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August 5, 2015

ADVISORY OPINON NO. 2015-07

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Use Of Office For Personal Gain/Baldwin County Board Of Education Members Approving Legal Fees To Be Paid On Their Behalf After Being Sued For Official Actions

Under the circumstances where a proper corporate interest is involved, it would not violate the Alabama Ethics Law for the Board as a whole (including those Board members being sued) to vote for the approval of the expenditure of public monies, assuming the Collins requirements are complied with and assuming that the Board so decides in an official vote.

While it may be logically unnecessary, in order to be in strict compliance with the terms of the Code, each of the seven Board members should abstain from voting on the issue of using public money to pay their legal fees but may vote on the issue as relates to the other members, assuming the matter is brought up as separate action items.

Dear Mr. Lewis:

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

QUESTION PRESENTED

May the members of the Baldwin County Board of Education, who were sued based on their official actions, vote to use public funds to provide a defense on behalf of the other Board members and Superintendent who similarly have been sued, without violating the Alabama Ethics Law?

FACTS AND ANALYSIS

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

R. Scott Lewis, on behalf of Stone, Granade and Crosby, represents the Baldwin County Board of Education. In that capacity, and on behalf of Superintendent Robbie Owen and Board members Norman Moore, David Tarwater, Shannon Cauley and Angie Swiger, he respectfully requests a formal written opinion from the Commission.

The public school system of Baldwin County is funded in large measure by ad valorem and sales tax. Seven (7) of the twelve (12) mills of ad valorem taxes levied and collected for public school purposes in Baldwin County were scheduled to expire in tax years 2017 and 2018. Additionally, a county-wide one (1) cent sales tax is scheduled to expire in 2018. In order to renew the expiring ad valorem taxes and to replace the expiring sales tax, the Board, on November 13, 2014, adopted a resolution requesting that the Baldwin County Commission schedule an election on March 31, 2015, to allow the voters of Baldwin County to vote on the renewal of seven (7) mills of expiring ad valorem tax and to consider eight (8) additional mills of ad valorem tax. In response thereto, the Baldwin County Commission scheduled the requested election on March 31, 2015.

The November 13, 2014 Resolution (attached as Exhibit A) authorized and directed the Superintendent to take all appropriate steps necessary, including the use of Board personnel, property and resources, to educate the voters of Baldwin County and to promote passage of ad valorem measures requested therein. The November 13, 2014 Resolution was drafted in accordance with guidance previously provided by the Alabama Attorney General, which includes, without limitation, the following opinions:

a) In opinion 1996-242 to Governor Fob James, Attorney General Jeff Sessions provided that the precursor to § 17-7-5(a) (then codified at Ala. Code § 17-1-7) did not prohibit the Governor from using the resources of his office for issue advocacy to educate voters on issues of public importance, including urging voters to support proposed Constitutional amendments. Attorney General Sessions found support for his opinion first on the practical ground that "limiting the ability of the Governor to educate legislators and voters about legislative measures needed for the good of the State would clearly impede the work of the Governor in carrying out the duties of that office."

b) Attorney General William Pryor later issued opinion 2003-232 to the State Superintendent of Education, providing that public schools may use public funds and property to advocate on behalf of proposed ballot initiatives.

The law that is the subject of the foregoing Attorney General opinions, which is now codified at Ala. Code § 17-7-5(a)(1975), was in the Code in 2003, and was the very provision considered by the Attorney General in 2003. In 2003, the statute at issue was codified at Ala. Code § 17-1-7(c) and provided as follows:

> "No person in the employment of the state of Alabama, a county, or a city whether classified or unclassified, shall use any state, county, or city funds, property or time, for any political activities."

The statute was amended and recodified in 2010 to expressly cover employees of a local school board and other agencies, but in all other respects remained the same. The statute at issue, as amended and recodified, now appears as Ala. Code § 17-7-5(a) and reads as follows:

> "No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency, whether classified or unclassified, shall use any state, county, city, local school board, or other governmental agency funds, property, or time, for any political activities."

