

STATE OF ALABAMA
ETHICS COMMISSION



COMMISSIONERS

Linda L. Green, Chairman
Nancy Edwards Eldridge, Vice-Chairman
John H. Cooper, Esq.
Cameron McDonald Vowell, Ph.D.
Michael K.K. Choy, Esq.

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

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



James L. Sumner, Jr.
Director

October 5, 2005

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE www.ethics.alalinc.net

ADVISORY OPINION NO. 2005-27

Page B. Walley, Ph.D.
Commissioner
Alabama Department of Human Resources
Post Office Box 304000
Montgomery, Alabama 36130-4000

Conflict Of Interest/Department Of Human Resources (DHR) Employees Serving As Foster Care Providers

The Ethics Commission may only render Advisory Opinions and address issues that are prospective in nature. As several of the questions and scenarios set forth in this request are not prospective in nature, the Commission will not render an opinion regarding those children already placed in foster homes prior to the rendering of Advisory Opinion Nos. 2001-07 and 2002-21, nor will the Commission address whether the Department of Human Resources may "grandfather" these individuals into compliance with those opinions.

County Department of Human Resources (DHR) employees may not serve as foster care providers in the county in which they are employed, regardless of whether or not they are employed in the foster care division of DHR, as their serving as a foster care provider would involve direct interaction with their employer, and give them access to confidential information, thereby, creating a conflict of interest.

However, County DHR employees may serve as foster care providers in the county in which they are employed, if the foster care is approved by and otherwise overseen by a County DHR office other than the employing entity.

State DHR employees may participate in the foster parent program in the county in which they reside, as State DHR does not approve foster family homes/parents, and their serving as a foster parent would not involve their direct interaction back with their employer, State DHR. However, State DHR employees may not use their position as a State DHR employee to influence or affect their being approved as a foster care provider, or to affect the conditions of their being a foster care provider, nor may they use confidential information obtained in the course of their employment with State DHR to influence or affect their being approved as a foster care provider, or to affect the conditions of their being a foster care provider.

County DHR employees may serve as foster care providers to children who are their relatives under a fact-specific, case-by-case review, or otherwise as is consistent with this opinion.

Any regulations or guidelines set out by the RC Consent Decree overseen by the federal courts, are not subject to, nor are they addressed by this Advisory Opinion.

Dear Dr. Walley:

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 AND ANALYSIS

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

Page B. Walley is the Commissioner for the Alabama Department of Human Resources (DHR). He is requesting an interpretation of Ethics Commission opinions that have been rendered in the matter of DHR employees being approved as foster parents for children in the custody or care of the Department of Human Resources. As they revise statewide child welfare policy to address the opinions issued by the Ethics Commission, they have concerns that have been raised by county directors regarding the most recent opinions, 2001-07 and 2002-21.

Those opinions state as follows:

Advisory Opinion No. 2001-07, rendered on February 7, 2001, states that:

“A Service Social Worker I/II with the Mobile County Department of Human Resources may serve as a foster parent in a county other than Mobile County, Alabama, as her serving as a foster parent in Mobile County would involve interaction with her employer.”

Advisory Opinion No. 2002-21, rendered on May 1, 2002, states that:

“A Service Social Worker I/II with the Jefferson County Department of Human Resources may serve as a foster parent in a region of Jefferson County other than the region with which he or she is employed, as this would not involve interaction with his or her employer.”

Advisory Opinion No. 405, rendered on December 13, 1979, held that:

“ . . . all DPS personnel *except those engaged in the placement of foster children and those persons who supervise, inspect or regulate foster home facilities* may participate in the foster home program.”

Dr. Walley states that Advisory Opinion No. 405 allowed the county departments to approve DHR employees in a county department who work in a program area other than their foster care program to become foster parents. He states that the Department has 24 DHR employees statewide approved as foster parents.

