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May 8, 2009

Debra E. English, Chair
Alaska Personnel Board
9787 Middlerock Road
Anchorage, Alaska 99507

Re: Analysis of Ethics Charge

Dear Debra:

As Independent Counsel for the Alaska Personnel Board, and in accordance with AS 39.52.310(d), I have reviewed the Ethics Complaint submitted by Sondra Tompkins dated April 22, 2009, to determine "whether it is properly completed and contains allegations which, if true, would constitute conduct in violation of [the Alaska Executive Branch Ethics Act]." For the reasons explained below, I have concluded that the complaint does not allege facts that violate the Ethics Act. Therefore, no investigation is warranted, and the complaint shall be dismissed.

A. Creation of Political Action Committee

The Ethics Complaint submitted by Sondra Tompkins first alleges that Governor Sarah Palin violated the Ethics Act by forming a political action committee, SarahPAC. The complaint alleges a violation of AS 39.52.170, which prohibits rendering services to "benefit a personal or financial interest," or engaging in outside employment which "is incompatible or in conflict with the proper discharge of official duties." The complaint also alleges a violation of the prohibition on the use of official position for personal gain.

1. Prohibition on Use of Official Position for Personal Gain

Alaska Statute 39.52.120(a) provides that a "public officer may not use, or attempt to use, an official position for *personal gain* . . ." *Gain* is defined in the statute as "actual or anticipated gain, benefit, profit, or compensation." AS 39.52.960(10). A benefit is defined in the Ethics Act as "anything that is to a person's *advantage or self-interest*, or from which a person profits,

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regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, *advantage, advancement*, or anything of value." AS 39.52.960. In other words, "*'benefit' means anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including . . . advantage,[or] advancement, . . .*"

Putting the relevant sections of the statute together, the issue is whether the Governor *used* her *official position* for personal *advantage, self-interest, or advancement*. In the context here, the issue is whether the Governor used her position to create a political action committee, which is for the Governor's personal advantage, self-interest, or advancement.

There is little doubt that the Governor seeks personal advantage or advancement by creating the PAC. PACs are established to fund political campaigns and activities. One reason for Governor Palin to establish a PAC is to enhance her stature as a potential national political candidate. Thus, the creation of SarahPAC is, at least in part, for the purpose of Governor Palin's political advantage or advancement to national office.

The second question is whether the Governor used her position to obtain the "personal gain" that may accrue to her through SarahPAC. Certainly, the Governor created the PAC. Its name is SarahPAC and its website features a photo of the Governor. But did the Governor use her position as Governor to create the PAC? I consulted with one of my partners in Washington, D.C., an attorney whose practice is primarily campaign finance law. She explained that SarahPAC is a "leadership PAC." Leadership PACs are established by national political figures as a way to finance a platform for addressing national issues. The PAC can solicit contributions, which are then used to pay for the politician's travel, hotel rooms, food, and other expenses related to their speaking engagements around the country. The PAC money can also be used to make campaign contributions to like-minded candidates for office. *See* 1 CFR §110.2(l), 68 Fed. Reg. 67013-67018. Usually, only political figures with national prominence establish leadership PACs. If Governor Palin did not have national standing as a former candidate for Vice President of the United States, it is unlikely that she would have set up a leadership PAC, or if she did, it is unlikely that it would generate significant contributions.

In other words, Governor Palin used her position as a national political figure to set up SarahPAC, not her position as Governor. Accordingly, even if SarahPAC will be used for the Governor's "personal gain," I do not think there is probable cause to believe that the Governor used her position as Governor to establish SarahPAC.

It is also worth noting that the purpose of the law allowing PACs is to eliminate fraud and corruption of the political process by regulating and limiting contributions to political figures and candidates. It would be ironic to rule that a political figure who plays by the very rules that have

been established by Congress to regulate political contributions can, by doing so, be guilty of violating the State Ethics Act.

In sum, the fact that the Governor created a PAC, just like other political office holders all over the United States, does not show that she used her office for personal gain. There is little doubt that the purpose of the PAC is personal gain, but there is an insufficient basis for concluding that the Governor used her office to create the PAC.

