

Administrative Procedure Act Regulations Drafting

Alcoholic Beverage Control Board



Department of Law

GENERAL OVERVIEW

- Administrative Procedure Act
- Relation between Statute and Regulation

Administrative Procedure Act

AS 44.62.020. Authority to adopt, administer, or enforce regulations

- The APA does not confer authority on a state agency/board to adopt 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.

Title 4

- AS 04.06.090 – Board Powers and Duties
 - The board is vested with the powers, duties, and responsibilities necessary for the control of alcoholic beverages, including the power to propose and adopt regulations.

Title 4

- AS 04.06.100 – Regulations
 - The board shall adopt regulations governing the manufacture, barter, sale, consumption, and possession of alcoholic beverages in the state that are consistent with this title and necessary to carry out the purpose of this title.

Title 4

Subject areas for regulation, including

- Employment, conduct, and duties of the director and of regular and contractual employees of the board
- Procedures for the issuance, denial, renewal, transfer, revocation, and suspension of licenses and permits
- Terms and conditions of licenses and permit
- Fees
- Board meetings
- Delegation to Director of routine administrative functions and powers

Title 4

Subject areas for regulation, including

- Notice
- Temporary granting or denial of issuance, transfer, and renewal of licenses
- Licensee qualifications, conditions upon which a license may be issued, the accommodations of licensed premises, and board inspection of those premises
- Wholesaler reports
- Fidelity bond purchasing

Title 4

- Subject areas for regulation, including
 - Prohibition of sales to drunken persons and minors
 - Required reports from business entity licensees
 - creation of classifications of licenses or permits not provided for in this title

Administrative Procedure Act

- Back to Regulations Review Process
 - Much more detailed than described here
 - Focus: ensuring regulation is within statutory authority of the Board

Administrative Procedure Act

- Every state agency or board that by statute possesses regulation-making authority shall work with the Department of Law in the preparation and revision of its regulations
- The Department of Law shall advise the agencies on legal matters relevant to the adoption of regulations and may advise the agencies on the need for and the policy involved in particular regulations.

Administrative Procedure Act

- In addition, the department shall prepare a written statement of approval or disapproval after each regulation has been reviewed in order to determine
 - its legality, constitutionality, and consistency with other regulations;
 - the existence of statutory authority and the correctness of the required citation of statutory authority following each section;
 - its clarity, simplicity of expression, and absence of possibility of misapplication;
 - compliance with the drafting manual for administrative regulations.

Administrative Procedure Act

- § 44.62.125. Regulations attorney set out in statute
 - In the Department of Law a particular attorney, called the regulations attorney, shall be assigned, as the attorney's primary responsibility, the functions relating to the handling of administrative regulations.

Administrative Procedure Act

The Department of Law shall also:

- advise on the nature and use of administrative regulations
- alert that statutes that need to be implemented, interpreted, or made clear by regulation
- continually review the regulations for deficiencies, conflicts, and obsolete provisions
- assist with drafting all new regulations, advising the agencies of legal problems encountered, and ensuring compliance with the drafting manual

Administrative Procedure Act

- Article 2: Submission, Filing, Publication of Regulations
 - Final submission of regulations to the Lieutenant Governor must include statement of statutory sections being implemented, interpreted, or made clear.

Conclusion

- If passed, major SB 9 rewrite that will keep us all busy
- Questions?



Alcoholic Beverage Control Board

Open Meetings Act

State of Alaska Department of Law

Overview

- Open Meetings Act - AS 44.62.310 - .319
- Government business presumed public business
- Exceptions
- Executive sessions
- Consequences of violations

Fundamental State Policy

- AS 44.62.312(a):

It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

Presumption

- Meetings of a governmental body of a public entity are open to the public
- Closed sessions are permitted only if an exception applies, or another law so provides
- Materials considered by the governmental body in a meeting should be available to the public, even at teleconference locations

What is a Meeting?

AS 44.62.310(g)(2) - “meeting” means a gathering of members of a governmental body when

(A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) more than three members or a majority of the members, whichever is less, are present, the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act, and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

What is a Meeting? Essentials

- More than three members or a majority, whichever is less
- Applies to committees
- Applies if policies or decisions are considered, even if not prearranged
- Applies to prearranged consideration of recommendations or advice, even if the body lacks independent authority to act

Required Notice

AS 44.62.310(e) - Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

What is “Reasonable Public Notice”?