In developing policy to meet Ethics Commission Opinion No. 2001-07, their concerns center around the Department's capacity to maintain children in their community and within any current placements. Under the R. C. Consent Decree, the Department of Human Resources is required to place children in close proximity to their home, and generally in their own county. Additionally, the Federal Adoption and Safe Families Act (ASFA) requires that relative placement resources be pursued prior to placement in an unrelated foster home. Other concerns include whether DHR employees (approved by county departments other than the county of employment) can receive a foster care maintenance payment from their county of employment. He states that there can be instances when the most appropriate placement for a child is with a DHR employee/foster parent who is also employed by the County DHR with placement responsibility.

First of all, it is important to recognize that the Ethics Commission cannot render Advisory Opinions after-the-fact or which are not prospective in nature. Because the Ethics Law is a criminal statute, it would be improper for the Commission to render an opinion after-the-fact, making a determination (without the protections of due process) that an individual has or has not violated the Ethics Law, as this would amount to an ex post facto law which is prohibited by the U.S. Constitution. That determination can only be made after a full and complete investigation into a valid complaint with the affected individual noticed of the complaint and being given the opportunity to respond.

Therefore, this opinion will only address the scenarios prospectively and will not in any way comment on those situations where individuals employed by a County DHR are also serving as foster parents in that county, nor will the Commission comment on whether or not they may be grandfathered in.

In reviewing Advisory Opinion No. 405, the Commission, in 1979, stated that:

“All public employees and officials must simply avoid dealing financially with their own department or agency insofar as possible even though the objective is worthy as is certainly the case here.”

While this Commission agrees that the cause is worthy, it is noticeable that the Commission at the time did not address the conflict of interest which exists when an individual in his or her private capacity has dealings with his or her employer.

Regardless of whether or not individuals are employed in the foster care program of a County Department of Human Resources, if they are employed in any capacity with the County Department of Human Resources, they are in a position where they can, on the one hand, exert some influence over the placement of children, receive special treatment, or have access to confidential information, etc., and, on the other hand, place themselves in a position where their private interests are or may be different from those of their employer. It is a conflict of interest for public employees to have dealings or interactions back with their employer in a private capacity.

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.”

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 36-25-5(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 36-25-5(c) states:

“(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy.”

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."

QUESTIONS PRESENTED

- 1) “Does Opinion No. 2001-07 supercede Opinion No. 405? Opinion No. 405 allowed DHR employees within the county of employment to be foster parents if they did not work in the foster care program area, e. g. clerical, Food Stamps programs. Our interpretation of Opinion No. 2001-07 is that no DHR employee in any program area can be a foster parent for their county of employment due to the inherent interaction with their employer or appointing authority.”

Advisory Opinion No. 405 was rendered on December 13, 1979. The revised Alabama Ethics Law went into effect on October 1, 1995, and from that date forward, all previous Advisory Opinions were considered to be invalid if they were in conflict with the revised law.

Section 36-25-4(9) in pertinent part states that:

“On October 1, 1995, all prior advisory opinions of the commission in conflict with this chapter, shall be ineffective and thereby deemed invalid and otherwise overruled unless there has been any action performed or action refrained from in reliance of a prior advisory opinion.”

As of October 1, 1995, the Commission began rendering new opinions which followed the revised Ethics Law rather than continuing to rely on opinions rendered under the previous Ethics Law.

Advisory Opinion No. 2001-07, rendered on February 7, 2001, therefore, supercedes Advisory Opinion No. 405. Advisory No. 2001-07 holds that:

“A Service Social Worker I/II with the Mobile County Department of Human Resources may serve as a foster parent in a county other than Mobile County, Alabama, as her serving as a foster parent in Mobile County would involve interaction with her employer.”

- 2) “Are DHR employee/foster parents prohibited from accepting foster care children into their home from their county of employment? In this situation, the foster parent is approved by another county/agency, but the county of employment will have the custody, planning and payment responsibility for children placed with the foster parent by the county of employment. This is of particular concern because of the potential of moving children from their current stable and familiar placements.”