2. Prohibition on Outside Employment

Ms. Tompkins' ethics complaint also alleges a violation of AS 39.52.170, which restricts public employees from engaging in employment outside the agency they serve. Subsection (a) states, "[a] public employee may not render services to benefit a personal or financial interest or engage in or accept employment outside the agency which the employee serves, if the outside employment or service is incompatible or in conflict with the proper discharge of official duties." Subsection (b) requires public employees engaging in outside employment to file a report to his or her designated supervisor. Subsection (c) prohibits the head of the principal executive department from accepting employment for compensation outside the agency that the executive head serves.

Here, the ethics complaint alleges that the Governor's creation of a political action committee, SarahPAC, is a contract to perform services for America, which conflicts with her duty as Governor of Alaska, "which has the much smaller focus of the Alaskan people." The assertion that Governor Palin has accepted employment that is in conflict with her duties as Governor, has no merit for the simple reason that the creation of a PAC is not "employment." Governor Palin is not employed by the PAC, but rather, has established a PAC for the purpose of generating funds to support political activities outside her role as Governor.

However, AS 39.52.170(a) also states that a public employee "may not render services to benefit a personal or financial interest . . . , if the . . . service is incompatible or in conflict with the proper discharge of official duties." The ethics complaint quotes from the SarahPAC website, which states, among other things:

By supporting SarahPAC, you will allow Governor Palin to help find and create solutions for America's most pressing problems; priority number one is building a strong and prosperous economy that recognizes hard work, innovation and integrity by rewarding small businesses and hard working American families.

The complaint alleges that this statement indicates that the Governor intends to render services to America that conflict with her duties to the people of Alaska. The complaint does raise a

legitimate question regarding whether the services described in the SarahPAC website benefit her "personal interest," i.e., her interest in political advancement.

The more difficult question is whether the purported services that the Governor promises to perform are "incompatible or in conflict with the proper discharge of [her] official duties." See AS 39.52.170(a). Although it is conceivable that finding solutions for America's most pressing problems could be incompatible with the duties of Governor of the State of Alaska, the complaint offers no explanation or specifics to indicate why those goals are incompatible. It is just as likely that in her role as the Governor of Alaska, Governor Palin will advance ideas that not only help Alaskans but also will "*create solutions for America's most pressing problems,*" and will develop ideas for "*building a strong and prosperous economy that recognizes hard work, innovation and integrity by rewarding small businesses and hard working American families.*" Moreover, I think it is apparent that the language used on the SarahPAC website expresses the type of broad, campaign-type rhetoric, devoid of specifics, that is common in politics.

As explained above, the real purpose of a leadership PAC is to allow nationally prominent political leaders to solicit funds to pay for the expenses associated with traveling and speaking on national issues. It is not at all clear that this will be incompatible with Governor Palin's normal duties as Governor, which include expressing her opinion on a broad range of issues of concern to Alaskans and the nation. For example, Governor Palin's recent trip to Indiana to address a group that opposes abortion, addressed an issue that also concerns Alaskans. Indeed, a bill requiring minors to obtain parental consent before obtaining an abortion was considered in the 2009 legislative session. Governor Palin made no secret of her support of that legislation. The point here is that Governor Palin's expression of her views on abortion rights – whether to the legislature in Alaska or at a speaking engagement in Indiana -- is consistent with her role as the chief executive of Alaska.

Two additional points are worth noting. First, the Ethics Act does not apply to conflicts of "insignificant or conjectural effect." AS 39.52.110(b). Whether the Governor's creation and use of SarahPAC will conflict with her duties as Governor is conjectural.

Second, a ruling that the Governor has violated the Ethics Act by creating a PAC to fund the expression of her views on national issues raises a First Amendment concern. The Governor, like other citizens, has a right to express her opinion on matters of public concern, whether they are local or national. *Alaskans for a Common Language*, 170 P.3d 183, 202-203 (Alaska 2007); *Thomas v. Hickel*, 947 P.2d 816, 821 (Alaska 1997). Statutes should be interpreted in a way that will avoid the danger of unconstitutionality. See *Alaskans for a Common Language*, 170 P.3d at 192. My interpretation of the Ethics Act avoids the risk of unconstitutionality.

In sum, the creation of the SarahPAC website is an insufficient basis to find probable cause to believe that the Governor is rendering services to benefit a personal interest that is incompatible or in conflict with the proper discharge of her official duties as Governor. Accordingly, I find, pursuant to AS 39.52.310(d), that the allegations in part A of the complaint does not warrant an investigation and therefore this part of the complaint shall be dismissed.

