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ADVISORY OPINION NO. 2003-58

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Conflict Of Interest/Individual Providing Professional Services To Public Entity, The Compensation For Which Is Less Than 50 Percent Of His Income

An individual employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time individual's income, is not considered a public employee under the Ethics Law and is excluded from its coverage.

Revolving Door/Public Employee Accepting Employment With Entity With Which He Was Involved In The Contractual Process

A public employee, whose compensation from the public entity is more than 50 percent of his or her income, and who is involved in the contractual process with a private entity, may not, for a period of two years after leaving the employ of the public water and sewer system, accept employment with that private entity.

Dear Mr. Thorington:

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.

QUESTIONS PRESENTED

- 1) Is there any restriction applicable to "A" leaving employment with the Authority and entering into employment with "Firm B"?
- 2) Were "Firm B" and the Authority to enter into an agreement for "Firm B" to furnish the Authority management consulting services, would "Firm B" be precluded from competing for engineering contracts in the Authority's future capital improvement projects?
- 3) Would the proposed arrangement conflict with "Firm B" furnishing professional services to a public water system in the county in which "A" formerly served as Executive Director?

FACTS AND ANALYSIS

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

Robert D. Thorington represents an individual who is the retired, former Executive Director of a public water and sewer system. Mr. Thorington has identified his client as "A." By virtue of his service to the water and sewer system, "A" receives retirement benefits from the Retirement Systems of Alabama.

Subsequent to his retirement from the water and sewer system, "A" entered into an agreement with a water, sewer and fire protection authority, a public corporation organized pursuant to the provisions of Alabama Code, Section 11-88-1, *et seq.*, under which "A" serves as General Manager of the Authority, with the duties and responsibilities outlined in the contract between "A" and the Authority. "A" has worked for the Authority on a part-time basis since the fall of 2000. "A" works an average of two hours per day. Sometimes "A" works more than two hours, and other days, "A" does no work for the Authority. "A's" \$18,000 annual compensation from the Authority is substantially less than one-half of his total annual income.

The Authority also has a Superintendent, who is in training to become General Manager and works full-time. "A" is helping to train the present Superintendent to become the General Manager, and helps answer the Superintendent's questions.

The Board of Directors of the Authority is a relatively hands-on Board, and is involved in much of the day-to-day decision-making (as well as policy-setting). All purchases of \$7,500 or more must be approved by the Board. Many purchases smaller in amount, however, are also routinely presented to the Board for approval.

A private engineering consulting firm, "Firm B," recently has been engaged by the Authority to perform certain engineering consulting services for the Authority. "Firm B" was introduced to the Authority by a member of the Authority's Board of Directors, for whose company "Firm B" has performed engineering consulting services, not by "A."

"Firm B" has contracts to perform the engineering consulting work associated with the construction of an office building and also the construction of an elevated water tank for the Authority, presently. "Firm B" was selected for these projects by the Board of Directors, not by "A." "A" helped formulate the needs for the office building (for example: space, general configuration of internal space, specific space and feature needs), but was not involved in the selection of "Firm B" to perform the engineering consulting services relating to the office building. Although plans for the office building have been completed, construction has not commenced.

The Authority requested proposals for the engineering consulting work relating to the elevated water tank. As the tank would be funded in part with funds received under a federal grant, the procedures for obtaining engineering consulting services for the tank were prescribed by the Economic Development Administration of the U.S. Department of Commerce. "A" established weights to be given, various criteria and the responses to bids received, and using these weights, ranked the responses. "Firm B" was one of two firms which responded that tied for first place, according to the weighting performed by "A."

The four top responders' proposals were considered by the Board of Directors of the Authority, who interviewed each of the four top firms. The Board selected "Firm B" to furnish the engineering consulting services associated with the construction of the tank. "A" was not involved in the Board's deliberations which led to the selection of "Firm B" from among the four top respondents for the engineering consulting work on the elevated tank.

Once "Firm B" was selected for the office building and for the elevated tank, contracts between "Firm B" and the Authority were negotiated by the Board of Directors of the Authority. "A" was present during these negotiations, but did not conduct them. "A" reviewed the resulting

contracts to ensure that no provisions critical to the Authority had been omitted, but did not negotiate the contracts with "Firm B." "A" has had no responsibilities to inspect work on either the office building or the elevated water tank.