Question number two concerns a County DHR employee accepting children into his or her home where two County DHR offices are involved, the county of employment and the county approving the home as a foster care provider. DHR understands from Advisory Opinion No. 2001-07, that a Department of Human Resources employee may be approved as a foster parent by a county other than the county where the employee works. However, the employee approved prior to issuance of this opinion, may already have a child in his or her home from his or her county of employment, and DHR is concerned of a possibility of a move for the child. For example, an employee of “Unknown County” DHR, who lives in “Unknown County,” has been an approved foster parent for “Unknown County,” and has a child placed in his or her home from “Unknown County,” would now need to be approved as a foster parent by an adjoining county. DHR asks whether the child placed in this home by “Unknown County” DHR may remain in the home? Can the home accept other children from his or her county of employment? Related to this situation of an employee who lives in one county but works in another county, the county DHR office in which the employee lives, will approve the employee as a foster parent; however, can the foster parent accept children from his or her county of employment? In both situations, the county placing the child authorizes payment, but State DHR issues the payment.

In the facts as set out in question number two, it is obvious that this scenario is not prospective in nature. Advisory Opinion No. 2001-07 holds that a DHR employee may serve as a foster parent in a county other than the county in which he or she is employed, as to do otherwise, would involve his or her interaction with his or her employer.

The Commission recognizes that there are situations where two County DHRs are involved. A DHR employee may not be a foster parent in any county if his or her employing agency (the County DHR) is involved in the decision-making process regarding the foster care and that employee.

Even in those situations where two County DHR offices are involved, when one of those offices is the foster parent's employer, part of an employee's responsibilities as an employee of the County Department of Human Resources, is to perform the functions of and further the interest of the Department of Human Resources. If that individual is also serving as a foster parent, his or her interests, needs, etc. on many, if not most, occasions will be different than those of the employer, and will create an inherent conflict of interest. However, that conflict can be resolved if the employing County DHR is not involved in any aspect of the decision-making process involving that employee and his or her serving as a foster parent, nor is otherwise involved in performing various discretionary functions relating to that foster care.

- 3) "Can the Department "grandfather" in the placements of those children currently placed with DHR employee/foster parents in the same county where the DHR employee works in order to avoid moving children to another foster home?"

The Alabama Ethics Commission cannot render Advisory Opinions that are not prospective in nature or are after-the-fact. If the Department of Human Resources currently has children placed with DHR employee/foster parents, the Commission cannot render an opinion, nor advise as to whether or not this situation may be grandfathered. While the Department can obtain some guidance in dealing with these situations from this opinion, this opinion only addresses those situations which are prospective in nature.

While Ethics opinions are advisory in nature, they are designed to highlight permitted and prohibited activities under the Alabama Ethics Law. In other words, they are designed to give guidance to public officials and public employees as to the parameters contained within the Ethics Law. And, while they do not become "law," per se, they do serve as precedent until such time as they may be overturned by a court of competent jurisdiction.

Activity becomes prohibited (or a possible violation of the Ethics Law) after the Commission renders an Advisory Opinion. Therefore, while the actions of DHR employees who become foster parents in the county in which they are employed (necessitating interaction with

their employer) are in conflict with Advisory Opinion No. 2001-07, and may well be in violation of the Alabama Ethics Law, the Commission cannot apply an Advisory Opinion banning certain activities to circumstances which occurred prior to the rendering of the Advisory Opinion, as this would, in effect, be ex post facto, which, as previously stated, violates the United States Constitution.

- 4) “Can SDHR employees participate in the foster parent program? Are there parameters to this? In addition to the 67 county departments, individuals at the State Department of Human Resources (SDHR) may be interested in becoming a foster parent. These individuals’ hiring authority is the Commissioner, while the county department employees’ hiring authority is the county director. SDHR employees may be employed in a number of program areas other than Family Services.”

State DHR employees may participate in the foster parent program in their county of residence, as all interaction/approval, etc. is done at the local level. The State Department of Human Resources does not approve foster family homes/parents, according to Dr. Walley.

A State DHR employee participating in the foster parent program in his or her county of residence, would not conflict with, or be in violation of Advisory Opinion No. 2001-07, as the State DHR would not be involved in approving/overseeing the foster family home/parent.

