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October 4, 2017

ADVISORY OPINION NO. 2017-12

Mr. Michael G. Kendrick
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2323 2nd Avenue North
Birmingham, Alabama 35203

Conflict of Interest/Members of the Board of Trustees or employees of the University of West Alabama serving on the Board of Directors of a charter school located on the University campus

Members of the Board of Trustees or employees of the University of West Alabama may serve as a member of the governing body (Board of Directors) of the 501(c)(3) corporation authorized by the Alabama Public School Charter Commission to operate a charter school. However, members of the Board of Trustees or employees while serving on the charter school Board of Directors cannot use their position with the University or the charter school to provide personal gain for themselves, their family, or any business with which they are associated.

Dear Mr. Kendrick:

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.

QUESTION PRESENTED

May members of the Board of Trustees and/or employees of the University of West Alabama serve on the governing body (Board of Directors) of a 501(c)(3) corporation affiliated with the University of West Alabama for the purpose of assisting in the filing of an application with the Alabama Public Charter Schools Commission, and which Board of Directors of the charter school shall oversee the operations of the charter school?

FACTS AND ANALYSIS

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

The University of West Alabama Board of Trustees has adopted a resolution exploring the possibility of the formation of a charter school. The University's Administration is in the process of evaluating and compiling information to present to the Board relating to that application. Charter school formation and administration is governed generally by Ala. Code §§ 16-6(f)-1 through 11. They ask these questions given the relatively new nature of charter schools in Alabama.

The University of West Alabama, a public university, was involved in the application for a charter school to be located on its campus. The application process for a charter school requires the formation of a 501(c)(3) corporation. At least 20% of the membership of the Board of Directors of the 501(c)(3) must include parents of students to be enrolled in the proposed charter school. They ask whether any conflicts of interests would arise as a result of an employee of the University or a member of the Board of Trustees of the University serving as member of the Board of Directors of the 501(c)(3) corporation which will be the governing body of the charter school. The members of the Board of Directors of the charter school would serve without compensation, but may be reimbursed for reasonable expenses incurred in the performance of their duties as members of the Board of Directors of the charter school. This has been verified by the Commission. A Charter was granted to the University Charter School in June of 2017 by the Alabama Charter School Commission.

Even though the charter school will be affiliated with the University of West Alabama, the University will not regulate the charter school. The Board of Directors of the University Charter School will be responsible for setting policy for the charter school. They will hire the administration and will oversee activities, as any Board of Directors would do; however, the day-to-day operations would be in the hands of the staff. The charter school will be located on the University of West Alabama campus. In addition, the University has decided that any employee of the University who serves on the Board of Directors of the charter school will conduct all charter school business on their own time, and there will be no resources of the University of West Alabama used to assist them in carrying out their school board responsibilities.

Members of the Board of Trustees for the University of West Alabama are public officials as defined by the Ethics Law, and the University's employees are public employees as defined by the Ethics Law. Anyone appointed to the charter school board would likewise be a public official. Membership on the Board of Directors of a charter school makes the charter school by definition a "business with which the person is associated," as well. (See Ala. Code §§ 36-25-1(2), (26) and (27)).

A conflict of interest is defined in Ala. Code § 36-25-1(8) as,

A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs.

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.

There is no inherent conflict of interest in the proposed structure, and the Commission has not been asked to determine whether a conflict exists in any specific scenario. Charter schools, by statute, are public schools. We have generally recognized a difference in private and public entities when applying Ala. Code § 36-25-5, and have held that using your position to benefit a public entity generally does not raise concerns under Section 5 because the public entity is not a "business" or "business with which the person is associated" as contemplated within the Act. See, e.g., AO 2016-37 (Armstrong/Shattuck); AO 2015-15 (Boucher).

Of course, even in this context, using your position to benefit yourself, a family member or any other business you're associated with could violate the Act. As this is uncharted territory, some examples of how a conflict of interest or use of office could arise are:

- 1) A University employee/trustee, who serves on the Board for the charter school, using their position to assure that their child gets accepted to the charter school; or,
- 2) That same employee/trustee, who serves on the Board for the charter school, using their position to obtain a contract to provide goods or services to the school through their private business interests or that of a family member.

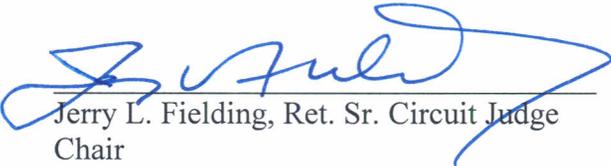
These are only two examples to show how even in this relatively safe context the Act could be violated. For that reason, if circumstances arise where a question of whether a conflict of interest or use of office exists while serving, the person affected should follow up with the Commission.

CONCLUSION

Members of the Board of Trustees or employees of the University of West Alabama may serve as a member of the governing body (Board of Directors) of the 501(c)(3) corporation authorized by the Alabama Public School Charter Commission to operate a charter school. However, members of the Board of Trustees or employees while serving on the charter school Board of Directors cannot use their position with the University or the charter school to provide personal gain for themselves, their family, or any business with which they are associated.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 4, 2017.



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