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December 19, 2018

ADVISORY OPINION NO. 2018-14

Mr. Michael Stewart
Deputy Director
Department of Natural Resources
and Environmental Management
City of Huntsville.
123 Gary Glen Blvd.
Huntsville, Alabama 35811

Revolving Door/Private employment/direct regulation

An employee of the City of Huntsville may go to work for a private company that he regulated but not before two years post regulation, calculated either from the date of retirement or from the last date he personally participated in the direct regulation, audit, or investigation of that private entity, as previously determined in AOs 1998-16 and 2001-46.

If the offer of employment is made prior to retirement, it must be under facts which "make it clear" that the offer is provided for reasons "unrelated to [your] public service as a public official or public employee.

Under Ala. Code § 36-25-13(c), a former employee of the City of Huntsville may not represent his private sector employer before the City of Huntsville for a period of two years commencing on the date of his retirement.

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Dear Mr. Stewart:

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

Based on the schedule of work provided, at what point in time did the direct regulation by Mr. Stewart of Mullins, LLC end?

FACTS AND ANALYSIS

Michael Stewart is the Deputy Director of the Department of Natural Resources and Environmental Management for the City of Huntsville. After 31 years of service, he is considering retirement from public service and employment in the private sector. From October 2004 to July 2017, Mr. Stewart was employed by the Engineering Department as a Civil Engineer I. In that position, Mr. Stewart interacted with Mullins, LLC, among other private engineering firms. In that position, Mr. Stewart reviewed and approved subdivision plans and commercial site plans daily. After approval, he would then inspect the subdivisions and commercial construction sites upon construction completion which also required acceptance of the subdivisions into the city's maintenance program and issuance of certificates of occupancy to commercial construction sites. Mullins LLC submitted many site plans that Mr. Stewart reviewed and approved and many subdivisions that he reviewed, approved, and accepted into the city's maintenance program.

In October 2015, Mr. Stewart moved out of the subdivision/development section and into the Capital Improvement section of the Engineering Department. Capital Improvement projects are projects that are funded through the City's Capital Improvement Program which are managed by the Engineering Department. These projects include roadways, bridges, sanitary and storm sewers, storm water management and other civil engineering projects which are contract-based and handled through our contract coordination. As an example, when a project is scheduled to begin, the City Engineer will select a private engineering consultant and place them under contract, which is approved through the City Council, to provide design plans, quantities, and an engineer's estimate for construction. The City Engineer will then assign the project to a Civil Engineer in the Capital Improvement section of the department to act as the city's representative throughout the duration of the design. Once the consultant delivers the design plans, quantities, and engineer's estimate, the Engineering Department will bid the project and award a construction contract to the lowest construction bidder. The City Engineer will then place the construction contractor under contract, which is approved through the City Council, to construct the project and the assigned Civil Engineer will manage the construction project through completion.

When Mr. Stewart was in the Capital Improvement section of the department from October 2015 to July 2017, Mullins LLC had very few Capital Improvement design projects given to them by the City of Huntsville Engineering Department. The last Mullins, LLC design project that he managed was the "US Hwy 72 West Improvements at County Line Road." His duties for this design contract project and all other design contract projects were to manage, schedule, track the project from start to completion, approve invoices for payment; review the design plans and documents for the purpose of determining whether such documents are generally consistent with the city's intent, and insure the design engineer has incorporated into their design the requirements contained within the city's engineering standards, standard specifications, and design manuals.

The duration of the "US Hwy 72 W Improvements at County Line Road" project was from May 2016 until February 2017. The timeline of the project with key dates are as follows:

- The project was awarded to Mullins, LLC on May 12, 2016 by the City Council for the amount of \$31,065.00.
- A 60% design payment was made to them on September 20, 2016 for the amount of \$18,604.50.
- The 100% design plans were delivered to the City Engineering Department on November 28, 2016.
- The final invoice was received from Mullins, LLC on February 1, 2017 for the amount of \$12,490.50.
- The invoice was signed by Mr. Stewart on February 2, 2017 and returned to the Accountant Technician.
- The Engineering Department's Accountant processed the payment on February 9, 2017.
- The Finance Department processed the payment on February 24, 2017.
- The final payment was received by Mullins, LLC on March 8, 2017.

The month-long delay in Mullins, LLC receiving their final payment was due to the city's processing time.

Mr. Stewart was managing this design contract between the City of Huntsville and Mullins, LLC and that contract had a beginning date and a specified period of service.

Pursuant to Ala. Code § 36-25-1(26) a public employee includes any person employed at the state, county, or municipal level of government or their instrumentalities who is paid in whole or in part from state, county, or municipal funds. Therefore, Mr. Stewart is a public employee and is governed by the Ethics Laws.

Ala. Code § 36-25-13(e) states that “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.” In Advisory Opinions 1998-16 and 2001-46, the Commission determined that for purposes of this restriction, the two-year waiting period commences either from the date of retirement or for two years after having personally participated in the direct regulation, audit, or investigation of that private entity.

Based on the facts presented above, and the Commission’s historic approach to the issue, the last Mullins, LLC design project that Mr. Stewart managed was the US Hwy 72 West Improvements at County Line Road that ended when Mr. Stewart signed the invoice on February 2, 2017. Thus, the prohibitions of Ala. Code § 36-25-13(e) will expire on February 2, 2019.

Ala. Code § 36-25-13(c) states:

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 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.

This means that for a period of two years from the date of departure from the City of Huntsville, Mr. Stewart may not represent Mullins, LLC before the City of Huntsville. Further, Ala. Code § 36-25-12 states, “No person shall offer or give to a member or employee of a governmental agency, board, or commission that regulates a business with which the person is associated, and no member or employee of a regulatory body, shall solicit or accept a thing of value while the member or employee is associated with the regulatory body other than in the ordinary course of business. “

A thing of value includes a promise of future employment. Ala. Code § 36-25-1(34)(a). The circumstances under which jobs can be solicited within a similar context were previously addressed in AO 2016-27 (Mac McArthur). That opinion acknowledges that the facts must “make it clear” that the offer is provided for reasons “unrelated to [your] public service as a public official or public employee.” Ala. Code 36-25-1(34)(b)(10).

CONCLUSION

An employee of the City of Huntsville may go to work for a private company that he regulated but not before two years post regulation, calculated either from the date of

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retirement or from the last date he personally participated in the direct regulation, audit, or investigation of that private entity and as previously determined in AOs 1998-16 and 2001-46.

If the offer of employment is made prior to retirement, it must be under facts which “make it clear” that the offer is provided for reasons “unrelated to [your] public service as a public official or public employee.

Finally, under Ala. Code § 36-25-13(c), a former employee of the City of Huntsville may not represent his private sector employer before the City of Huntsville for a period of two years commencing on the date of his retirement.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on December 19, 2018.

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