A State Department of Human Resources employee may participate in the foster parent program, when that foster parent program is operated through a County DHR. This is due to the fact that, while State DHR is the umbrella organization, each County DHR operates, to some degree, separately and apart. It would, therefore, not be a conflict for state DHR employees to be foster parents under a County DHR program, as there would be no interaction with their employer. However, the State DHR employee may not use their position as a State DHR employee, nor may they use confidential information obtained in the course of their employment with State DHR to influence or affect their being approved as a foster care provider, or to affect the conditions of their being a foster care provider.

- 5) “When a relative placement is also an employee of the county DHR office, can another county department approve the relative as a foster parent and allow the county of employment to place the related child in the home? Also, can the county of employment in these situations make a foster care maintenance payment? Generally we are going to find that relatives of children in DHR custody or planning responsibility are living in the same county as the children. In some cases relatives are willing to care for the children but need the assistance that comes with being related foster parents.”

This scenario is similar to question number two, in that there are two County Department of Human Resources involved. However, the DHR employee is the relative of a child that is in need of placement. DHR rules allow relatives to be approved as foster parents, provided they meet the Minimum Standards for Foster Family Homes, and the relative may also be a DHR employee.

As a general rule, it would seem that parents would designate a responsible individual as legal guardian for their minor children, should something unexpected happen to the parent or parents. Generally speaking, that legal guardian would be of a close degree of kinship or an extremely close family friend. It would further appear that for a relative to be in the posture to become a foster parent, as opposed to a legal guardian, he or she would have a more distant degree of kinship than those individuals who might become legal guardians. According to State DHR, however, efforts are first made to place a child with a relative before that child would be placed with a non-relative foster care provider.

Based on these difficulties, this is not a question on which the Commission can render a definitive answer, but one that must be addressed on a case-by-case, fact-specific basis.

However, in general, Advisory Opinions No. 2001-07 and 2002-21, as well as this opinion, would still be applicable. However, any rules or guidelines set out by the RC Consent Decree governed by the federal courts, would take precedent over any guidelines set out in an Ethics Commission Advisory Opinion.

CONCLUSION

The Ethics Commission may only render Advisory Opinions and address issues that are prospective in nature. As several of the questions and scenarios set forth in this request are not prospective in nature, the Commission will not render an opinion regarding those children already placed in foster homes prior to the rendering of Advisory Opinion Nos. 2001-07 and 2002-21, nor will the Commission address whether the Department of Human Resources may "grandfather" these individuals into compliance with those opinions.

County Department of Human Resources (DHR) employees may not serve as foster care providers in the county in which they are employed, regardless of whether or not they are employed in the foster care division of DHR, as their serving as a foster care provider would involve direct interaction with their employer, and give them access to confidential information, thereby, creating a conflict of interest.

However, County DHR employees may serve as foster care providers in the county in which they are employed, if the foster care is approved by and otherwise overseen by a County DHR office other than the employing entity.

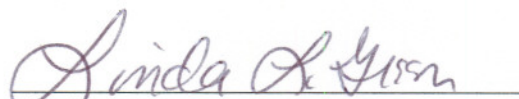
State DHR employees may participate in the foster parent program in the county in which they reside, as State DHR does not approve foster family homes/parents, and their serving as a foster parent would not involve their direct interaction back with their employer, State DHR. However, State DHR employees may not use their position as a State DHR employee to influence or affect their being approved as a foster care provider, or to affect the conditions of their being a foster care provider, nor may they use confidential information obtained in the course of their employment with State DHR to influence or affect their being approved as a foster care provider, or to affect the conditions of their being a foster care provider.

County DHR employees may serve as foster care providers to children who are their relatives under a fact-specific, case-by-case review, or otherwise as is consistent with this opinion.

Any regulations or guidelines set out by the RC Consent Decree overseen by the federal courts, are not subject to, nor are they addressed by this Advisory Opinion.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on October 5, 2005.



Linda L. Green

Chair

Alabama Ethics Commission