing education credit for some or all of the NBCE service is also an insignificant benefit.

C. Award of Continuing Education Credit

There are additional Ethics Act issues created by the NBCE agreement relating to the approval of an individual member's continuing education credit.

Generally, AS 39.52.160(a) prohibits a public officer from assisting with a matter pending before his own administrative unit when the matter involves his financial interests. But there is an exception stated in AS 39.52.160(b) for non-salaried board members when a member has an interest in the matter so long as the member discloses the interest and refrains from participation. The simplest example relates to members of licensing boards: a licensed member's license will come to the board for renewal. The member may appear before the board to address the license renewal, but the member may not act upon it.

²⁷ In a similar situation, we concluded that a state employee's appointment to serve on a national board in an official capacity to represent the state's interests did not violate AS 39.52.120(b)(4). That provision prohibits taking official action to affect a public officer's own financial interests and under the Ethics Act, service as a board member creates a financial interest. Thus, strict application of the prohibition would prevent any state officer from ever serving as a state representative on a non-state board, in spite of the fact that the service is intended to advance the state's interests. We found that although there was minor personal benefit to the employee in the form of experience or prestige, there was no significant advantage or benefit to the employee serving solely in an official capacity. *2001 Inf. Op. Att'y Gen.* (July 27; 663-01-0136). AS 39.52.120(b)(2) did not apply because the employee was paid by the state and the board position was uncompensated. An employee would be precluded from accepting compensation in this situation.

The Board of Chiropractic Examiners has adopted regulations that describe the types of activities for which continuing education credit is given.²⁸ Assuming some or all of the NBCE activities fall within existing regulations, then a licensed member would submit the required documentation in the ordinary course of the license renewal process and, under AS 39.52.160(b) could not participate in any board action relating to the member's license and continuing education credit. The NBCE related credit would not be addressed any differently than any other credit.

If the board's continuing education regulations do not currently cover activities such as the NBCE committee work and examiner duties, which we understand may be the case, a member's participation in action to amend the regulations creates a potential violation of AS 39.52.120(a), unless the standards in the Ethics Act for balancing conflicts permit us to conclude that participating in the adoption of regulations creates no substantial impropriety.

Although NBCE practice has been to request state board members to serve as examiners, the state's agreement with NBCE is not so limited. Action by current Board members to adopt regulations permitting continuing education credit for NBCE activities will benefit the interests of those continuing to serve as well as future members and possibly other state licensed practitioners. Any regulation adopted by a licensing board regarding continuing education requirements in one way or another affects the licensed members' own interests. We must balance the legislature's requirement that licensed practitioners serve on the board, as discussed earlier, against the individual interests affected here and consider AS 39.52.110(b)(1), which provides that there is no substantial impropriety if the member's interest is one possessed generally by a large class to which the public officer belongs, in this instance, licensed chiropractors.²⁹ Thus, with the reminder that the members are expected to consider the health of their profession as a whole, we conclude that there would be no substantial impropriety in a current board member participating in the board's actions adopting of regulations outlining a standard applicable to all licensees permitting continuing education credit for some or all NBCE activities.

The Alaska Legislature intended that we apply the Ethics Act restrictions in a way that balances the need to ensure the integrity of state action with the need to recruit persons

²⁸ AS 08.20.055; 12 AAC 16.280 - .390.

²⁹ 9 AAC 52.030 precludes such an officer from participation if his or her own interest is substantial. As discussed, earlier we believe the interests at issue here are insignificant in the circumstances.

qualified to serve in state office. We believe our conclusions recognizing the benefit to the state of the NBCE service and the absence of substantial conflicts of interest in the circumstances are consistent with that intent.

Please do not hesitate to contact me if you have any questions.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Julia B. Bockmon
Senior Assistant Attorney General

cc: Don Habeger, Director, Division of Corporations, Business and Professional
Licensing, Department of Commerce and Community Development
Dan Branch, Assistant Attorney General, Commercial/ Fair Business Section

JBB/slc