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August 16, 2017

ADVISORY OPINION NO. 2017-11

Mr. Steve Gamble
Right of Way Acquisition Manager
Alabama Department of Transportation
2301 County Road 504
Hanceville, Alabama 35077

Revolving Door/Employee With The Alabama Department Of Transportation (ALDOT) Providing Right of Way Consulting Work For Engineering Firm Contracting With The Department Of Transportation.

A former Right of Way Acquisition Manager for ALDOT may accept employment from an engineering firm that contracts with ALDOT as he did not participate in the direct regulation, audit, or investigation of that engineering firm and did not interact with the firm during the course of his employment with ALDOT.

A former employee of ALDOT may not represent back before ALDOT for a period of two years per Ala. Code § 36-25-13(c).

A former employee of ALDOT may discuss, apply for, interview, negotiate, or accept a job from a principal, in this case, Volkert, when

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the facts “make it clear” that the future employment falls within the “compensation and other benefits” exception in Ala. Code § 36-25-1(34)(b)(10).

Dear Mr. Gamble:

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.

QUESTION PRESENTED

Upon retirement, may a Right of Way Acquisition Manager with the Alabama Department of Transportation (ALDOT) accept employment to perform right of way consulting work with an engineering firm that contracts with the Alabama Department of Transportation to perform design work?

FACTS AND ANALYSIS

You are contemplating retirement from the Alabama Department of Transportation (ALDOT) after 33 years of service and are considering employment with a ROW consulting company, working on local public agency projects.

You are currently employed as a Right of Way Acquisition Manager for the Alabama Department of Transportation (ALDOT) in the Tuscaloosa Area of the West Central Region. As a Right of Way Acquisition Manager, your responsibilities are as follows: review and supervise all phases of the right of way acquisition process, including engineering, appraisals, negotiations, relocations, and condemnation; monitor and supervise right of way staff in the preparation of right of way maps, deeds, court sketches, appraisals, and appraisal reviews; coordinate and make assignments for the negotiations and relocations involved in right of way projects, meet with public officials, property owners, and departmental personnel concerning right of way projects; conduct and attend meetings on the legal aspects of the right of way acquisition process; prepare, review, and submit cost estimates and right of way budgets for ALDOT Right of Way Bureau’s approval to establish monies to pay appraisers, court costs, and property owners in the process of right of way acquisition; and operate and maintain state equipment including vehicles to attend required meetings and visit job sites.

In June of this year another Right of Way Acquisition Manager was assigned these duties for the West Central Region and your duties were changed to the equivalent of an “assistant” Right of Way Acquisition Manager making sure the office runs smoothly and doing research on old projects. You do not make any monetary recommendations or decisions. ALDOT does not use outside contractors for any of their right of way acquisition work, with the exception of appraisers. ALDOT uses certified fee appraisers on a personal service contract basis for valuations on more complex properties. You are not an appraiser and will not be doing any appraisal work.

You do not make any decisions as to which projects are selected for construction. All decisions as to which properties and how much of each property that are slated for acquisition are made by design engineers. Those design engineers either contract with ALDOT or are employed by ALDOT. You have no direct interaction with the design engineers as part of your responsibilities as a Right of Way Acquisition manager and do not participate in the contract negotiations or solicitations between ALDOT and the engineering firm. Although the company from which you are seeking employment, Volkert, contracts with ALDOT as design engineers, they do not contract with ALDOT regarding right of way acquisitions. You have had no interaction with this company in the course of your employment with ALDOT. You have never regulated, audited, or investigated the employer from whom you are seeking employment. You will not work on any project in which the state is a party or in which you personally participated as an ALDOT employee. Volkert is a registered principal.

Volkert is currently working on a project for the City of Huntsville. You would be presenting approved offers for right of way acquisitions to property owners. Your job would be to communicate with the engineering firm for whom you are working and determine what the client, in this case, the city of Huntsville, will pay a property owner for a Right of Way and then go and negotiate with that landowner on behalf of your employer. Your employer will never own the Right of Way, but they are facilitating the reimbursement for property on behalf of their client, the City of Huntsville. ALDOT North Region personnel have oversight review over the project because the project is funded in part by federal money. You have had no professional interaction with the engineering firm during the project in the City of Huntsville or otherwise. There is potential for interaction between you and ALDOT during the course of your new employment, but you would not be regularly interacting with anyone from ALDOT.

