

STATE OF ALABAMA  
ETHICS COMMISSION



MAILING ADDRESS  
P.O. BOX 4840  
MONTGOMERY, AL  
36103-4840

STREET ADDRESS  
RSA UNION  
100 NORTH UNION STREET  
SUITE 104  
MONTGOMERY, AL 36104

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TELEPHONE (334) 242-2997

FAX (334) 242-0248

WEB SITE: [www.ethics.alabama.gov](http://www.ethics.alabama.gov)

August 1, 2018

**ADVISORY OPINION 2018-09**

Mr. Cary Dunn  
Quality Assurance Supervisor  
Alabama Department of Transportation  
P.O. Box 87  
Carbon Hill, AL 35549

Use of Office for Personal Gain/Public  
Employee Discussing, Applying For,  
Interviewing, Negotiating, Or Accepting A  
Job With A Lobbyist Or Principal While  
Still Employed As A State Employee

A public employee may apply for, interview,  
negotiate, and accept a job with Volkert  
while still employed with ALDOT, because  
he has not used his position as a public  
employee as leverage to obtain the  
employment.

Provided the public employee has not  
audited, regulated, or investigated Volkert in  
his current position, he is not prohibited by  
the "Revolving Door" to accept employment  
with Volkert.

A public employee is prohibited from  
representing Volkert back before ALDOT  
for a period of two years after he leaves  
employment with ALDOT.

A public employee may not use any  
confidential information obtained while  
employed with ALDOT that could result in  
financial gain to anyone or any business for

a period of four years after his separation from service.

Dear Mr. Dunn:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

### FACTS

Mr. Cary Dunn is currently employed by the Alabama Department of Transportation ("ALDOT") as a Quality Assurance Supervisor. Part of his responsibilities include checking and submitting BMT-38 (Summary of Tests) final reports for all East Central Region (Birmingham Area Only) construction projects using final quantity reports, calculators, computers, plans, specifications and engineering principles. This work is done so that deadlines are met and that the project can be closed out.

Volkert is contracted by ALDOT for inspection and engineering work. Regarding Mr. Dunn's involvement with Volkert, Volkert is contracted to be the project manager for the projects Mr. Dunn reviews because ALDOT does not have enough employees to be project managers. Volkert gathers the test reports and any information needed to determine whether or not the primary and sub-contractors on a project have sufficiently completed the work they were contracted to perform. Volkert sends that information to Mr. Dunn to review and either approves or sends back for additional information. Volkert would then communicate with the primary or sub-contractors and explain the deficiencies and what was needed for approval. In order to be paid for their work, the contractor and sub-contractor work must be approved at this stage. Volkert is the agent that gathers the information from the contractors and sub-contractors and provides it to Mr. Dunn. Volkert is not negatively affected if the contractors have failed to supply the information needed for approval; they are simply standing in the place of ALDOT as project managers managing the contractors. Mr. Dunn is not auditing, regulating, or investigating Volkert, he is regulating the contractors and subcontractors. Volkert is the first step in his regulation and investigation of those contractors, and serves as a conduit of information only.

If Mr. Dunn were to see that a Volkert representative had not provided all of the necessary information for a project, he would request that data be provided to him. If they refuse to comply, Mr. Dunn would report that Volkert employee to their supervisor, much like he would if they were an ALDOT employee. If that course of action was ineffective, Mr. Dunn would then report it to the Construction Section of ALDOT and someone from that Section would manage the issue with Volkert. Mr. Dunn has no authority to reprimand anyone with Volkert and their contract would not be terminated for the project manager contracting based on one employee's malfeasance.

If Mr. Dunn were to accept employment with Volkert, he would be a project manager for an ALDOT project for which Volkert was contracted. Mr. Dunn would be compiling the information for BMT-38's and maintaining that information. Also, he will be trained to do monthly estimates. The two projects that Volkert is working on in the section he would be assigned to are the Central Business District projects around the Civic Center.

### QUESTION PRESENTED

Upon retirement, may a Quality Assurance Supervisor with the Alabama Department of Transportation accept employment to perform project management for the BMT-38's (Summary of Tests) with Volkert, Inc., a principal?

### ANALYSIS

Volkert, Inc. is a principal.<sup>1</sup> Whether a public employee may solicit and accept a job with a principal while still employed with the state has been addressed thoroughly in Ethics Advisory Opinion 2016-27 as set out below:

Ala. Code § 36-25-5.1 states, "No lobbyist, subordinate of a lobbyist, or principal shall offer or provide a **thing of value** to a public employee or public official or to a family member of the public employee or family member of the public official; and no public employee or public official or family member of the public employee or family member of the public official shall solicit or receive a **thing of value** from a lobbyist, subordinate of a lobbyist, or principal." (Emphasis added)

Ala. Code § 36-25-1(34)(a) defines "thing of value" to include, among other things, a "promise of future employment." Ala. Code § 36-25-1 (34)(b)(10) provides as an exception to the definition of "thing of value" "compensation and other benefits earned from a nongovernment employer, vendor, client, **prospective employer, or other business relationship** in the ordinary course of employment or non-governmental business activities **under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient's public service as a public official or public employee.**" (Emphasis added)

To aid in that analysis, the Commission, in Advisory Opinion 2016-27, set out relevant factors in determining whether an offer of future employment falls under the exception set out in §36-25-1(34)(b)(10) as being "compensation and benefits." These factors are intended to give guidance in determining if the facts "make it clear" that the offer of employment is unrelated to

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<sup>1</sup> Ala. Code §36-25-1(24)

Mr. Dunn's public service as a public employee, and the Commission stated that it would include these factors in any Advisory Opinion on the issue.