There was no substantive change to the provision. Furthermore, prior to the enactment of the November 13, 2014 Resolution, the Board, through counsel, confirmed that the 2003 opinion remained valid and in force and that it was authoritative. The Board acted in reliance upon the only authoritative interpretation of applicable Alabama law, that being the opinions of the Attorney General.

Prior to the March 31 election, State Auditor Jim Zeigler began questioning and challenging the validity of the 2003 opinion and the expenditure of public funds and requested Attorney General Luther Strange to convene a grand jury investigation. Mr. Zeigler also scheduled a press conference prior to the election to publicize his opposition to the Board's actions and to further encourage investigation by the Attorney General. In response thereto, the Attorney General sent Mr. Zeigler a letter informing him of the continuing validity of the 2003 opinion.

Following the defeat of the proposed millage increase, Mr. Zeigler, along with two other Baldwin County residents filed a complaint in Montgomery County Circuit Court against the Attorney General and the Superintendent and Board members seeking a declaration that the 2003 opinion is invalid and also seeking the four named Board members to personally repay the campaign expenditures made with public funds. The lawsuit did not allege that there had been any personal enrichment or gain to any of the named defendants.

Subsequent to the date the complaint was filed, and prior to this Advisory Opinion being rendered, the Court dismissed the claims against the Superintendent and the members of the Baldwin County Board of Education. However, during that period of time, the Superintendent and the Board members claim they have incurred legal expenses related to the lawsuit.

The Board has previously requested an official opinion from the Attorney General to determine the appropriate standard to be applied by the Board in exercising its discretion, as to whether public funds can be used to defend the Superintendent and the four named Board members. By opinion dated May 15, 2015, the Office of the Attorney General of Alabama opined that the standard as set forth by the Alabama Supreme Court in City of Montgomery v. Collins, 355 So. 2d 1111, is the applicable standard to be used in analyzing the provisions of a defense to the Superintendent and Board members. While the Ethics Commission has no jurisdiction over Title 17 or the Collins case, it is important to this analysis.

What we do have jurisdiction over is the Ethics Act, and the two relevant Code sections are Section 36-25-5(a) and Section 36-25-9(c) which state as follows:

Section 36-25-5(a) states:

"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 36-25-9(c) states:

"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."

On April 8, 1998, the Ethics Commission rendered Advisory Opinion No. 98-21, which held that members of the Legislature could use public funds to pay for their defense when they had been sued in an election challenge if they found a "corporate interest" in doing so.

The Commission cited City of Montgomery vs. Collins and recognized the four issues as established by the Collins case that must be reviewed:

1) It must be in the proper corporate interest to expend its funds for the purpose;
2) That this proper corporate interest depends upon the existence of a risk of future civil litigation against the "public entity" itself, arising out of the same or similar circumstances;
3) The act allegedly committed must be done by the official in the discharge of his or her corporate duties; and,
4) The officers performing these duties must have acted honestly and in good faith.

We have, likewise, recognized the Collins case in other Advisory Opinions, but have disallowed the reimbursement of expenses from public funds absent there being a "proper corporate interest" involved; and when the benefit bestowed was wholly to the individual we have found that a proper corporate purpose does not exist. Specifically, we held that prosecutions for violations of the Ethics Act did not present a "proper corporate interest" given the highly personal nature of the charge and in light of previous formal opinions which had specifically held public money could not be spent in defense of violations of the Ethics Act. See AO-2010-04 (April 7, 2010) ("A member of the Bessemer City Council, who was indicted and prosecuted in her official capacity for violating the Alabama Ethics Act, but who was acquitted of the charges, may not seek reimbursement for payment of her attorneys' fees, expert fees and other fees by the City of Bessemer, as there is no proper corporate interest involved on the part of the City of Bessemer.") See also, AO-97-15. These facts are not presented here, and because the facts alleged in the Complaint filed against the Board relate solely to official decisions and actions of the Board, public interest issues, not personal issues, are implicated.

