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September 1, 2016

ADVISORY OPINION NO. 2016-27

Mr. Mac McArthur
Executive Director
Alabama State Employees Association
110 N. Jackson Street
Montgomery, Alabama 36104

Use Of Office For Personal Gain/Public
Employee Discussing, Applying For,
Interviewing, Negotiating, Or Accepting A
Job With A Lobbyist Or Principal While
Still Employed As A State Employee

A public official or public employee may not solicit a lobbyist for a job or a job interview while employed with the State of Alabama under the provisions of § 36-25-23(c). A public official or public employee may discuss, apply for, interview, negotiate, and accept a job with a principal while still employed with the State, but only if those discussions take place within the parameters articulated herein, and under circumstances which "make it clear" that the job offer is being made for reasons unrelated to the recipient's public service as a public official or public employee.

Dear Mr. McArthur:

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

QUESTIONS PRESENTED

- 1) Is a public employee permitted to discuss, apply for, interview, negotiate, and accept a job with a lobbyist or principal while still employed as a state government employee?
- 2) Is the answer to question #1 affected by whether the public employee initiates the discussions about an employment opportunity or if the lobbyist or principal approaches the public employee about the employment opportunity?

FACTS AND ANALYSIS

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

Mac McArthur is the Executive Director of the Alabama State Employees Association (ASEA). The ASEA is a membership organization comprised of state employees that is directed for and by its members. The members elect the organization's leaders, and the ASEA staff works to achieve the goals that are established by these leaders. They ask for this Advisory Opinion, which implicates Ala. Code §§ 36-25-5, 5.1, 7(a), 13(c), 13(e), 23(c), and what is and is not a thing of value under § 36-25-1(34)(a) and § 36-25-1(34)(b)(10).

In order to seek a private-sector job, and to continue providing for their families during the application process, these public employees, in many instances, continue working for their state government employer while pursuing other opportunities.

Mr. McArthur states that ASEA understands that the Ethics Act prohibits employees from using their public positions as leverage to obtain financial gain for themselves or their family members. They also recognize that the "Revolving Door" provisions of the Ethics Act could apply in some circumstances, but are not directing this request to those situations. However, those issues must be generally addressed as a reminder of the restrictions that apply. Those restrictions, as well, have to be considered when job opportunities arise.

Given the number of public employees in the state, their varied duties, the different potential employers that exist, and the general nature of the questions asked, all we can give at this point is a general response directed to public employees at all levels of government.

Moreover, the Code treats public officials and employees the same under these provisions. Therefore, this analysis should be made in relation to public officials, as well. Taking into account the Code's clear language and the competing interests that the Code requires the Commission to balance, and attempting to give those who are subject to the Act some guidance moving forward, the Commission states the following.

While the Ethics Law puts certain restrictions on what a public employee can do upon leaving the public sector, it is not designed or intended to prohibit their finding employment in the private sector. There are currently 800 registered principals in Alabama, and the list includes most major employers, municipalities, and charities in the state. Determining that neither public employees nor the members of their family can seek employment from private employers would be unreasonable, and the Code's clear language does not support that conclusion. Requiring them to quit their job before searching for another job is unreasonable, as well. At the same time, serious issues arise under the Ethics Laws when a public official or employee seeks or accepts a job with a principal with business before the Legislature or the State.

Ala. Code § 36-25-2(b) attempts to balance these competing objectives in providing the Legislative purpose for the Ethics Act: "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 interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Public officials and employees may seek other employment, but the circumstances under which they may do so are guided by several statutory provisions.

Ala. Code § 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."

Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not for the purpose of corruptly influencing official action.

Ala. Code § 36-25-13(c) prohibits them from lobbying or otherwise representing clients, including their employer before the board, agency, commission, or department of which they are

a former employee for a period of two years after leaving that public employment. Therefore, whenever a public employee accepts a job in the private sector, he or she is prohibited from representing his or her new employer before their old, public employer for a period of two years.

Ala. Code § 36-25-13(e) states that “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.” Public employees cannot solicit or accept employment from these prohibited employers.

Ala. Code § 36-25-23(c) prohibits a public official or employee from soliciting any lobbyist to give anything, whether or not it is a thing of value, other than a campaign contribution.

Beginning first with lobbyists, under the plain language of this provision neither a public official nor public employee may solicit a lobbyist for a job or a job interview while employed with the State.

