Jahna Lindemuth Testimony on SB 165
March 22, 2024

I fully support the passage of SB 165. The Dept of Law regulations that went into effect 11/12/23 are inconsistent with the Exec Ethics Act and the Alaska Constitution. Rather than resolving this in the courts, the legislature should clarify that the AG's office may not defend either the AG or the Governor, and that they should be treated as any other state employee who may ask for reimbursement of fees if exonerated by adopting this bill. This is consistent with the AG Opinion issued by then-AG (now senator) Dan Sullivan on August 5, 2009.

In a nutshell, the Executie Ethics Act prohibits using one's position for personal gain. AS 39.52.120(a. It prohibits using state resources for personal interest. .120(a)(3). It further prohibits taking action in matter where officer has a personal interest. .120(a)(4)

The AG is the State officer charged with ensuring compliance with Executive Ethics Act.

- AG issues advisory opinions to state employees under AS 39.52.240.

- Designated ethics supervisors submit quarterly reports to the AG under AS 39.52.260.

- AG is primary prosecutor for ethics violations:
  - can initiate a complaint based on information in the quarterly reports to AG or otherwise known to the AG. .310(a)
  - citizens may file complaints with the AG .310(b)
  - If a hearing is required, the AG is a party and presents charges and has the burden of proving the charges by a preponderance of the evidence. AS 39.52.360(c).

- Only instance where AG is not the prosecutor is where the allegation is against the AG himself or against the Governor, the AG's boss who can remove the AG without cause. In that instance, the Personnel Board will hire independent counsel to serve in the AG's usual role because the law recognizes the AG's conflict of interest.

This conflict of interest precluding the AG from prosecuting the AG or Governor should not mean that the AG's office is then free to DEFEND the AG or Governor. There are at least three problems with the regulations:

1. There is an inherent conflict with the AG's primary role as enforcer of Exec Ethics Act.
   -As noted by the Sullivan Opinion, footnote 46, such a situation could result in the Department of Law arguing a provision of the Act is unconstitutional or should be more narrowly construed than the AG had previously asserted in other proceedings.

   -It could even happen that a complaint is filed against the AG or Governor and one or more subordinates. Thus the AG could be prosecuting someone in the Governor's office while Department of Law is defending the Governor on the same allegations.

2. More importantly, however, the regulations authorizing the Department to defend the AG and Gov are inconsistent with the overall role of AG. The AG is the attorney for the state, not any one officer including the Governor, and the AG acts through all the Assistant AG's working under him or her. Stated another way, neither the AG nor any other attorney at the Department of Law can serve as the personal attorney for any state employee.

   The AG may point out that the AG's office regularly defends state employees in court cases. But when defending a tort claim against, say, a commissioner or corrections officer, the Department is defending the actions of that state employee taken within the scope of his or her state employment.

Ethics Act cases are different because the nature of the claim is that the state employee used his or her position for personal gain or used state resources for a personal interest.

The irony here is that these regulations further sanction additional state assets being used for the AG's or Gov's personal interest, if the allegations are indeed true.

3. Which bring me to the final and third point – the November regulations are inconsistent with only using public monies for a public purpose, as required by our constitution.

   I want to point out that most complaints don't make it out of the gate and are summarily dismissed. .310(d) (dismissal before investigation) And even if not summarily dismissed, most never make it to a formal complaint because only those complaints where there is probable cause can go forward. .320 (If after investigation it appears there is no probable cause to believe a violation of this chapter has occurred, the AG shall dismiss the complaint.)

If there is probable cause to find that either the AG or Governor violated the Exec Ethics Act by using state resources for personal benefit, there is simply no public purpose to using state resources to defend them. Just like every other state employee, they should have to personally defend, and seek reimbursement if exonerated.

Stated another way, if they are guilty, by definition the fees are not for a public purpose as required by the Constitution. Art 9, Sect 6.("No …appropriation of public money [shall be] made or public property transferred except for a public purpose.")

The regulations purport to require the AG to certify that defending the Gov is in the public interest, and require the Gov to certify that defending the AG is in the public interest – but in making such certifications both have a conflict of interest – and not simply because both are the direct beneficiaries of these regulations.

Given that the AG serves at the pleasure of the Governor and his subordinate, the AG does not have the neutrality to make this determination and is conflicted. There are also no side boards in the regulations as to what constitutes a public purpose. I expect the AG would take the position that defense of any allegation against the AG or Governor satisfies this test, regardless of the merits of the allegation.

I also point the Committee's attention to corporate law as an analogy to when payment of a defense should be allowed. AS 10.06.490 allows a corporation to indemnify (in other words, pay back) the attorney's fees a corporate officer incurs in defending claims if that officer acted in good faith and in the best interests of the corporation. However, by law, a corporation CANNOT reimburse if a person has been adjudged liable for negligence or misconduct in the performance of corporate duties, unless a court finds indemnification fair and reasonable.

This corporate standard for reimbursement is consistent with AG Sullivan's 2009 opinion, which remains good law if SB 165 is enacted and the regulations are negated. That opinion outlines a four part test: (1) public officer exonerated, (2) acted within scope of state employment, (3) fees are reasonable, and (4) there is a source of public funds available (ie an appropriation).

Here, because the regulations authorize the Department to defend the AG and Gov regardless of the merits or outcome, and in the face of a probable cause finding, the current regulations allow the State to illegally spending state resources on the defense even if the AG or Governor actually violated the Exec Ethics Act. SB 165 is needed to cure this and I urge that it be passed.