In City of Montgomery v. Collins, 355 So. 2d 1111 (Ala. 1978), Alabama's Supreme Court held, "It is the opinion of this Court that a municipal corporation has the power to employ counsel to defend city officials, including police officers, in actions brought against the officials, whether civil or criminal, where the corporation has a proper interest in the action, the acts allegedly committed were done by the officials in the discharge of their corporate duties, and the

officials in performing said duties acted honestly and in good faith." The Court held that the expenditure of city funds, even if it benefited individuals, was permissible so long as the benefit inured to the city and was "identified with a public purpose."

The Court further held:

> "Regardless of whether the official was charged by complaint or indictment, it would be within reasonable scope of 'proper corporate interest' for the municipality to attempt to protect itself and its officers against future litigation brought under agency principles by defending their agents against criminal charges arising out of the same general circumstances with a view of obtaining their acquittal and money expended to defend officers was not a grant of public monies 'in aid of, or to any individual' within meaning of constitutional restriction."

This is still the law. Although the City in Collins wanted to use public funds for the defense of someone other than those casting the vote in favor of the action, nothing in Collins or elsewhere deprives the same body of the freedom to decide, in appropriate circumstances, that a lawsuit against themselves based on official acts relates to a "public interest" and we have previously recognized that fact.

The resolution of whether a public interest is involved in this particular lawsuit (as opposed to a purely personal interest), therefore, under the facts as presented rests with the Board, not us. This decision does put the fox in charge of the hen house so to speak, but as Collins notes, "[It is] the power of duly elected municipal officials to exercise their responsibilities in defining their city's 'proper corporate interest;' whether their decision is wrong in this connection is for their constituency to decide." City of Montgomery v. Collins, 355 So. 2d 1111 (Ala. 1978). The same reasoning would apply to the decisions of a public, elected School Board spending public money. We have recognized the authority of Collins on this issue, and it would be improper for us to ignore that case here.

Therefore, the Board must first officially determine whether the lawsuit involves a "proper corporate interest," and must otherwise determine, in an official vote, that the Collins factors are satisfied in order to not be in violation of 36-25-5's prohibition of using office for personal (as opposed to public) gain, and 36-25-9(c)'s prohibition of not voting on a matter in which the individual (as opposed to the public) has a financial interest. If they are satisfied that Collins' criteria have been met, then the Board may, consistent with Collins and our previous Advisory Opinions, use public funds to pay for a legal defense of the members and Superintendent who have been sued without violating the ethics laws. Whether that is a good policy decision is for "their constituency to decide." See Id. Additionally, the board members may vote to allow the legal fees to be expended for their fellow board members, but should abstain from voting on providing attorneys' fees to themselves (if they are brought up as separate

items). While this approach would take several votes to complete and may seem cumbersome or even logically unnecessary, it would be in strict compliance with the clear terms of the statute.

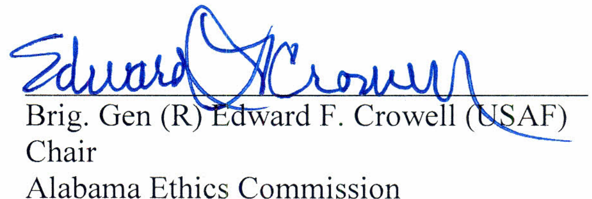
CONCLUSION

Based on the facts provided and the above law, under the circumstances where a proper corporate interest is involved, it would not violate the Alabama Ethics Law for the Board as a whole (including those Board members being sued) to vote for the approval of the expenditure of public monies, assuming the Collins requirements are complied with and assuming that the Board so decides in an official vote.

While it may be logically unnecessary, in order to be in strict compliance with the terms of the Code, each of the seven Board members should abstain from voting on the issue of using public money to pay their legal fees but may vote on the issue as relates to the other members, assuming the matter is brought up as separate action items.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on August 5, 2015.



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Chair
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