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October 2, 2002

RECONSIDERATION OF
ADVISORY OPINION NO. 2002-40

Ms. Deborah J. McGill
Executive Director
Jefferson County Economic and Industrial
Development Authority
500 Beacon Parkway West
Birmingham, Alabama 35209

Conflict Of Interest/Member Of The Jefferson County Economic And Industrial Development Authority Accepting Employment With The Industrial Development Authority.

A member of the Economic and Industrial Development Authority of Jefferson County may accept employment with the Industrial Development Authority Board, when he resigned from the Board with no prearranged understanding that he would be hired, where he did not use his influence as a Board member to obtain the position, and where the Board, after reviewing qualified applicants, determines that the former member is the most qualified applicant for the position.

Dear Ms. McGill:

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.

QUESTION PRESENTED

May a member of the Jefferson County Economic and Industrial Development Authority, upon his resignation, accept employment as the Development Director with the Industrial Development Authority?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Deborah J. McGill is the Executive Director of the Jefferson County Economic and Industrial Development Authority. She requests this opinion specific to the hiring of a former Board member, Jerry Cross, who only served on the Authority Board for ten months.

Ms. McGill currently holds the only staff position, which is that of the Executive Director. The position available is a staff position, Development Director, and Ms. McGill has been trying to fill the position since June.

The Jefferson County Economic and Industrial Development Authority owns a 736-acre industrial park in west Jefferson County. Approximately 95 percent of any staff time is dedicated to the development of this Park. In the past four months, the Industrial Development Authority Board has sold 90 acres of land, and has Options on a 35-acre site and is negotiating an Option on a 16-acre site. Ms. McGill states that they are experiencing increased industrial prospect activity, so their search moved them to identify someone with both industrial experience and construction experience. The general parameters of the position are as follows:

1) The position will report to the Executive Director, not to the Board of Directors.

2) Salary range is $35,000 to $65,000.

3) The job tasks are specific to Park operation and maintenance, including the maintenance of a 6,000 square foot office center at the Park, general operation of the Park such as oversight of landscaping, irrigation, utilities and infrastructure. The employee will also have daily contact with companies locating in the Park to ensure fast track instruction permitting during new facility construction.

4) The position will not be able to authorize any funds or contracts.

It was brought indirectly to Ms. McGill's attention that Jerry Cross was going to retire from Hoar Construction on October 1, 2002, after 40 years of service. Mr. Cross served as Vice President and was very active in marketing and construction in industrial development. The person who brought this to Ms. McGill's attention had approached Mr. Cross about a position he had available. This individual had referred another candidate to Ms. McGill and was aware of her desire to hire a person with both economic development and construction experience. He called and notified Ms. McGill of Mr. Cross' plan to retire, and the possibility of his potential interest.

Unaware of the Ethics Commission's "Revolving Door" provision, Ms. McGill approached Mr. Cross to determine the extent of his interest, and Mr. Cross stated that he would be interested in the position. This discussion took place on July 24, 2002, in Ms. McGill's office through her request. She states that since that initial meeting, no influence was implemented through him to hire him to the position. Concerned with the fact that he was a Board member, Ms. McGill approached her Board regarding this potential hire on August 1, 2002. Mr. Cross was not present for any of these discussions. The Board requested that Ms. McGill receive an Advisory Opinion from the Ethics Commission. Since then, Ms. McGill has been in contact with the staff of the Ethics Commission to ensure that the Industrial Development Authority Board followed all required steps to ensure a lawful hire according to the Ethics Law. Mr. Cross resigned from the Board on August 14, 2002, and there will be no contact with him until this matter is resolved. No Board members, with the exception of the Chairman, who informed Mr. Cross of the intention of requesting an Advisory Opinion, have had any contact with Mr. Cross.

Ms. McGill sets out several statements of the reasons why, as Executive Director, she would go to this extent to request that Mr. Cross be permitted to work for the Authority.

