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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



James L. Sumner, Jr.  
Director

TELEPHONE (334) 242-2997  
FAX (334) 242-0248  
WEB SITE: [www.ethics.alabama.gov](http://www.ethics.alabama.gov)

February 3, 2010

**ADVISORY OPINION NO. 2010-01**

Kenneth O. Simon, Esq.  
Christian Small, LLP  
505 20<sup>th</sup> Street North  
Suite No. 1800  
Birmingham, Alabama 35203-2696

Revolving Door/Former Chairman Of  
Birmingham-Jefferson County Transit  
Authority (BJCTA) Applying For Position  
As Transit Authority Director

The former Chairman of the Birmingham-Jefferson County Transit Authority may not be hired as Executive Director of the Birmingham-Jefferson County Transit Authority upon his resignation, as he played a substantial role in the hiring process prior to his resignation.

The former Chairman of the Birmingham-Jefferson County Transit Authority may not lobby current Board members seeking their support for his hiring. While third persons may lobby the Board on his behalf, based on his prior involvement in the hiring process, he may not accept the position without violating the Ethics Law.

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Dear Mr. Simon:

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) May the former Chairman of the Birmingham-Jefferson Transit Authority apply for and be hired as Executive Director for the Transit Authority?
- 2) May the former Chairman of the Birmingham-Jefferson Transit Authority or third persons lobby the Board members on his behalf?

### **FACTS AND ANALYSIS**

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

Kenneth O. Simon represents the Birmingham-Jefferson County Transit Authority (BJCTA), a public corporation created under authority of Alabama Act No. 993 (1971). The BJCTA is governed by a nine-member Board consisting of representatives appointed by the various jurisdictions which participate in the Transit System.

The BJCTA is seeking to hire a new Director. The former Executive Director resigned of his own volition in September 2008. The Board has taken several steps since that time to hire a new Executive Director.

A former Chairman of the Board resigned his Board position a few weeks prior to October 3, 2009, and has now applied for the position of Executive Director. The Board seeks a determination as to the appropriateness of his application in light of the Ethics Law's prohibition against the use of official office for personal gain.

One of the first steps taken by the former Chairman was to appoint what he described as an "Ad Hoc Committee" consisting of four Board members and four private citizens. The Ad Hoc Committee's purpose was to make certain recommendations concerning the selection process. Among other things, the minutes show that the Ad Hoc Committee performed such tasks as preparing a job description and identifying potential candidates. The minutes detail the fact that the Chairman personally exercised his discretionary authority to appoint the Ad Hoc

Committee and described the vigorous debate concerning his sole exercise of that authority. Additionally, he appointed each member of the Board's previous Human Relations Committee, which had the responsibility of leading the search effort in finalizing the job description.

In an addendum to their request dated November 2<sup>nd</sup>, Mr. Simon points out that, while Chairman of the Board, the former Chairman received a copy of each candidate's resume for the Executive Director's position. This information was unavailable to other candidates.

Although the Ad Hoc Committee was charged with screening candidates, as well as developing a job description, the Board, itself, apparently has performed, or will perform the screening. Moreover, it does not appear that the job description developed by the Ad Hoc Committee will be used in the selection process. The Board may, however, seek out an Executive Director who possesses at least one of the key characteristics identified by the former Chairman and the Ad Hoc Committee, the ability to serve as a visible and effective BJCTA representative to participating jurisdictions and to the community at-large.

Based on this scenario, Mr. Simon asks the above questions on behalf of the Transit Authority.

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 36-25-5(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 36-25-9(c) states:

“(c) No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest.”

Section 36-25-13(a) states:

“(a) No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member for a period of two years after he or she leaves such membership. For the purposes of this subsection, such prohibition shall not include a former member of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.”

This is an issue that has been repeatedly addressed by the Commission, most recently in December of 2009. Advisory Opinion No. 2009-11 states that:

“A former member of the Bessemer Airport Authority may serve as part-time Airport Director after his resignation; provided, that when he resigned from the Board, there was no prearranged understanding that he would be hired; that he did not use his influence as a Board member to obtain the position; where the Board, after reviewing qualified applicants, determines that the former member is the most qualified applicant for the position; and further, where he was not involved in creating the vacancy.”

The distinction between this scenario and previous opinions is that prior to his resignation, it appears the former Chairman played a substantial role in not only appointing an Ad Hoc Committee to perform a search of potential candidates, but was also involved in the development of the job description for the new Director.

In addition, the former Chairman had access to the resumes of the other candidates prior to his resignation.

While the former Chairman did not play a role in creating the vacancy, nor is there evidence to indicate that there was a prearranged agreement that he would be hired, it appears that, based on his involvement in the process prior to his resignation, a level playing field cannot be established.

Section 36-25-13(a) prohibits public officials from lobbying, on behalf of their clients, their employer or themselves, the Board or agency on which they formerly served. Therefore, the former Chairman may not personally lobby the BJCTA Board members for a period of two years after his resignation in an effort to obtain the position, or on any other issue.

There is nothing that would prohibit third parties from lobbying on his behalf.

Based on the facts as provided and the above law, the former Chairman of the Birmingham-Jefferson County Transit Authority may not be hired as Executive Director of the Birmingham-Jefferson County Transit Authority upon his resignation, as he played a substantial role in the hiring process prior to his resignation.

Further, the former Chairman of the Birmingham-Jefferson County Transit Authority may not lobby current Board members seeking their support for his hiring. While third persons may lobby the Board on his behalf, based on his prior involvement in the hiring process, he may not accept the position without violating the Ethics Law.

### CONCLUSION

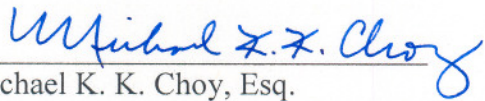
The former Chairman of the Birmingham-Jefferson County Transit Authority may not be hired as Executive Director of the Birmingham-Jefferson County Transit Authority upon his resignation, as he played a substantial role in the hiring process prior to his resignation.

The former Chairman of the Birmingham-Jefferson County Transit Authority may not lobby current Board members seeking their support for his hiring. While third persons may lobby the Board on his behalf, based on his prior involvement in the hiring process, he may not accept the position without violating the Ethics Law.

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**AUTHORITY**

By 3-0 vote of the Alabama Ethics Commission on February 3, 2010.

  
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Michael K. K. Choy, Esq.  
Chair  
Alabama Ethics Commission