

LEGAL SERVICES

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MEMORANDUM

May 20, 2019

SUBJECT: Executive Branch Ethics Act restrictions on use of funds for partisan political purpose (Work Order No. 31-LS1006)

TO: Representative Zack Fields
Attn: Tristan Walsh

FROM: Daniel C. Wayne
Legislative Counsel



You have asked whether the governor's recent posting of a paid advertisement on Facebook.com violates ethics law regarding the use of public funds for paid advertising for partisan political purposes. I have attached a copy of the ad you provided to this office with your request.

The applicable ethics law is the Executive Branch Ethics Act (AS 39.52). As a preliminary matter, our advice is not binding on a finder of fact in a matter investigated under AS 39.52. Any person may report a potential ethics violation under AS 39.52.230, or file an ethics complaint under AS 39.52.310(b). Reports of potential ethics violations, under AS 39.52.230, are investigated by a public officer's designated ethics supervisor, who, for the governor, is the Attorney General.¹ However, if an ethics complaint is filed against the governor under AS 39.52.310, the personnel board appoints an outside special counsel to investigate the complaint and recommend findings to the personnel board, and the personnel board makes the final determination.²

The governor is a public officer.³ If a complaint were filed against the governor based on the attached ad, the special counsel and the personnel board would probably consider AS 39.52.120(b), which provides in relevant part:

(b) A public officer may not

...

¹ AS 39.52.960(8).

² AS 39.52.310(c).

³ AS 39.52.960(22).

- (6) use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes; . . . in this paragraph, "for partisan political purposes"
- (A) means having the intent to differentially benefit or harm a
- (i) candidate or potential candidate for elective office; or
- (ii) political party or group;
- (B) but does not include having the intent to benefit the public interest at large through the normal performance of official duties.

The top of the ad proclaims "Sponsored - Paid for by Governor Michael J. Dunleavy." This suggests that state funds were used to pay for the ad; if so, two questions remain: (1) is the ad "for partisan political purposes;" and, (2) does the ad have "the intent to benefit the public interest at large through the normal performance of official duties."

(1) Is the ad for a partisan political purpose?

The body of the ad reads:

The Senate has proposed a full \$3,000 PFD, but sadly *the House Majority* has proposed a \$0 PFD. With just days left in the legislative session, Alaskans need to take immediate action. Use this handy tool to tell lawmakers you want YOUR full \$3,000 PFD - and nothing less. Act now to save your PFD: www.akgov.us/cyl⁴

Although "political party or group" is not defined under AS 39.52, because the house majority is a caucus, the independent counsel and the personnel board may determine that it is a political group.

When terms are undefined in statute, AS 01.10.040(a) directs that they be construed "according to their common and approved usage." The Alaska Supreme Court has said:

Dictionaries provide a useful starting point for determining what statutory terms mean, as they provide the common and ordinary meaning of words. When a popular or common word is used in a statute, but is not defined, the word should be given its common meaning.⁵

⁴ Emphasis added. The online address "www.akgov.us/cyl," listed in the Facebook.com ad is for a webpage that prompts users to enter personal identifying information for the apparent purpose of generating an electronic letter to legislators.

⁵ *Alaskans For Efficient Government, Inc. v. Knowles*, 91 P.3d 273, 276 n. 4 (Alaska 2004), quoting 2A Norman J. Singer, Sutherland Statutory Construction § 47.28 (6th ed. 2000).

The common meaning of "caucus," according to one dictionary, is "a private meeting of leaders or a committee of a political party or faction to decide on policy, pick candidates, etc., esp. prior to a general, open meeting."⁶ In this context, which involves a majority caucus of a house of the legislature, the independent counsel and the personnel board may look to the definition of "caucus" under the Legislative Ethics Act (AS 24.60), although they are not necessarily bound by that definition. The Legislative Ethics Act defines "caucus" as "a group of legislators who share a political philosophy, or have a common goal, and who organize as a group."⁷ Either of these two definitions would support a finding that the house majority is a political group.

(2) Is the ad intended to benefit the public interest at large through the normal performance of official duties?

Although one purpose of the ad may be to benefit the public interest at large, through a permanent fund dividend, does an intention to benefit the public interest supersede the AS 39.52.120(b)(6) prohibition on partisan political use of public funds? And, if so, is use of public funds to pay for a political ad on Facebook.com a normal performance of official duties? As noted in an Attorney General opinion,

[U]nder article IX, section 6 of the Alaska Constitution, "no appropriation of public money [may be] made, or public property transferred . . . except for a public purpose." The use of public resources for a partisan election campaign is not per se prohibited by the public purpose doctrine. However, this office has in past opinions narrowly construed the power of state officials to expend state money or use state property in support of a partisan position in an election campaign. We advised that there are two barriers to those expenditures. In 1980 we wrote,

[t]he first [barrier to the expenditure of public money or property] is that there must be clear and explicit statutory authority to expend public money in support of partisan position The second barrier is the rule that public funds may be expended on political activities only if the government's involvement is fair and neutral.⁸

⁶ *Webster's New World Dictionary of the American Language, Second College Edition.*

⁷ AS 24.60.037(g)(1).

⁸ 1994 *Inf. op. Att'y Gen. (Jan. 1; 663 94 0147)* citing 1980 *Inf. Op. Att'y Gen. (June 11; Pegues)*.

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Applying this interpretation of the constitutional "public purpose" requirement, the use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties.

Conclusion

Based on the foregoing, if a complaint were filed against the governor related to the attached ad, the special counsel and the personnel board may determine that producing and paying for the ad constitutes a prohibited use of state funds by a public officer, under AS 39.52.120(b)(6) of the Executive Branch Ethics Act.

DCW:mjt

19-243.mjt

Attachment



Restore the PFD

Sponsored · Paid for by Governor Michael J. Dunleavy



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www.akgov.us/cyl





EMAIL YOUR OFFICIALS

FS9.FORMSITE.COM
Contact Your Elected Officials
Support the PFD back-pay bills by sending a letter t...



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