MEMORANDUM

State of Alaska
Department of Law

TO: Joanne Grace
Civil Division Director

DATE: November 16, 2018

FROM: Maria Bahr
Assistant Attorney General
Opinions, Appeals, and Ethics Section

SUBJECT: Former Legislator Accepting Executive Appointment

QUESTION:

May an outgoing member of the 30th state legislature be appointed to an executive branch position without violating the Ineligibility Clause of the Alaska Constitution?

Background:

Rep. Saddler was defeated in the Senate primary race. Rep. Saddler's term will expire in January 2019. He has contacted the Department of Law requesting advice on whether he could be appointed to a position in the executive branch without violating the constitutional prohibition of Article II, section 5, also known as the Ineligibility Clause. He indicates this would not be a position newly created during his last term of office.

As the Department of Law may encounter this question again in the transition to a new administration, we have prepared this general advice on the topic. Rep. Saddler has approved the release of this memorandum to others within the transition team. A more definitive analysis requires fact-specific information, such as the actual position for which a legislator would be seeking appointment. For this analysis, we assume Rep. Saddler is seeking appointment to a commissioner or partially exempt position.

Law:

Article II, section 5 states in relevant part: "No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member."

The Alaska Supreme Court has interpreted this constitutional provision twice. While these opinions offer insight into the intent of the court in interpreting the Ineligibility Clause, neither case addresses the specific question asked by Rep. Saddler.

(1) In *Warwick v. State*, 548 P.2d 384 (Alaska 1976), the Court gave a broad interpretation to the provision in addressing whether the appointment of a legislator to the position of Commissioner of Administration was invalid as contrary to Article II, section 5. Warwick resigned from the legislature and was appointed Commissioner to the Department of Administration. However, the legislature had actually raised the salaries of all executive and judicial officers during Warwick's term, including the Commissioner of Administration.

In finding that the appointment was invalid, the Court found:

The terms of art II, sec. 5 of the Alaska Constitution are clear and unambiguous. The purpose sought to be accomplished by that section is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives. Id. at 391.

(2) *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968). Unlike *Warwick*, which involved a legislator resigning for a state position, the Court in *Begich* considered the issue of holding dual offices - being a legislator while also holding another state position. The Court held that art. II, sec. 5 prohibited a legislator from holding a position as a superintendent or teacher in a state operated school system while serving as a member of the legislature. Again, this case does not address the question raised by Rep. Saddler.

Attorney General *Opinions:*

The Department of Law most recently addressed the Ineligibility Clause in an Attorney General Opinion prepared for the Office of the Governor in 2010. Alaska Op. Atty. Gen. (Jul. 1, 2010). In that opinion the Department scaled back on earlier advice concerning the resignation of a state legislator to accept a newly created position as Senior Military Affairs Advisor. The Opinion precluded the appointment of Rep. Dahlstrom, who resigned from the legislature for the stated purpose of accepting the position created just after her resignation. In reaching this conclusion, the Department noted that the Alaska Supreme Court has broadly construed the Ineligibility Clause and there was "an appreciable risk" that an Alaska court would invalidate Rep. Dahlstrom's appointment under the circumstances, despite the earlier advice given by Law which relied on a more technical and strict application of the constitutional language. *Id.* at 6.

The Attorney General has issued several other opinions addressing this language from Article II, section 5:

- In a 1979 Opinion, the AG advised that a legislator was barred for a period of one year after his term of office ended from taking a civil service position, the salary of which was increased during the legislator's term pursuant to a collective bargaining agreement with the state. Among the conditions of the negotiated contract were provisions creating a cost of living allowance increase, dependent upon the consumer price index. Significantly, the AG noted that *Warwick* involved a position for which there had been a specific legislative enactment to increase the salary for the position, unlike the case at issue where the salary was increased through collective bargaining negotiations with the state. Nevertheless, the AG was of the view that the legislator was barred from accepting the position based on art. II, sec. 5. The AG noted that art. II, sec. 5 "does not specify that the position must be created or enhanced only through legislative enactment." The AG noted that collective bargaining agreements are funded by legislative appropriations. Alaska Op. Atty. Gen. (Inf.) (Feb. 28, 1979).

- In a 1985 Opinion, the AG advised that a legislator could seek appointment as a superior court judge, however, if the legislature during the period when the applicant was a member of the legislature enacted a measure increasing the salary or emoluments of the position, the legislator would no longer be eligible for appointment. Alaska Op. Atty. Gen (Jan. 16, 1985).

- In a 1992 Opinion, the AG addressed the appointment of a former legislator to a position created after the legislator was no longer a member but within one year of the end of the legislator's term. Here the AG concluded that a strict reading of the constitutional provision would appear to permit the appointment but cautioned that the legislature should avoid the appearance of impropriety. Alaska Op. Atty. Gen. 251 (Dec. 1, 1992). This opinion was found to be no longer consistent with Alaska case law in the 2010 AG opinion cited above.

