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ADVISORY OPINION NO. 2018-12

Ms. Jackie Graham
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"Revolving Door"/Public Employees

A public employee changing jobs within the public sector may represent the interests of his or her new public employer before his or her former public employer without violating Ala. Code § 36-25-13(c); provided that the new employer is not a principal; the employee does not have to register as a lobbyist; the employee has not used his or her position as leverage to obtain the new employment in violation of Ala. Code § 36-25-5(a); and the employee does not violate Ala. Code § 36-25-8.

Dear Ms. Graham:

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

FACTS

When public employees change jobs within the public sector, their new job duties often require them to represent the interests of their new public employer before their former public employer. For example, an employee of the State Personnel Department may leave his or her service from Personnel and begin working for the Department of Finance in the role of Personnel Manager. In that new role, he or she may be required to represent Finance before State Personnel. The "Revolving Door" prohibits a public employee from leaving one job and representing the new "employer" before the former public employer. The requestor asks whether "employer" within this section of Ala. Code 36-25-13 applies to public sector employers.

QUESTION PRESENTED

May public employees who leave one public employer for another public employer communicate and interact with their former employer on behalf of their new employer without violating 36-25-13(c)?

ANALYSIS

Yes, a public employee may move from one public employer to another and communicate with his or her former employer in the course of their new position without violating §36-25-13(c). The Legislature declared in Ala. Code § 36-25-2 that public officials should be independent and impartial; governmental decisions and policy should be made within the proper channels of governmental structure; public office should not be used for private gain; and the public should have integrity in government.

It further declares that these ends are impaired whenever there exists a conflict of interest between the private interests of a public employee and the duties of the public employee. The Code's definition of Conflict of Interest focuses on a conflict between public responsibilities and private interests, not public responsibilities and public interests.¹

Ala. Code 36-25-13(c) states:

No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee or worked pursuant to an arrangement such as a consulting agreement, agency transfer, loan, or similar agreement for a period of two years after he or she leaves such employment or working arrangement. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.

In AO2014-01, the Commission held, "While the 'Revolving Door' provisions are silent as to a State employee going to work for another State agency and representing that State agency back before their former State agency, this was surely not the intent of the drafters." In spite of this statement regarding legislative intent, however, the conclusion itself was tentative and fell short of declaring this to be the interpretation of this section in all cases because it grounded the opinion on there being "no financial benefit to the new public employer" (which implies the concern was not benefitting a "business you are associated with."). In the years following the issuance of that opinion, therefore, the Commission issued conflicting Advisory Opinions and has given conflicting informal advice which called into question its previous determination as to this subsection of this statute.

¹ See Ala. Code §36-25-1(8)

Beginning in 2015, the Commission began to recognize that public entities are not “businesses” within the context of the Ethics laws.² Moreover, with respect to public officials, the Commission has stated twice that public officials can represent their new public employer before their previous public employer or legislative body without violating 36-25-13(a).³ Likewise, allowing public employees to move freely within public service and represent their new public employer before their former public employer does not impair the purposes of the Ethics laws which are concerned primarily with regulating the interaction between private interests and public offices and servants. This interpretation is not without limits, however.

This opinion is limited in application to Ala. Code 36-25-13(c). It does not apply if the new employer is a principal or if the employee must register as a lobbyist given his or her new job duties.⁴ Additionally, the employee remains bound by the restrictions of Ala. Code §36-25-8 regarding the use or disclosure of confidential information.

Further, this opinion does not provide an exception to a public employee or public official using his or her position for personal gain in violation of Ala. Code §36-25-5(a). A public employee or public official may not trade on his or her position or his or her influence in his or her position to obtain future employment, even within the public sector. For instance, an employee may not use his or her public position as leverage in order to obtain different public employment, a determination which is necessarily dependent on the facts of the job offer and recruitment including the influence he or she will have with the former employer when he or she represents his or her new employer back before his or her former employer.

CONCLUSION

A public employee changing jobs within the public sector may represent the interests of his or her new public employer before his or her former public employer without violating Ala. Code § 36-25-13(c); provided, that the new employer is not a principal; the employee does not have to register as a lobbyist; the employee has not used his or her position as leverage to obtain the new employment in violation of Ala. Code § 36-25-5(a); and that the employee does not violate Ala. Code § 36-25-8.

² See Ethics Advisory Opinion 2015-15.

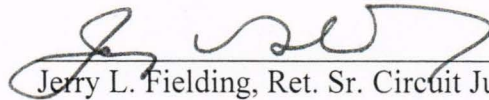
³ See Ethics Advisory Opinions 2018-10 and 2016-26.

⁴ For example, many public entities are nonetheless registered as principals—Alabama State Port Authority, many municipalities, as well as public colleges and universities.

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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 3, 2018.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
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