



# STATE OF ALABAMA ETHICS COMMISSION



## COMMISSIONERS

Jerry L. Fielding, Ret. Sr. Circuit Judge, Chair  
Frank C. "Butch" Ellis, Jr., Esq., Vice Chair  
James Jerry Wood, Esq.  
Stewart Hill Tankersley, M.D.  
Charles Price, Ret. Circuit Judge

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

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

Thomas B. Albritton  
Executive Director

TELEPHONE (334) 242-2997  
FAX (334) 242-0248

WEB SITE: [www.ethics.alabama.gov](http://www.ethics.alabama.gov)

April 26, 2017

## ADVISORY OPINION NO. 2017-03

Ms. Jackie Graham  
State Personnel Director  
State Personnel Department  
300 Folsom Administrative Building  
Montgomery, Alabama 36130-4100

Revolving Door/Retired State Employees  
Returning To State Service

Persons employed in the classified service, who are selected for appointment pursuant to the Merit System Act, are not public officials for purposes of the Alabama Ethics Law.

A public employee, regardless of their job title, who held a position of authority with discretionary responsibilities within that agency, may not be rehired by that agency as a Retired State Employee within the two-year period set out by the "Revolving Door" provisions of the Alabama Ethics Law.

Under the "Revolving Door" provisions, there is a per se prohibition against department heads and other enumerated categories of employees being hired back by their former agency for a period of two years. Other employees who held positions of authority may not be hired back for a period of two years as determined by the particular job responsibilities of the employee and the discretion contained therein.

Dear Ms. Graham:

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) Does the definition of “public official,” Ala. Code § 36-25-1(27), include persons employed in the classified service (i.e., “merit-system employees”) who are selected for appointment pursuant to the Merit System Act, Ala. Code § 36-26-1, *et seq.*?
- 2) Can a public employee, who held a position of authority in the agency, be rehired with the same agency by contract as a Retired State Employee, or by any other mechanism, within a two-year period without violating the “Revolving Door” provisions of the Alabama Ethics Law?
- 3) Are only Department Heads and Deputy Department Heads considered occupying positions of authority, or are division directors and other high level employees that make decisions concerning their areas of responsibility also considered to hold a position of authority?

### **FACTS AND ANALYSIS**

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

In an effort to assist State agencies, the State Personnel Board established a job classification of “Retired State Employee.” This classification allows individuals who have retired from the State to return to work on a part-time basis, subject to a statutory salary cap. Employees in this classification do not accrue any benefits such as leave or retirement. Questions have arisen as to the application of the State Ethics Law “Revolving Door” provisions to this classification.

The State Personnel Department understands that the “Revolving Door” provisions prohibit all individuals in positions of authority from returning in any manner to the agency for a two-year period, including as a Retired State Employee. Some agencies disagree with this interpretation and take the position that the Revolving Door provisions only prohibit public officials, not public employees, from re-employment with the same agency, even if the employee occupied a position of authority.

Further, other agencies take the position that the Revolving Door provisions only prohibit public employees from representing clients or employers before the agency of which he or she was a former employee for a two-year period, as set out in Section 36-25-13(c), and are not applicable to re-employment with the same agency. Because the State Personnel Department is responsible for the creation of the Retired State Employee classification and for certifying these individuals to the agencies for potential employment, Ms. Graham requests that this difference of opinion be resolved. Ms. Graham specifically states that this request for an Opinion is not intended to address Act No. 2016-128.

The State Personnel Department also requests clarification as to the scope of provisions that apply by their terms only to public officials and not to public employees. Under the Ethics Law, the term “public official” includes not only elected officials, but also any person “appointed to a position” in state or local government. They point out that Ala. Code § 36-26-17, relating to the filling of vacancies within the State’s classified service, also referred to as the Merit System, likewise uses the phrase “appointed.” They further point out that Merit System employees are officially hired by a “Letter of Appointment” signed by an “appointing authority” pursuant to Ala. Code § 36-26-2(1). The question, therefore, becomes whether all State Merit System employees, because they are appointed to a position in State employment, are subject to the Ethics Law provisions that relate to “public officials.”

