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October 5, 2016

ADVISORY OPINION NO. 2016-34

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Use Of Office For Personal Gain/Holiday Gifts To Teachers

To the extent that portions of Advisory Opinion No. 2011-12 can be read as continuing the per se prohibition on all individuals and organizations – not just principals, lobbyists or subordinates of lobbyists – providing a “thing of value” to any public official or employee in this state, those portions are overruled.

The Commission will continue to recognize the exceptions found in Ala. Code § 36-25-1(34)(b) to be a “safe harbor” for public employees and officials, but public employees and officials are no longer bound by those exceptions outside the clear context of Section 5.1. The prohibitions of Sections 5, 7 and 23(c) remain as they always have.

ISSUE PRESENTED

The application of Ala. Code § 36-25-5.1 generally, and specifically within the context of holiday gifts given to teachers who are by definition “public employees” under the Ethics Act.

FACTS AND ANALYSIS

Although the present Opinion specifically addresses the context of public school teachers and holiday gift giving, it applies equally to public officials and employees outside of that context. As the Commission has consistently held, the Code does not draw distinctions among classes of public employees or officials so neither can the Commission.

The teacher gift scenario, however, illustrates the problems that can be created when applying Section 5.1 outside its clear language. For that reason, it is a good example to use here and one that is often raised. In that regard and historically speaking, students (along with their parents) customarily give holiday gifts to teachers. The portion of the Commission's decision in AO 2011-12 regarding holiday gifts for teachers, however, has generated much comment and confusion regarding the parameters within which public school teachers in Alabama, who are "public employees," can accept holiday gifts from students in their class. The Legislature's attempt to address this confusion following the issuance of AO 2011-12 by establishing a definition of de minimis helped but has not eliminated the uncertainty about this topic. Moreover, it has not eliminated the persistent criticism that in this context the Code punishes a group of public employees in a way not contemplated at passage, when it is read to state that students and their parents can never give a teacher a gift, the value of which exceeds \$25.00.

The relevant Code sections are:

Ala. Code §§ 36-25-5(a) and (e) which state,

"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..." (Emphasis added.)

"**No** public official or **public employee** shall, other than in the ordinary course of business, **solicit** a thing of value **from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity.**" (Emphasis added.)

Ala. Code § 36-25-5.1(a) which 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.** Notwithstanding the foregoing, a lobbyist, or principal may offer or provide

and a public official, public employee, or candidate may solicit or receive items of de minimis value.” (Emphasis added.)

and Ala. Code § 36-25-7(a) which states,

“**No person** shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall **solicit or receive anything for the purpose of corruptly influencing official action**, regardless of **whether or not the thing solicited or received is a thing of value.**” (Emphasis added.)

Finally, Ala. Code § 36-25-23(c) states that no public employee or official can solicit anything at all, whether it is a “thing of value” or not, from a lobbyist.

To the extent portions of AO 2011-12 can be read as continuing the per se prohibition on *all* individuals and organizations – not just principals, lobbyists or subordinates of lobbyists – providing a “thing of value” to any public official or employee in this state, those portions are overruled. In AO 2011-12, the Commission relied on its longstanding “personal gain / thing of value” approach in applying the Section 36-25-5(a) “use of office for personal gain” restrictions. That approach had been followed for many years prior to 2010. Following the 2010 revisions to the Act and the addition of Section 36-25-5.1, however, that well-intended approach to interpreting the Section 36-25-5(a) “use of office for personal gain” restrictions is no longer warranted and has only led to confusion as to the relationship between Sections 5(a) and 5.1(a).

The analysis for when public employees and officials can solicit or receive any gift is governed by the above Code sections and their language binds the Commission. The clear terms of Section 5.1 apply only to the relationship between lobbyists, subordinates of lobbyists, principals and public employees/officials and their families. Therefore, unless falling within one of Ala. Code § 36-25-1(34)(b)’s exceptions (such as the \$25.00 de minimis exception), no public official or employee (including teachers) can either solicit or receive gifts from lobbyists, subordinates of lobbyists, or principals (defined as “[a] person or business which employs, hires or otherwise retains a lobbyist.” Ala. Code § 36-25-1(27)). See also AO 2016-24 defining “principal.”

