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April 4, 2018

HELD OVER FROM 12/04/17
ADVISORY OPINION NO. 2017-14

Mr. Scott Daniel
Board Investigator
Alabama Board of Pharmacy
111 Village Street
Birmingham, Alabama 35242

Revolving Door/Current Board of Pharmacy
Member Resigning as Board Member and
being Employed by Board of Pharmacy as
Executive Secretary

A current Board of Pharmacy member may
resign as a Board member and accept
employment with the Board of Pharmacy as
executive secretary immediately without
violating the "Revolving Door" because Ala.
Code § 34-23-90 is a specific statute that
governs the appointment of a Board member
as executive secretary and is the controlling
statute over the general "Revolving Door"
statute, Ala. Code § 36-25-13.

The Board member is prohibited by Ala.
Code § 36-25-5 from using her position to
influence the Board to hire her as executive
secretary, putting herself in line for the job,
or to create the vacancy.

Dear Mr. Daniel:

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 a current Board of Pharmacy member resign as a Board member and be employed by the Board of Pharmacy as the executive secretary without violating the “Revolving Door” provisions in the Ethics Act?

FACTS AND ANALYSIS

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

Mr. Scott Daniel of the Alabama Board of Pharmacy has submitted the question of whether a current Board of Pharmacy member, Donna Yeatman, may resign as a Board member and be employed by the Board of Pharmacy as the executive secretary without violating the “Revolving Door” provisions in the Ethics Act.

The “Revolving Door” statute prohibits public officials from contracting back with the agency for which they were a public official for a period of two years as set out below:

Except as specifically set out in this section, no public official... 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.

Ala. Code § 36-25-13(d)

Governor Bentley appointed Donna Yeatman to the Board of Pharmacy. That makes her a public official per Ala. Code § 36-25-1(27) and therefore subject to the prohibitions in Ala. Code § 36-25-13(d).¹ The Ethics Commission addressed the definition of “public official” in Advisory Opinion 2017-03 as follows:

¹ “Public official. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-13-40.” Ala. Code § 36-25-1(27)

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.

The Commission has previously addressed this issue and considered employment to be "contracting back" beginning in 1998 with Advisory Opinion 98-44 when it said:

The above section [36-25-13(d), formerly 36-25-13(c)] recognizes that certain individuals by virtue of their position, such as public officials, directors, departmental or division chiefs, etc., have inherent in their job classification, certain responsibilities and have the authority to determine to some degree the outcome of the contractual process, grant process and hiring process. It is clear that these individuals, as well as those individuals with the express authority to make purchases or negotiate or approve contracts, grants or awards, may not retire or leave public service and contract back with that governmental agency for a period of two years. Otherwise, these individuals would potentially have the leverage to arrange for themselves, part-time employment prior to their retirement.

This interpretation of Ala. Code §36-25-13(c) (now 13(d)) is the correct interpretation. Although the Commission has consistently considered employment to be "contracting back" since AO 98-44, it made a distinction in multiple opinions subsequent to 1998 concerning the application of Section 36-25-13(c) (now 13(d)) to public officials. In several Opinions, the Commission did not address the application of the "Revolving Door" when the facts raised "Revolving Door" issues. The result was that it inconsistently applied Section 36-25-13(c) (now 13(d)) to public officials despite its original acknowledgment that public officials, by virtue of their position alone, are bound by the section's restrictions as are certain public employees. This Opinion serves to correct that inconsistency and affirm that Section 36-25-13(d) applies to public officials just as it applies to every other public employee described in Section 36-25-13(d).²

² To the extent that this guidance is in contradiction to the following or any other Advisory Opinions, those opinions may no longer be relied upon. See, e.g., AO 97-07, 98-43, 98-57, 98-62, 01-50, 03-40, 08-07 et al.

The present matter, however, falls outside the limitation above by virtue of Ala. Code § 34-23-90 which addresses the replacement of a Board member if that Board member were to be selected as the secretary and permits a Board member to occupy the role of Secretary contrary to the terms of the Revolving Door. Even though the above section preceded the “Revolving Door” section of the Ethics Act by several years, Section 34-23-90 has been renewed every year subsequent to the enactment of the “Revolving Door.”

It is a standard rule of statutory construction that in the event of a conflict between two statutes, a specific statute relating to a specific subject is regarded as an exception to, and will prevail over, a general statute relating to a broad subject. See Murphy v. City of Mobile, 504 So.2d 243 (Ala.1987); Bouldin v. City of Homewood, 277 Ala. 665, 174 So.2d 306 (1965). Between these two statutes, the “Revolving Door” statute is the general and the Board of Pharmacy statute is the specific and, therefore, prevails here.

That being said, there are other provisions of the Act that cannot be violated, chief among them Ala. Code § 36-25-5. Accordingly, the Board member could not have used her influence as a Board member to obtain the position, been involved in creating the vacancy, or in discussions with Board members surrounding the vacancy to put herself in line for the job. If she were, she would be using her office for personal gain in violation of the Act.


CONCLUSION

A current Board of Pharmacy member may resign as a Board member and accept employment with the Board of Pharmacy as executive secretary immediately without violating the “Revolving Door” because Ala. Code § 34-23-90 is a specific statute that governs the appointment of a Board member as executive secretary and is the controlling statute over the general Revolving Door statute, Ala. Code § 36-25-13.

The Board member is prohibited by Ala. Code § 36-25-5 from using her position to influence the Board to hire her as executive secretary, putting herself in line for the job, or to create the vacancy.

AUTHORITY

By 3-1-1 vote of the Alabama Ethics Commission on April 4, 2018.


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