Ala. Code § 36-26-17 sets out the manner of filling vacancies in the classified service. It states that “[v]acancies in the classified service shall be filled either by transfer, promotion, appointment, re-appointment, or demotion.” It further states that “[w]henever a vacancy is to be filled by appointment, the appointing authority shall submit to the Director a statement of the title of the position, and if requested by the Director to do so, the duties of the position and desirable qualifications of the person to be appointed, and a request that the Director certify to him the names of persons eligible for the appointment to the position. The Director shall thereupon certify to the appointing authority the name of the ten ranking eligibles from the most appropriate register ...”

Ala. Code § 36-25-1 defines a “public official” as “[a]ny person elected to public office...at state, county or municipal level of government...and any person appointed to a position at the state, county or municipal level of government.” This same section defines a “public employee” as “[a]ny person employed at the state, county, or municipal level of government...who is paid in whole or in part from state, county, or municipal funds....”

A “public official” subject to the Ethics Act is either elected by the people or appointed by a governmental official or entity to a position of authority or appointed to serve a term certain on a particular governmental board, agency or commission. By way of example, the Governor, members of his cabinet, and high ranking officials in his office, such as the Chief of Staff and Chief Legal Advisor would be considered public officials. Members of the Alabama Ethics Commission are appointed by the Governor, Lt. Governor, and the Speaker of the House to serve

a five-year term. They are public officials. Other examples are members of local Planning and Zoning Boards, members of Airport Authorities, members of the State Personnel Board who are appointed to serve in those roles but are not “employed” by these agencies.

In the context of Ala. Code § 36-26-17, the word “appointment” can be used interchangeably with the phrase “employed from a register.” In fact, in order to be appointed to a position in the Merit System, the individual must come from an “employment register.” Persons “appointed” under the Merit System are not appointed for a term certain, but are hired to do a job and can only be terminated “for cause.” Individuals appointed to the unclassified service serve at the pleasure of the appointing authority. Unclassified employees, like classified employees, are subject to the State Personnel Board Rules for all purposes except for appointment and dismissal. Unclassified employees are “employed” which brings them within the definition of “public employee.” These employees are also considered “employed” and should be considered “public employees.” Therefore, any person appointed to State service pursuant to Ala. Code § 36-26-17 is not a “public official” as contemplated in Ala. Code § 36-25-1. Also in State service are “exempt” employees as defined in Ala. Code § 36-26-10. These employees can be either a “public official” or a “public employee” depending on whether they were hired, appointed by a government official, or elected. The test under “Revolving Door” will be whether they hold a position of authority.

They next ask, “[c]an a public employee, who held a position of authority in the agency, be rehired with the same agency by contract, as a Retired State Employee, or by any other mechanism, within a two-year period, without violating the “Revolving Door” provisions of the Alabama Ethics Law?” and “[a]re only Department Heads and Deputy Department Heads considered occupying positions of authority, or are division directors and other high level employees that make the decisions concerning their areas of responsibility, considered as occupying a position of authority?”

The relevant Code section is Ala. Code § 36-25-13(d), which states in pertinent part:

“Except as specifically set out in this section, no public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency.”

In answer to the first question, the Commission has consistently recognized that public employees are included in the prohibition on re-hiring if they were in a position of authority with their former employer.<sup>1</sup> The reference to “any person” in the statute means just that, any person who performs any of the tasks enumerated in § 36-25-13(d) is prohibited from being hired back for two years after leaving employment.

The clear terms of the section apply, as well, to the following job classifications: public officials, directors, assistant directors, department or division chiefs, purchasing and procurement agents, “any person” who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates contracts, grants or awards. To directly answer the second question, a “division director” is essentially a “division chief” and comes under the clear terms of the statute. The questions ask, however, for guidance on the larger issue of what is meant by “position of authority” and that issue goes to the second part of the Requestor’s last question.