- Contains date, time and place of meeting, including teleconferencing information
- Posted on AOPNS, at the agency’s offices, and optionally publicized in print and broadcast media
- Email and physical mailing lists are common
- Objective is to reach as many interested persons as possible

Timing of Notice

- Agency should be consistent in the timing and manner of public meetings
- General rule is at least a week, but in appropriate circumstances a shorter period may be acceptable
 - Response to legislative inquiries
 - Litigation matters
 - Time-sensitive personnel or financial matters

Exceptions

- AS 44.62.310(d)
 - Adjudication by a judicial or quasi-judicial board (AS 47.30.031(b)(4))
 - Staff meetings
 - Participation in or attendance at a gathering of national, state, or regional organization of which the agency or a constituent is a member (but no action may be taken)

Executive Sessions

- As a matter of policy, should be used infrequently
- Matter to be discussed must be specifically described in public, without compromising the need for confidentiality
- Board must affirmatively vote to go into executive session
- No action may be taken in executive session, except to provide direction to an attorney in a specific legal matter

Subjects for Executive Session

- Matters the immediate knowledge of which would have an adverse effect on the finances of the agency
- Matters that tend to prejudice the reputation and character of any person, except that the person may request a public discussion
- Matters that are by law confidential
- Matters involving consideration of government records that by law are not subject to public disclosure

Non-Statutory Reasons

- The common law privilege of attorney-client communications may justify executive session for general legal advice
- Other common law privileges have been recognized but would be unlikely to apply to Board of Agriculture

Consequences of Violations

- Actions taken in violation of Open Meetings Act may be voided by a court
- Agency may cure violation by holding a properly noticed meeting and substantially reconsidering the action taken
- Cure may occur either before or after the action is voided by the court

Conclusion

- As a governmental body, the Board of Agriculture is expected to operate in public whenever possible
- When in doubt, ask for legal advice before acting
- Questions?



Ethics Training

Alcoholic Beverage Control Board

Department of Law

General Overview

- Background, 1986
- The Act – many pages long, but here summary of what is most important to YOU.

Definitions

- You have to know the who's who and the what's what to really understand the Act.

Public Officer

- A public employee
- A member of a board or commission
- *YOU*



\$\$ Financial Interest \$\$

- An interest held by *you or an immediate family member* which includes *involvement or ownership in a business*, including property, or a professional or private relationship that is *the source of income* or from which you have received or expect to receive income.
- Also means *holding a position* in a business, such as officer, director, trustee, partner, employee, or a position of management.

Personal Interest

- An interest held by *you or your immediate family*, including **membership** in any organization – fraternal, nonprofit, charitable, for profit, political – from which you **derive a benefit**.
- ***“Membership” broad definition: not just voting member, even advisory, on the rolls.***

Benefit

- *Anything that is to your advantage or self-interest*, or from which you gain financially, including dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan, promise to pay, grant, contract, lease, money, goods, services, privileges, patronage, advantage, advancement, or anything else of value.
- Very broad definition: *If you like it, it's a benefit.*

Immediate Family Member

- Spouse
- Conjugal partner
- Children, step-children
- Parents, siblings, grandparents, aunts, uncles
- Parents-in-law, brother and sister-in-law
- *That's your family*



Official Action

- Giving advice, *participating*, assisting, making a *recommendation*, making a decision, approving, disapproving, voting, or other similar action by a public officer.



Partisan Political Activity

- Those activities that are intended to benefit or harm a candidate, potential candidate, political party or group.
- Exceptions – we'll get to those in a minute: home, phones, plane.

Designated Ethics Supervisor

- The person you go to for assistance and guidance in navigating the provisions and requirements of the Ethics Act.
- Depends on the Agency or Board. Chair for Board members; Governor for Chair.



Let's jump in...



Basic Premise

- Avoid substantial and material conflicts of interest.
- You and your immediate family members may not benefit financially or personally from your position and actions as a state officer.
- You may not confer unwarranted benefits on others.

However...

- The Act does recognize that *independent pursuits should not be discouraged*
- *Many of you are here precisely because of your independent pursuits and interests,*
- *And some minor and inconsequential conflicts of interest are unavoidable.*
- *Such as....*



Stocks and bonds

- If your ownership interest or value in a company is less than \$5,000, it is presumed to be insignificant.