"Firm B" also has done other relatively minor engineering consulting work for the Authority, such as preparing maps of extensions of certain of the Authority's waterlines and similar tasks. All of this work was assigned to "Firm B" either by the Authority's Board of Directors or Superintendent. "A" did not select "Firm B" for any of this work.

If permissible under the Ethics Act, "Firm B" proposes to enter into a contract with "A" for him to become either an independent contractor or a part-time employee of "Firm B." "Firm B" also proposes to enter into a contract with the Authority for "Firm B" to furnish management consulting services to the Authority on an hourly basis (in addition to the engineering consulting services which "Firm B" is furnishing the Authority presently on the office building and water tank, respectively).

Upon resigning as a part-time employee of the Authority, "A" (as a part-time employee of "Firm B"), along with other "Firm B" employees, would furnish management consulting services to the Authority. "A" would not devote more than an average of four hours per day to management consulting activities furnished to the Authority by "Firm B." A substantial majority of the hourly time for which the Authority would be charged by "Firm B" under the Management Consulting Service contract, however, would be attributable to hours worked by "A." "A," however, would not be involved in supervising or inspecting engineering consulting work performed for the Authority by "Firm B." "A" also would perform other work for "Firm B," such as assisting in "Firm B's" marketing efforts, including marketing directed to municipalities and utilities in the county where "A" was formerly employed by the water and sewer system, and in which the Authority is located (although "A" will not be involved in marketing efforts to the Authority), as well as an adjacent county. In addition, "A" would represent "Firm B" at professional conferences.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) defines a public employee as:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. **For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to**

providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."
(Emphasis added.)

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."

Section 36-25-2(b) in pertinent part states:

"An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-13(b) states:

"(b) 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 for a period of two years after he or she leaves such employment. 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."

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 36-25-13(d) states:

“(d) No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual.”

As relates to questions two and three, the Ethics Commission has no jurisdiction over “Firm B”; therefore, it cannot opine as to whether or not the arrangement would be acceptable. The Commission only has jurisdiction over “A” and his activities, as he is the individual potentially covered by the Alabama Ethics Law.

The definition of a public employee excludes an individual who is employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee’s income.

In the facts as provided, it would appear that “A” falls into this category in that, he is a part-time employee providing professional services to the Authority, and the income received from the Authority is less than 50 percent of his total income.

If, in fact, this is the case, as “A” would be excluded from coverage by the Alabama Ethics Law, there would be nothing in the arrangement that would present a conflict of interest under the Ethics Law or prevent “A” and “Firm B” from entering into this arrangement.

If, on the other hand, “A” is a public employee as defined by the Ethics Law, he may not, for a period of two years, enter into an arrangement with “Firm B,” as he was involved in the contractual process between “Firm B” and the Authority. In addition, he could not, for a period of two years, represent “Firm B” in any dealings back with the Authority.

Based on the facts as provided and the above law, an individual employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time individual’s income, is not considered a public employee under the Ethics Law and is excluded from its coverage.

Further, a public employee, whose compensation from the public entity is more than 50 percent of his or her income, and who is involved in the contractual process with a private entity,

may not, for a period of two years after leaving the employ of the public water and sewer system, accept employment with that private entity.

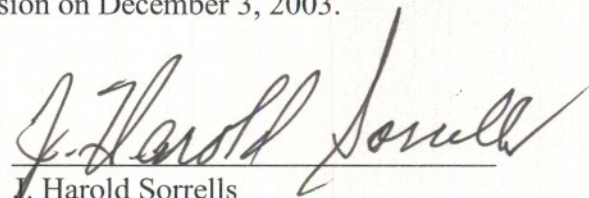
CONCLUSION

An individual employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time individual's income, is not considered a public employee under the Ethics Law and is excluded from its coverage.

A public employee, whose compensation from the public entity is more than 50 percent of his or her income, and who is involved in the contractual process with a private entity, may not, for a period of two years after leaving the employ of the public water and sewer system, accept employment with that private entity.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on December 3, 2003.



J. Harold Sorrells
Chair
Alabama Ethics Commission