Turning to principals, Ala. Code § 36-25-5.1 states, “No lobbyist, subordinate of a lobbyist, or principal shall offer or provide a **thing of value** to a public employee or public official or to a family member of the public employee or family member of the public official; and no public employee or public official or family member of the public employee or family member of the public official shall solicit or receive a **thing of value** from a lobbyist, subordinate of a lobbyist, or principal.” (Emphasis added)

Ala. Code § 36-25-1(34)(a) defines “thing of value” to include, among other things, a “promise of future employment.” Ala. Code § 36-25-1(34)(b)(10) provides as an exception to the definition of “thing of value” “compensation and other benefits earned from a non-government employer, vendor, client, **prospective employer, or other business relationship** in the ordinary course of employment or non-governmental business activities **under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient’s public service as a public official or public employee.**” (Emphasis added)

Regarding when a promise of future employment or other business relationship qualifies as a thing of value, the Commission will consider whether the exception in Ala. Code § 36-25-1(34)(b)(10) applies. That is, the Commission will ask whether the “promise of future employment or other business relationship” is made “under circumstances which make it clear that the thing is provided for reasons unrelated to the recipient’s public service as a public official or public employee.” In some cases this would be a relatively simple inquiry (for example, if a state-employed secretary takes a job for more money in the private sector, so long

as the job offer was not designed to influence official action or to violate some other section of the Ethics Act). In some cases, it would be a more difficult analysis such as when a public official seeks employment but intends to remain in public service.

In that vein, principals, public officials, and public employees should ensure that any promise of future employment does not violate Ala. Code § 36-25-7(a), which prohibits giving or receiving any thing for the purpose of corruptly influencing official action. Likewise, public officials and employees should heed Ala. Code § 36-25-5(a) which prohibits public officials and public employees from using their office for private gain on behalf of those people or entities who have offered them employment or another arrangement before leaving State service.

In addition to those restrictions, any promise of future employment from a principal must meet the “compensation and other benefits” exception in Ala. Code § 36-25-1(34)(b)(10). A promise of future employment that does not meet this exception would violate Ala. Code § 36-25-5.1(a), which prohibits soliciting or receiving a thing of value from a principal. In weighing whether the exception has been met, the Commission will look for facts that “make it clear” that the “thing” is provided for reasons unrelated to the recipient’s public service as a public official or public employee (or that of the relevant family member).

When considering this limited exception to the definition of “thing of value,” the Commission will consider the following factors to be relevant to this analysis:

1. Whether the public official or public employee intends to remain in public service;
2. A comparison of the “thing” being offered in relation to the recipient’s education and work history, including demonstrated skills, professional licensing, length of time or expertise in the relevant field, and recency of that expertise;
3. The amount of “compensation and other benefits” being offered compared to what is customarily offered for the same or similar services;
4. The amount of time expected to be given in return for “the thing” (for example, full time employment, part-time employment, or as-needed), taking into account the public official or public employee’s public responsibilities and other private business obligations;
5. Whether the “thing” was made generally available to other potential recipients other than the public official or public employee (for example, if the “thing” is an offer of future employment, whether the position was advertised and if so, how extensively; if it was not advertised, an explanation of why it was not advertised), and whether it is a newly created or changed position;

6. Whether the offer of the “thing” may create an irreconcilable conflict of interest for the public official or public employee;
7. Whether the position has objective measurements of job performance, considering the job description and evaluation standards or benchmarks;
8. The extent to which the duties and responsibilities of the public official or public employee’s public position and the thing offered may overlap;
9. Whether the public employee personally participated in the direct regulation, audit or investigation of the potential employer so as to trigger 13(e)’s prohibition; and
10. The principal’s current and recent governmental interests, the principal’s lobbyist’s activities, and the public official or public employee’s public or political interests, including any overlap and significant past official interactions, activities, or relationships between them.

The above list is not an exhaustive list of criteria, and each “thing” that may be an exception as contemplated in Ala. Code § 36-25-1(34)(b)(10) should be analyzed on its own set of facts. This standard applies even if the expected work will take place outside the State of Alabama. This Opinion creates no presumptions, and it is not a checklist that if satisfied gives any legal protection based on the offer or receipt. It simply sets out what those people and entities covered by the Ethics Act should consider as opportunities arise. These are, as well, factors that the Commission will consider upon requests for future Advisory Opinions on this exception and which it will address in response to those requests. Finally, these are the criteria the Commission will use to analyze allegations of violations of the above Code sections when raised.

CONCLUSION

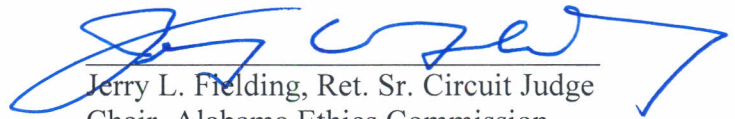
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The effective date of this opinion is delayed for 30 days to allow for a period of public comment, after which time the Commission may modify the Opinion or confirm it in its present form.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on September 1, 2016.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair, Alabama Ethics Commission