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MAILING ADDRESS

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

STREET ADDRESS

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



James L. Sumner, Jr.
Director

Hugh R. Evans, III
Assistant Director
General Counsel

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

November 4, 1998

ADVISORY OPINION NO. 98-55

C. L. Rabren
Former Director
Alabama Department of Forensic Sciences
991 Wire Road
Auburn, Alabama 36830

Revolving Door/Retired Employees Of The
Alabama Department Of Forensic Sciences
Working Under Contract For The
Department.

Retired employees of the Alabama
Department of Forensic Sciences may be
compensated for testifying in court cases in
which they participated before their
retirement.

Retired employees of the Alabama
Department of Forensic Sciences, who were
not in a position of authority, including
hiring, contractual or purchasing authority,
may be used to conduct peer reviews and
train new employees, and may be
compensated for their services.

Dear Mr. Rabren:

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.

QUESTIONS PRESENTED

1) May retired employees of the Alabama Department of Forensic Sciences contract with the Alabama Department of Forensic Sciences and be reimbursed their departing hourly rate for time spent in court after their retirement?

2) May retired employees of the Alabama Department of Forensic Sciences contract with the Alabama Department of Forensic Sciences to conduct peer reviews of casework performed by the full-time merit system employees when there is no other qualified scientist available during the training period to conduct that peer review and be compensated at their departing hourly rate?

3) May retired employees of the Alabama Department of Forensic Sciences contract with the Alabama Department of Forensic Sciences to train new employees to perform forensic duties when there is no other qualified scientist available during the training period to conduct that training and be compensated at their departing hourly rate?

FACTS AND ANALYSIS

C. L. Rabren is the former Director of the Alabama Department of Forensic Sciences and is requesting this opinion on behalf of the members of that agency. Mr. Rabren explains that the members have a question about the last paragraph on page six of Advisory Opinion No. 98-35, and he quotes, "The Ethics Commission is aware of many instances where, because of the Retirement Incentive Program, many State employees desire to leave State employment and contract back with the State to provide certain services to their Department. This is exactly what the 'Revolving Door Statute' was designed to prevent, as it would be a subterfuge of the law." Mr. Rabren states that the Alabama Department of Forensic Sciences' scientists have court commitments which will extend for several years beyond their retirement. Mr. Rabren feels that the Commission should know that the Alabama Department of Forensic Sciences has asked and received permission to fill each of the retiring positions with another full-time merit system employee, but most of those replacements will start at entry level or trainee levels. Therefore, they do have a need for contract work from retiring employees for the following three circumstances:

- 1) For the past two years, since the enactment of legislation allowing contract work for retired employees up to the level of \$14,000 or so dollars per year, Mr. Rabren has signed a contract with all retiring employees to allow

the Alabama Department of Forensic Sciences to pay them, at their departing hourly rate, for their time spent in court after their retirement.

- 2) The Alabama Department of Forensic Sciences has used retired employees to conduct peer reviews of casework performed by the full-time merit system employees when there was no other qualified scientist in the laboratory available during the trainee period to conduct that peer review. The peer review is required by department regulations prior to a report being issued and is part of their accreditation approval process.
- 3) Due to the fact that the Alabama Department of Forensic Sciences now has eight employees retiring at this time, Mr. Rabren desires to add a third provision for help during the next one to two years time-frame and that is to allow the retiring employees (in certain instances where there is no other qualified employee available) to help them train the new employees to perform their forensic duties. An example is where they are losing two of their three trace evidence examiners. Mr. Rabren would like to utilize the contract work to include hair examination training for the two new trace evidence examiners if both of them are trainees.

Mr. Rabren explains that all three of these situations are generated out of necessity and with no attempt to utilize contract employees to replace merit system employees or to violate the "Revolving Door Statute." The payment for court is a proper and necessary function of doing business. Peer review during the time where they have no other qualified scientist is a necessary function to insure the quality of their work. In trace evidence where they are losing two-thirds of their trained staff, Mr. Rabren will need to utilize the services of the two retired people to a limited degree to help train the two replacements if they are unable to hire qualified replacements. They are attempting to hire qualified replacements, but so far, without success.

Mr. Rabren adds that all three of these activities, by necessity and by law, will be held to the maximum amount allowed under the retirement system rules and regulations. None of the retired employees will be acting as a substitute or agent for the newly hired replacement.

Mr. Rabren requests the Commission's approval of these procedures because it is their sincere interest to make sure none of their employees violate any rule of the Ethics Commission as they attempt to insure that quality forensic services are provided to the citizens of this state.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) states:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

Section 36-25-1(13) defines governmental corporations and authorities as:

"(13) GOVERNMENTAL CORPORATIONS AND AUTHORITIES. Public or private corporations and authorities, including but not limited to, hospitals or other health care corporations, established pursuant to state law by state, county or municipal governments for the purpose of carrying out a specific governmental function. Notwithstanding the foregoing, all employees, including contract employees, of hospitals or other health care corporations and authorities are exempt from the provisions of this chapter."

Section 36-25-13(a) states:

"(a) No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member for a period of two years after he or she leaves such membership. For the purposes of this subsection, such prohibition shall not include a former member of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity."

Section 36-25-13(b) states:

"(b) 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 for a period of two years after he or she leaves such employment. 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."

Section 36-25-13(c) states:

“(c) 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.”

Section 36-25-7(b) states that:

“(b) No public official or public employee shall solicit or receive a thing of value for himself or herself or for a family member of the public employee or family member of the public official for the purpose of influencing official action.”

Section 36-25-13(d) states:

“(d) 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.”

Advisory Opinion No. 98-35 rendered in July of 1998 attempted to answer as many questions as possible about the “Revolving Door Provision” of the Alabama Ethics Law. That opinion stated that if additional questions were raised, the Commission would address those additional issues.

In the situation before the Commission, there are certain employees and former employees of the Alabama Department of Forensic Sciences whose responsibilities and input do not end at their retirement.

In many cases, a matter that an employee of the Department of Forensic Sciences worked on will not go to court for several years. It is, therefore, necessary for these individuals to be available to testify when the matter does come to trial. For that reason, it would not be in violation of the “Revolving Door Provision” for the Department of Forensic Sciences to have an agreement with former employees to have them available to testify in matters that they worked on and to reimburse them for testifying.

Due to the nature of the work of the Department of Forensic Sciences, they require highly specialized persons to perform scientific analysis and the Department states that experts outside their Department are extraordinarily hard to find and in some cases do not exist within the state. An example would be, a documents examiner.

The Commission has recognized a distinction between individuals with supervisory responsibilities including making hiring decisions, the authority to grant or award contracts or make purchases and those individuals who do not have those responsibilities.

In addition, there are certain circumstances where, because of the unique skills required there are no other individuals qualified to replace a retired individual and if the Department is not allowed to hire retirees with these skills on a part-time basis the Department may not be able to perform the functions required of them.

Based on the facts as presented and the above law, retired employees of the Alabama Department of Forensic Sciences, who were not in a position of authority, including hiring, contractual or purchasing authority, may contract back with the Department of Forensic Sciences after their retirement and be compensated for testifying in court, conducting peer reviews and training new employees.

CONCLUSION

Retired employees of the Alabama Department of Forensic Sciences may be compensated for testifying in court cases in which they participated before their retirement.

Retired employees of the Alabama Department of Forensic Sciences, who were not in a position of authority, including hiring, contractual or purchasing authority, may be used to conduct peer reviews and train new employees, and may be compensated for their services.

C. L. Rabren
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AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on November 4, 1998.



Camille S. Butrus
Chair
Alabama Ethics Commission