The Right of Way Acquisition Manager for ALDOT is a public employee as defined in Ala. Code § 36-25-1(26) and therefore subject to the “Revolving Door” provisions of the Ethics Act in Ala. Code § 36-25-13 as set out below:

(c) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee or worked pursuant to an arrangement such as a

consulting agreement, agency transfer, loan, or a similar agreement for a period of two years after he or she leaves such employment or working arrangement. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.

(e) 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.

This question has been answered previously in Advisory Opinion 1997-58:

A former Drafting Section Supervisor with the Alabama Department of Transportation may accept part-time employment providing drafting work with an engineering firm that contracts with the Department of Transportation as he did not personally participate in the direct regulation, audit, inspection, or investigation of the engineering firm while employed with the Department of Transportation, nor was he involved in the negotiation, solicitation, or approval of contracts between the Department of Transportation and the engineering firm for which he intends to go to work.

Based on the fact that you did not interact with the engineering firm or participate “in the direct regulation, audit, or investigation of” the engineering firm, you may accept employment with the engineering firm. It should be noted that Ala. Code § 36-25-8 prohibits any public employee or public official from using confidential information gained in the course of employment for their personal financial gain for a period of 4 years. Therefore, if there is confidential information that was obtained during the course of your employment with ALDOT, you may not use that information in your new position with the engineering firm. Finally, you may not work on any project in which the state is a party and in which you personally participated as an ALDOT employee.

A former employee of ALDOT may NOT represent back before ALDOT for a period of 2 years per Ala. Code § 36-25-13(c). This includes any communications or discussions with ALDOT representatives whether in person, on the phone, electronic, or written communication. If there is a need for such communication, that must be done by another representative of the engineering firm.

Ala. Code § 36-25-5.1 restricts principals from offering a thing of value to a public employee as well the solicitation of a thing of value by a public employee from a principal. The company at issue is a registered principal. In Advisory Opinion 2016-27, the Commission set out relevant factors in determining whether an offer of future

employment falls under the exception set out in §36-25-1(34)(b)(10) as being “compensation and benefits.” These factors are intended to give guidance in determining if the facts “make it clear” that the offer of employment is unrelated to your public service as a public employee.

1. Whether the public official or public employee intends to remain in public service;

You do not plan to remain an employee of ALDOT if you get a favorable ruling from the Ethics Commission. You plan to retire. You are seeking a ruling by the Ethics Commission in an effort to have the flexibility to explore all options that might be possible after retirement.

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:

You have 33 years of experience in many phases of the ROW process and are currently working in that field.

3. The amount of "compensation and other benefits" being offered compared to what is customarily offered for the same or similar services;

You understand that you would be paid an hourly rate of \$40/hour for your work which is the same as what a current temporary employee of the company makes. She has twenty-five years of experience in the right of way acquisition field, none of it as a public employee. No formal offer of employment has been presented to you by the company. You reached out to them to see what opportunities could be out there for you after retirement. You will be paid no more than any other consultant working in the same capacity.

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;

You would be a full-time employee with the company and not be doing any work for ALDOT. As you understand, you will be considered a Temporary Employee. This means you will be working assignments as they come along and will give them the time needed to complete each assignment. You will be paid no more

than other Temporary Employees of the company and will be offered no benefits package of any kind.

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;

The company let you know during discussions with them that they needed and were looking for a good qualified negotiator for this project. You do not know the extent, if any, of any advertising they did for it.

6. Whether the offer of the "thing" may create an irreconcilable conflict of interest for the public official or public employee;

The "thing" will not create an irreconcilable conflict of interest because you would just be working for the company on non-ALDOT projects if you get a favorable determination from the Commission.

7. Whether the position has objective measurements of job performance, considering the job description and evaluation standards or benchmarks;

The position you are seeking will be as a Negotiator only under an agreement which you presume would be terminable at will.

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:

The duties do not overlap because you would be working exclusively for Volkert and would have no official duties with ALDOT any longer.

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;

You have not participated in, nor do you intend to participate in any direct regulation, audit or investigation of the company.

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;

Volkert regularly engages in projects with governmental entities, and regularly works with ALDOT, but beyond that you are unaware of their governmental interests. Again, you are leaving public service and there will be no overlap if you go work for them.

Based on an analysis of these facts, it seems “clear” that your discussions with this company are not related to your public service as a public employee aside from the fact that your 33 years of experience comes from your work as a public employee with ALDOT.

CONCLUSION

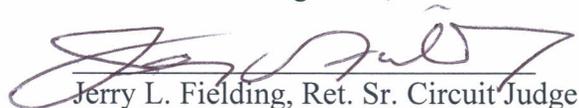
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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on August 16, 2017.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
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