Held by larger class of persons

- Your personal or financial interest in a matter is also presumed to be insignificant if it is held generally by the public at large, or by a larger class of persons.
- Example: PFD



Insignificant or Conjectural

- If your action or influence would have insignificant or merely conjectural effect on a matter, the conduct is not prohibited.
- Example: using state phone to check on babysitter or make a personal call. (But not managing your rental unit.)
- Mere appearance of impropriety is not enough to establish an ethics violation.

Misuse of Official Position

- The Grand-daddy of them all.
- AS 39.52.120

Misuse of Official Position

- Can't
- Can't
- Nope
- Sorry
- Cannot
- No way
- No sir
- No-can-do
- Can't



Misuse of Official Position

- Can't use position for *personal gain*, or to give *unwarranted benefit or treatment* to another person; (*hiring a friend who is unqualified*);
- Can't use your position to secure other employment or contracts; (*I'll do this for you if you give me a job when I leave*);
- Can't use your position to accept or solicit outside compensation; (*no tips for doing your job*).

Misuse of Official Position

- Can't use state resources to benefit a personal or financial interest, and
- Can't take or withhold official action on matters in which you have a personal or financial interest, unless...
- It's an *insignificant interest (less than \$5,000 in a business)*, or interest possessed generally by *public at large*, or action would have *insignificant or conjectural effect* on the matter.

Misuse of Official Position

- Can't coerce subordinates to do something for your own personal or financial benefit *(for instance, giving to a charity or political party of your choice... or moving your furniture, or making them terminate someone because you don't like them).*



Misuse of Official Position

- Can't attempt to influence the outcome of an administrative hearing by privately contacting the hearing officer *(but, you can respond to hearing officer's request for additional information).*



Politics

- Cannot use state funds, equipment, or facilities for *partisan political purposes*.
- Remember, these are activities that are intended to benefit or harm a candidate, potential candidate, political party or group.
- For example, cannot use state computer or state time to send campaign letters in support of candidate or cause.

Exceptions: Governor's Residence



Exceptions: Communications Equipment in Governor's Home



Exceptions: Airplane



If you want to campaign, must do it on
your own time

- ...and without using State resources, including without using your State title.

No politics on State property



Special Considerations for Board Members

- Declaration of Potential Violations by Members of Boards or Commissions
- AS 39.52.220
- Improper Representation
- AS 39.52.160

Declaration of Potential Conflicts

- Special Provision for Members of Boards and Commissions
- A member of a board or commission who is involved in a matter that may result in a violation of any of the other provisions of the Ethics Act, must disclose the matter on the public record, in writing (the in writing requirement may be met by disclosing on the record at a public meeting if a written record or electronic recording is kept of the meetings).

Declaration of Potential Conflicts, cont.

- The DES (the Chair) shall determine whether the member's involvement in the matter violates any of the provisions of the Ethics Act and will provide a written determination (or a determination on the record if the meeting is being recorded).
- If a member objects to the ruling/determination of the DES, the members present (minus the one with the potential conflict) will vote on the matter.
- If the DES or a majority of the members determine there is a conflict, then the member will refrain from voting, deliberating, or participating in the matter.

Declaration of Potential Conflicts, cont.

- If the DES or a majority of the members determine there is a conflict, then the member will refrain from voting, deliberating, or participating in the matter.

AS 39.52.220



Improper Representation (AS 39.52.160)

- General Rule: You cannot advise or assist a person in matters pending before your administrative unit for compensation, or if your assistance would in any way benefit your personal or financial interests.
- But, non-salaried members of boards or commissions are allowed to represent, advise, or assist in any matter in which the member has a personal or financial interest regulated by the board, but must do so in accordance with AS 39.52.220.

Improper Representation?

- Wearing a different hat....



Gifts

- Can't accept or solicit a gift if that gift is intended to influence your action or judgment in your official duties.
- Gifts are money, services, loans, travel, entertainment, hospitality, lunch, a place to stay, tickets to an event..



Gifts

- All gifts from lobbyists are presumed to be improper (unless they are an immediate family member, or long-time family friend...but even that is risky.)



Gifts

- A gift worth more than \$150 to you or your immediate family must be reported if:
- You could take official action that would affect the gift-giver, or
- The gift is being given to you because of your position as a public employee.

Gifts

- A gift of an amount less than \$150 should still be disclosed if one could “reasonably infer from the circumstances” that the gift was intended to influence your action or judgment.
- When in doubt, DISCLOSE!