Moreover, no public employee or official can solicit a gift from anyone who is his or her “subordinate” or anyone whom they inspect, regulate or supervise in their official capacity or through some act use their position to obtain a gift without violating Sections 5(a) and 5(e). In the teacher-student context, this would include soliciting gifts from students in their class or their parents, or initiating the idea of gift giving, which would be a use of official position for personal gain. No public employee or public official (which includes teachers) can solicit or receive anything at all from anybody for the purpose of corruptly influencing official action (for

example, in the context of teachers, better test grades, recommendations, etc.). Finally, no public official or employee can solicit anything from a lobbyist whether it is a “thing of value” or not without violating Section 23(c).

In the context of teacher gifts, most relationships will likely fall outside the language of Section 5.1. In order to make application of this Opinion less complicated to relationships or in scenarios in which it is difficult to easily discern whether Ala. Code § 36-25-5.1 applies, however, the Commission will continue to recognize the exceptions found in Section 36-25-1(34)(b) to be a “safe harbor” for public employees and officials, absent facts supporting violations outside of Section 5.1, but public employees and officials are no longer bound by those exceptions outside the clear context of Section 5.1. The prohibitions of Sections 5, 7 and 23(c) remain as they always have.

The Commission offers the following guidelines which it hopes give some practical guidance in how to approach this issue moving forward:

1. The Ethics laws have as their purpose the prevention of official corruption. Therefore, with that purpose in mind and outside of the Act’s clear prohibitions, the relative positions of the giver and the recipient are relevant, including whether their relationship presents an opportunity for corruption. Again, in the context of teacher gifts, and from the perspective of where the risk for official corruption lies, a school custodian, or support staff such as cafeteria attendant, school nurse, secretary, who work at the same school the student attends are in a different position relative to the student than is the student’s classroom teacher, principal, or guidance counselor;
2. The public employee/official may not initiate the idea of gift giving;
3. The value/amount/nature of the gift and the facts surrounding the giving and receipt of the gift are relevant. The Commission presumes, even in the context of Sections 36-25-5 and 36-25-7, however, that gifts with a value that falls under the “de minimis” definition are not a “personal gain” and are not being given for the purpose of corruptly influencing official action absent additional facts indicating such a motive or gain. For that reason, in situations that are less than clear, the best course of action remains keeping the gift under the “de minimis” amount. That being said, and again in the teacher context, a solicitation of \$1.00 in exchange for “extra credit” etc., or any other official action, remains a violation of the Act as it has been historically. Again, the facts are relevant;

4. When the facts make it clear that the gift is not in exchange for any action, inaction, or decision by the teacher in the discharge of his or her official duties, then those facts mitigate against a finding of an attempt to corruptly influence official action;
5. This Opinion should not be interpreted to imply that the Commission thinks that this is an area in which public officials and employees should not exercise proper judgment. For that reason, and in the context of public school employees in Alabama, all school boards in the state are encouraged to develop a formal policy regarding the practice of holiday gift giving that takes into account the specific characteristics of their school community, traditions, etc. in an attempt to prevent violations, as well as the perception of violations, as long as in doing so they do not allow conduct which the Ethics Act specifically prohibits.

CONCLUSION

To the extent that portions of Advisory Opinion No. 2011-12 can be read as continuing the per se prohibition on all individuals and organizations – not just principals, lobbyists or subordinates of lobbyists – providing a “thing of value” to any public official or employee in this state, those portions are overruled.

The Commission will continue to recognize the exceptions found in Ala. Code § 36-25-1(34)(b) to be a “safe harbor” for public employees and officials, but public employees and officials are no longer bound by those exceptions outside the clear context of Section 5.1. The prohibitions of Sections 5, 7 and 23(c) remain as they always have.

Given the nature of this Advisory Opinion and the fact that it is self-generated, we are delaying the effective date of the opinion until our December 7, 2016 meeting to allow for a period of public comment, at which time we may modify the opinion or confirm it in its present form.

AUTHORITY

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


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