The “Revolving Door” statute applies to all levels of public service—state, county and local. Applying these classifications statewide and at all levels of government, however, is often difficult. It is generally difficult to answer questions for individuals coming from agencies that do not have employees classified as “division chiefs,” but who nonetheless have positions of authority that operate as “division chiefs” normally do. Likewise, it is often difficult to articulate to what degree one’s “participation in contract negotiations” triggers the application of § 36-25-13(d) to those who “participate in the negotiation or approval of contracts, grants or awards.”

There have been many opinions, going back to 1987, that have addressed these issues within the Revolving Door provision of the Act. The Commission has historically, and consistently, held that those individuals who hold “positions of authority” generally fall within the prohibitions of § 36-25-13(d). There have been 45 Advisory Opinions issued regarding “positions of authority,” and over time the sheer volume of opinions and the varying fact situations has made application of the section more difficult than is necessary. Therefore, the Commission has reviewed the opinions to distill the factors that Commissions over the years have consistently endorsed as being indicative of the traits of positions which are “positions of authority” sufficient to trigger the application of § 36-25-13(d), outside of the clearly-stated classifications. What follows is not an all-inclusive list and ultimately it is an issue that is decided on a case-by-case basis. Nonetheless, the following factors should be helpful for guidance in applying Section 36-25-13(d) moving forward and in understanding how the Commission views the phrase “position of authority”:

The question to be asked is whether the position possesses any of the following discretionary responsibilities:

---

<sup>1</sup> See, e.g., Advisory Opinions 1998-44, 1998-35, 2001-01, 2004-14, 2006-12, 2014-08

1. Hiring/firing authority or the ability to influence hiring or firing decisions<sup>2, 3</sup>
2. Authority to make recommendations regarding hiring or firing<sup>4,5,6</sup>
3. Purchasing or contracting authority or the ability to influence those decisions<sup>2,3</sup>
4. Authority to make decisions regarding or to influence the awarding of grants or other awards<sup>2,3</sup>
5. Whether the individual was the employer's designated agent with authority to accomplish any of the prescribed actions in § 36-25-13(d)<sup>2,7,8</sup>

Therefore, an individual who may not fall within the specific classifications in the statute, but nonetheless falls within the guidelines established for a "position of authority" may not be rehired by the same agency as a Retired State Employee within the two-year period set out in the Revolving Door. They are not prohibited, however, from being rehired as a Retired State Employee with another State agency.

This Opinion request arose from conflicting advice regarding the Ethics Act being rendered by agencies other than the Ethics Commission. Although the Commission is not the only agency that can express an opinion on this issue, public employees and public officials should remember that an interpretation of the Ethics Act rendered by another agency or individual does not provide the same legal protection as an Advisory Opinion issued by the Commission.

### CONCLUSION

Persons employed in the classified service, who are selected for appointment pursuant to the Merit System Act, are not public officials for purposes of the Alabama Ethics Law.

A public employee, regardless of their job title, who held a position of authority with discretionary responsibilities within that agency, may not be rehired by that agency as a Retired State Employee within the two-year period set out by the "Revolving Door" provisions of the Alabama Ethics Law.

Under the Revolving Door provisions, there is a per se prohibition against department heads and other enumerated categories of employees being hired back by their former agency for a period of two years. Other employees who held positions of authority may not be hired back for a period of two years as determined by the particular job responsibilities of the employee and the discretion contained therein.

---

<sup>2</sup> Advisory Opinion 98-35, July 1, 1998

<sup>3</sup> Advisory Opinion 98-44, November 4, 1998

<sup>4</sup> Advisory Opinion 99-44, October 6, 1999

<sup>5</sup> Advisory Opinion 00-52, September 6, 2000

<sup>6</sup> Advisory Opinion 03-30, June 4, 2003

<sup>7</sup> Advisory Opinion 03-47, October 1, 2003

<sup>8</sup> Advisory Opinion 06-06, April 5, 2006

**AUTHORITY**

By 4-0 vote of the Alabama Ethics Commission on April 26, 2017.

A handwritten signature in blue ink, appearing to read "Jerry L. Fielding", is written over a horizontal line.

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