ANALYSIS

Term in office

The term in office for a representative is two years. Rep. Saddler's term ends in January 2019. Article II, section 5 provides that the one-year restriction applies for positions that were created or for which the salary and emoluments were increased during the term for which that legislator was elected, and one year thereafter. Thus, we must determine whether the appointed position in question was created or benefitted by legislative action during the last two years. Rep. Saddler indicates he would not be

appointed to a newly created position, and we also assume the position would either be exempt or partially exempt and not subject to a collective bargaining agreement.

Salary and Emoluments

Determining whether the salary has increased is a relatively straightforward task. For commissioner salaries we look to the State Officers' Compensation Commission ("SOCC"). The SOCC is directed by law to "review the salaries, benefits, and allowances of members of the legislature, the governor, the lieutenant governor, and each principal executive department head and prepare a report on its findings at least once every two years, but not more frequently than every year. " AS 39.23.540(a). In its final report for 2018, the SOCC wrote: "With regards to the Governor's, Lieutenant Governor, executive salaries, and legislative salaries, the commission decided to not make any recommendations."[1]

Even if Rep. Saddler is not seeking a commissioner position but rather a partially exempt position, the salaries of partially exempt positions, any cost-of-living increases, or any geographic differential applied to certain regions can only be changed through statute. The statutes were not changed during the 30th legislature.

Thus, we can assume no increases were made to "salaries, benefits, and allowances" to executive head positions or partially exempt positions. Our analysis might end here, but we have been asked to consider whether any potential increase in the cost of health benefits would constitute an emolument that might preclude Rep. Saddler from accepting an appointment following the end of his term.

What is an emolument?

Whether a cost of living increase is an emolument is handled differently in different jurisdictions.[2] However, as discussed above, an AG Opinion from 1979 found that an increase in salary based on a collective bargaining agreement that gave a cost of living allowance was considered an increase in emolument. *See, supra*, Alaska Op. Atty.

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1 http://doa.alaska.gov/dop/fileadmin/socc/pdf/2018/Final-Findings-and-Recommendations.pdf.

2 In *Strake v. First Court of Appeals*, 704 S.W. 2d 746 (Texas 1986), a three percent raise, which was less than the increase in the cost of living, was an "increase" in emoluments as that term was used in the Texas Constitution, thus state senator could not run for Attorney General. In *Shields v. Toronto*, 16 Utah 2d, 395 P.2d 829 (1964), the Supreme Court of Utah held that a modest across-the-board salary increase for state officers should be treated as a cost-of-living adjustment and not an increase in emoluments within the meaning of its constitutional provision.

Gen. (Inf.) (Feb. 28, 1979). For purposes of this discussion, we will assume that any increase in benefits, including health care, would be an increase in emoluments.

Was there an increase in the cost of health benefits to state employees?

For many state employees, including commissioners, the State provides health benefits through an AlaskaCare plan that operates as a self-insured entity.[3] The state as an employer contributes to a group health benefits fund and employees contribute to the cost of their health benefits.[4] Although a statute provides that the state contribute $630 a month per employee for this cost (this amount was established in 2002), in reality the state provides a greater contribution to the cost of employee health benefits.[5] Monthly costs for health benefits are determined by the Division of Retirement and Benefits with the assistance of an actuary, and then approved by the Commissioner of Administration.[6] According to Michele Michaud, the Deputy Director for Retirement and Benefits, over the past two fiscal years employer contribution by the state for the cost of employee health benefits has remained at $1,555.00 per employee.[7]

Because the state's contribution has not increased over the last two years, out-of-pocket expenses for employees have actually increased. For example, an exempt executive employee, such as a commissioner, would have had an option to select the standard healthcare plan for the employee and family for $388 a month in 2018. In 2019, the cost for the same plan will be $399 a month.[8] There has been no increased benefit to the employee; rather the employee is required to pay more money (less take home pay) in 2019 than 2018.[9]

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3 AS 39.30.091, .095. Some employees represented by unions receive health insurance through a union health trust.

4 AS 39.30.095(a).

5 AS 39.30.095(e).

6 AS 39.30.095(b).

7 Although this amount has increased over the years, no increases occurred during the last legislative term.

8 *See* http://doa.alaska.gov/drb/alaskacare/employee/plans/premiums.html.

9 Legislators are eligible for coverage by the same health insurance program as exempt or partially exempt employees. So there is a possibility that former Rep. Saddler would just be continuing his coverage if he moved to a position within the executive branch.

CONCLUSION

There is no case law directly addressing the factual scenario raised here. However, based on our research, we can draw these conclusions:

First, we find that based on the final report of the SOCC, there has been no increase in "salaries, benefits, and allowances" for department head and partially exempt positions.

Second, we find that given the information received from the Deputy Director of the Division of Retirement and Benefits, there has been no increased amount in the value of the employer contribution towards employee health benefits; in fact, employees will actually have to pay more out-of-pocket for health benefits in 2019.

Given these findings, there has been no increase in salary or emoluments to the position of commissioner or any existing partially exempt position during Rep. Saddler's term in office. Although this would be an issue of first impression for an Alaska court, a court would likely find that Rep. Saddler's appointment to a commissioner or partially exempt position would not violate the Ineligibility Clause, Art. II, section 5 of the Alaska Constitution.