1. Mr. Dunn's public service as a public employee, and the Commission stated that it would include these factors in any Advisory Opinion on the issue. Whether the public official or public employee intends to remain in public service:

No. Mr. Dunn plans to retire from public service.

2. A comparison of the "thing" being offered in relation to the recipient's education and work history, including demonstrated skills, professional licensing, length of time or expertise in the relevant field, and recency of that expertise:

Mr. Dunn has been in his current position performing this work for over 10 years.

3. The amount of "compensation and other benefits" being offered compared to what is customarily offered for the same or similar services:

The compensation has not been discussed, but Mr. Dunn will be negotiating for a salary commensurate with those in the same field.

4. The amount of time expected to be given in return for "the thing" (for example, full time employment, part-time employment, or as-needed), taking into account the public official or public employee's public responsibilities and other private business obligations:

The position will be a full-time position and Mr. Dunn will be retired from public service.

5. Whether the "thing" was made generally available to other potential recipients other than the public official or public employee (for example, if the "thing" is an offer of future employment, whether the position was advertised and if so, how extensively; if it was not advertised, an explanation of why it was not advertised), and whether it is a newly created or changed position:

The position was not advertised because Mr. Dunn inquired if a position was open to someone with his experience.

6. Whether the offer of the "thing" may create an irreconcilable conflict of interest for the public official or public employee:

There would be no conflict of interest because Mr. Dunn would only be working for Volkert, Inc. and not any public entity and not representing back before ALDOT.

7. Whether the position has objective measurements of job performance, considering the job description and evaluation standards or benchmarks:

Mr. Dunn will be required to meet monthly deadlines as a measure of his job performance.

8. The extent to which the duties and responsibilities of the public official or public employee's public position and the thing offered may overlap:

The data Mr. Dunn collects while at Volkert will be submitted to a supervisor at Volkert who will then submit it to the person that replaces Mr. Dunn at ALDOT once he retires. That will be the only overlap and will not affect Volkert in anyway if data is missing. Only the contractor will be affected if test reports/data is missing. Mr. Dunn will not be communicating with ALDOT directly in his position at Volkert.

9. Whether the public employee personally participated in the direct regulation, audit or investigation of the potential employer so as to trigger 13(e)'s prohibition;

There is no direct regulation of Volkert in Mr. Dunn's current position. As described above, Volkert stands in the place of ALDOT under these circumstances and is not regulated by Mr. Dunn; and

10. The principal's current and recent governmental interests, the principal's lobbyist's activities, and the public official or public employee's public or political interests, including any overlap and significant past official interactions, activities, or relationships between them.

The prior relationship is as described previously, the Volkert supervisor, as the project manager for ALDOT, sends the data he has collected from the contractors to Mr. Dunn for review. Volkert works on many projects involving the State, however.

Insofar as accepting employment from a principal, based on the facts you have provided, you may apply for, interview, negotiate, and accept a job with Volkert while still employed with

ALDOT, because the facts you have given us support the conclusion that you have not used your position as a public employee as leverage to obtain the employment. There was nothing given or received in order to corruptly influence Mr. Dunn's official action as an employee of ALDOT in exchange for this opportunity.<sup>2</sup>

A public employee may not work for any private business which they audited, regulated, or investigated for a period of two years after they leave public service.<sup>3</sup> Mr. Dunn's relationship with Volkert, Inc. in the facts presented is not one of auditing, regulating, or investigating. Volkert is simply providing Mr. Dunn with information they have gathered from the contractors and sub-contractors hired by ALDOT to complete a project. Volkert is standing in as a project manager and Mr. Dunn is not regulating their work. Mr. Dunn is not able to impact their financial or business relationship with ALDOT. Therefore, he is not able to set up a position for himself to go to work with Volkert as is prohibited by the "Revolving Door." Because Mr. Dunn has not audited, regulated, or investigated Volkert in his current position, he is not prohibited by the "Revolving Door" to accept employment with them.<sup>4</sup> Mr. Dunn is, however, prohibited from representing Volkert back before ALDOT for a period of two years after he leaves employment with ALDOT.<sup>5</sup> Therefore, in any employment Mr. Dunn might accept, whether with Volkert or some other business, he is not permitted to communicate or represent their interests back before ALDOT. Should that contact become necessary, someone other than Mr. Dunn must be the contact for two years after his separation from service from ALDOT. Lastly, Mr. Dunn may not use any confidential information obtained while employed with ALDOT that could result in financial gain to anyone or any business for a period of four years after his separation from service.<sup>6</sup>

### CONCLUSION

A public employee may apply for, interview, negotiate, and accept a job with Volkert while still employed with ALDOT, because he has not used his position as a public employee as leverage to obtain the employment.

Provided the public employee has not audited, regulated, or investigated Volkert in his current position, he is not prohibited by the "Revolving Door" to accept employment with Volkert.

A public employee is prohibited from representing Volkert back before ALDOT for a period of two years after he leaves employment with ALDOT.

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<sup>2</sup> Ala. Code §36-25-7(a)

<sup>3</sup> Ala. Code §36-25-13(f)

<sup>4</sup> See Ethics Advisory Opinions 200-45, 2001-35, 2003-24, 2004-15, 2005-32, 2006-02, 2016-03, 2017-11

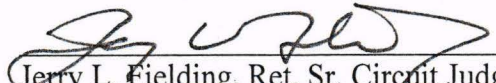
<sup>5</sup> Ala. Code §36-25-13(c)

<sup>6</sup> See Ala. Code §36-25-8

A public employee may not use any confidential information obtained while employed with ALDOT that could result in financial gain to anyone or any business for a period of four years after his separation from service.

**AUTHORITY**

By 4-0 vote of the Alabama Ethics Commission on August 1, 2018.

  
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Jerry L. Fielding, Ret. Sr. Circuit Judge  
Chair  
Alabama Ethics Commission