Gifts

- Any gift received from another government, regardless of value, must be disclosed. This includes foreign, federal, state, municipal, and tribal governments.



Gifts, Ethics Act, Family

- You must report a gift that a family member receives if it would be reportable if you received it.



Questions

- Can I keep this gift basket?
- Can I keep this bottle of wine?
- Can I keep this gift card?
- \$50 presumption
- 9 AAC 52.060 (a)



Information



- AS 39.52.140
- A ***current or former public officer*** may not disclose or use information gained in the course of official duties that could in any way result in a benefit to the officer or their immediate family member, if the information ***has not been publicly disseminated***, or is ***confidential by law***.

No insider trading

Present and future



Non-public and Confidential Information

- It is only publicly disseminated if follows 9 AAC 52.070:
- Newspaper, broadcast, press release, newsletter, legal notice, non-confidential court filing, published report, agency's website, Alaska Online Public Notice System, public speech, public testimony.



- NOT just if discoverable under FOIA request.

Improper Influence in State Grants, Contracts, Leases, or Loans

- A public officer or immediate family member cannot attempt to acquire, receive, apply for, or have a personal or financial interest in a state grant, contract, lease or loan, if the public officer may take action that affect the award. AS 39.52.150(a)

Improper Influence in State Grants, Contracts, Leases, or Loans



Improper Influence in State Grants, Contracts, Leases or Loans

- A public officer shall report in writing to the designated ethics supervisor a personal or financial interest held by the officer, or an immediate family member, in a state grant, contract, lease, or loan that is awarded by the agency the officer serves. AS 39.52.150(d)

Post-State Employment

- AS 39.52.180



Ethics Act, 39.52.180

- After leaving state service
- ***Two year restriction*** on
- ***A matter***
- For ***compensation***
- In which you ***participated personally and substantially***
- Through the exercise of ***official action***
- ***(each phrase subject to interpretation and analysis; all must be met)***

What's the matter?

- “**Matter**” includes case, proceeding, application, contract, determination, proposal or consideration of a legislative bill, a resolution, a constitutional amendment, or other legislative measure, or proposal, consideration, or adoption of an administrative regulation. AS 39.52.180(a)
- “Matter” does not include the general formulation of policy. 9 AAC 52.100
- Construed narrowly (not a continuation or Part 2).

Don't take it personally

- For purposes of AS 39.52.180(a), routine processing of documents, general supervision of employees without direct involvement in a matter, or ministerial functions not involving the merits of a matter under consideration by an administrative unit ***do not constitute personal or substantial participation in a matter*** by a public officer. 9 AAC 52.100

Personal and Substantial

- 30,000 foot view



Personal and Substantial

- 10,000 foot view



Personal and Substantial

- Being a supervisor and being aware of the work of others does not necessarily constitute “personal and substantial” involvement for purposes of post-state employment restrictions.

Personal and Substantial

- In the trenches



Make it official

- ***“Official action”*** means advice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.

AS 39. 52.960(14)



Post-State Employment Exceptions

- Can contract with former agency.
- Can get public interest waiver (approved by your agency and the Attorney General).
- AS 39.52,180(b)(c)

Restrictions on Employment After Leaving State Service



The Ethics Act's restriction on employment after leaving state service prohibits certain former officials from working as paid **lobbyists** for **one year** after leaving state service.

Restrictions on Employment After Leaving State Service

The one-year lobbying restriction applies to the following positions:

- Governor and Lt. Governor;
- head of an executive branch department;
- deputy head of an executive branch department;
- director of a division within an executive branch department;
- legislative liaison within an executive branch department;
- legislative liaison, administrative assistant, or other policy-making position in the Office of the Governor or Office of the Lt. Governor;
- member of a board or commission having regulation-adoption authority; and
- member of the governing board and executive officer of a state public corporation.



Restrictions on Employment After Leaving State Service

The restriction on board service prohibits, for one year, a **former head of a principal department** from serving on the governing board of any organization

- that was **regulated by** that department; or
- that the former department head **worked with** as part of his or her official duties.



Confidentiality

- Ethics Act 39.52.140
- Forever and Ever



Ethics Act, 39.52.140

- Penalties?
- Up to \$5,000/violation, pay back up to 2X the financial benefit received via the infraction, any other civil penalties, any actions related to the infraction (such as a contract or lease) are voidable.

What happens?



Who to call

- Department of Law, Ethics Attorney, 269-5285.
- Your Designated Ethics Supervisor – Chair