B. Governor's Trip to Indiana at End of Legislative Session

1. Prohibition on Use of Official Position for Personal Benefit

Next, the complaint alleges that the Governor's trip to Evansville, Indiana to attend the Vanderburgh County Right to Life dinner at the "critical end-of-session" legislative activities violated the Ethics Act prohibition against use of official position for personal gain. This allegation fails for the same reason that the complaint regarding creation of SarahPAC fails. The Governor was not invited to speak at the Right to Life dinner in Indiana because she is the Governor of Alaska. Rather she was invited because of her national standing, her outspoken opposition to abortion, and her recent personal decision to forego an abortion. Thus, by making the trip, the Governor may have been seeking personal gain in the form of political advancement, but there is no probable cause to believe the Governor used her position to do so. Moreover, news reports of the trip stated that the Governor used SarahPAC funds to finance the trip, not state funds. That fact also shows that the Governor was not using her position as Governor to make the trip.

The Governor's decision to leave the state at the end of the legislative session, may have been unwise. But the voters should express their opinion on that subject at the ballot box – not in an ethics complaint.

2. Prohibition on Outside Employment

The complaint arguably also alleges that Governor Palin's trip to Indiana for a speaking engagement at the end of the legislative session violated AS 39.52.170(a), which states that a public employee "may not render services to benefit a personal or financial interest . . . , if the . . . service is incompatible or in conflict with the proper discharge of official duties." The Alaska Supreme Court has ruled that the phrases "rendering services" and "accept employment" in the Ethics Act "imply either actual performance of work or an actual agreement to perform services." *Skvorc v. State Personnel Board*, 996 P.2d 1192, 1203-1204 (Alaska 2000). The issue then is whether the Governor engaged in "performance of work" when she spoke at a Right to Life dinner that was "incompatible or in conflict with the proper discharge of official duties."

Assuming, without deciding, that a speaking engagement is the performance of work, I do not think that it was incompatible or in conflict with the Governor's duties. The Governor has a

broad range of duties as the leader of the state and its citizens. Included among those duties is speaking out on issues that affect the citizens of Alaska. Historically, our Governors have represented the state by traveling to the lower 48 states, Washington, D.C., and abroad to represent the interests of the state and the people of Alaska.

A regulation interpreting the Ethics Act states,

For purposes of AS 39.52.170, a public employee's outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the employee's designated supervisor reasonably determines that the outside employment or service, (1) takes time away from the employee's official duties; (2) limits the scope of the employee's official duties; or (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties."

9 AAC 52.090. The fact that the Governor traveled to Indiana to attend a dinner (and a breakfast meeting the next morning) did not take significant time, if any, away from the Governor's duties, nor did it limit the scope of the Governor's official duties.

The complaint alleges that the Governor's trip was incompatible with the Governor's official duties because she left the state at the end of the legislative session. However, the Governor has staff members who interface with the legislature, and the Governor herself can communicate with members of the Legislature by phone or email, even when she is in another state. Indeed, it is common for high-level executives in private business as well as government to effectively perform their duties while engaging in frequent travel away from their home base. And as explained in section A(2) above, the Governor's views on abortion are relevant to her position as Governor. In sum, in the absence of a specific showing that the Governor's trip to Indiana interfered with the effective performance of her duties, I do not find probable cause to believe that the ethics complaint has merit.

Finally, as noted in section A(2), above, the Ethics Act does not apply to conflicts of "insignificant or conjectural effect." AS 39.52.110(b). Whether the Governor's trip to Indiana conflicted with her duties as Governor is conjectural. Some citizens may feel that the Governor should not spend any time speaking to groups out of state unless it directly relates to the business of state government. Again, that is a concern more appropriately addressed at the ballot box rather than in an ethics complaint.

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CONCLUSION

I find that the complaint does not allege facts which constitute a violation of the Ethics Act. Therefore, an investigation is not warranted. Pursuant to my authority under AS 39.52.310(d), the complaint is hereby dismissed. Notice of the dismissal will be provided to the complainant and the Governor.

Sincerely,



Thomas M. Daniel

TMD:ljk