1) Mr. Cross has 40 years of experience in construction and in economic development. He has established relationships with every utility, marketing and State economic development professional. He is also very familiar with utility and facility construction, which is critical for this job.

2) Jefferson County Economic and Industrial Development Authority has hired staff positions for five years. There are only two paid positions—the Executive Director and Development Director. Both administrative and bookkeeping are shared expenses with other agencies. In a four-year duration (the position has been open for a year), they have had three different employees. All of the employees in the Development Director position have used the position in an effort to make contacts and move on to higher paying jobs. Mr. Cross is retiring as of October 1. He is not using this job as a stepping-stone. Mr. Cross brings to the staff an opportunity for continuity over the next few years.

3) Ms. McGill states that Mr. Cross was part of the Board meeting that raised the annual salary range to $65,000. This occurred on July 17, 2002 (see attached Minutes). This was done in order to open the position to individuals with experience to meet the job requirements. Ms. McGill states that if Mr. Cross' intent were for personal gain, one would assume he would ask for the $65,000. Ms. McGill states that when she met with him to discuss his possible interest, she questioned his salary intentions. She did this to be assured his interest was not due to the new salary range. Mr. Cross stated that he would take the job for

$40,000 annually. Ms. McGill states that this is $8,500 below what was paid to the former employee in this position, who only had five years' experience in banking and no economic development experience.

4) Ms. McGill states that it is her intent to offer the job at an annual salary of $43,000 and benefits.

5) Mr. Cross was appointed to the Board ten months ago for the same reason he is now being pursued for this job. He brings an incredible amount of knowledge and experience regarding industrial development and industrial facility construction. Ms. McGill states that he is furthermore a man of integrity and an extremely hard worker.

In conclusion, Ms. McGill states that she is very understanding as to why this law is in place. If she understands the intent of the law, it prevents those in public positions of authority from accepting employment with companies and entities that they approved contracts for or where they had direct influence, in order to have personal gain from service in a public position. She states that this is clearly not the case with Mr. Cross. This is not a position of authority, and the position is hired, supervised and reviewed and can be terminated only by the Executive Director. In no circumstances has Mr. Cross had influence over her position as one voter of an eleven-member Board that has voted unanimously on every issue since his appointment.

Ms. McGill further states that Mr. Cross could take his 40 years of experience to many other organizations and most likely make a much better income. She feels fortunate that he would even consider this position. She states that he would be a major attribute to their staff and to industrial development in Jefferson County. She states that it would be their request that ten months of public service on an industrial development board will not prevent him from having this opportunity.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

> "(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2."

Section 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-13(c) states:

"(c) No public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency."

Section 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

While the Commission has addressed this issue in the past, each specific set of facts and circumstances must be reviewed on its own.

In the facts before the Commission, it is obvious that all parties involved took special care to see that the Ethics Law was complied with, and that any actions taken regarding the hiring were done according to law.

From the facts as provided, it appears that Mr. Cross has in no way used his influence to obtain the opportunity, but instead, it appears that the Industrial Development Board has determined that Mr. Cross is the most qualified applicant, and that his experience and expertise will provide a tremendous benefit to the Development Authority.

Therefore, a member of the Economic and Industrial Development Authority of Jefferson County may accept employment with the Industrial Development Authority Board, when he resigned from the Board with no prearranged understanding that he would be hired, and where the Board, after reviewing qualified applicants, determines that the former member is the most qualified applicant for the position.

CONCLUSION

A member of the Economic and Industrial Development Authority of Jefferson County may accept employment with the Industrial Development Authority Board, when he resigned from the Board with no prearranged understanding that he would be hired, where he did not use his influence as a Board member to obtain the position, and where the Board, after reviewing qualified applicants, determines that the former member is the most qualified applicant for the position.

AUTHORITY

By 3-2 vote of the Alabama Ethics Commission on September 4, 2002.

Reconsidered by 3-2 vote of the Alabama Ethics Commission on October 2, 2002.

Russell Jackson Drake, Esq.
Chair
Alabama Ethics Commission