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STATE OF ALABAMA
ETHICS COMMISSION

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
WEB SITE www.ethics.alalinc.net

October 6, 1999

ADVISORY OPINION NO. 99-44

Roger L. Bates
Attorney at Law
Hand Arendall, L.L.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203

**Revolving Door Applicability/Former City
Engineer Contracting Back With City To
Provide Engineering Services.**

A former city engineer may not contract back with the city for a period of two years after retirement or otherwise leaving public service, as he held a position of authority with the city, in that, he had the authority to make recommendations regarding the hiring of personnel; and, was personally involved in the negotiation, design, review, study and approval of many significant projects; therefore, holding a position of authority with the city.

Dear Mr. Bates:

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

May the former City Engineer of the City of Hoover, Alabama, contract back with the City of Hoover to provide engineering services?

FACTS AND ANALYSIS

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

Roger L. Bates, as the City Attorney for the City of Hoover, Alabama, would like to clarify the City's need and the parameters under which the City may independently contract with the City Engineer and still be compliant with the Alabama Ethics Law. Therefore, an opinion addressing the City of Hoover's retention of its present City Engineer on a private consultant basis, has been requested.

The City of Hoover has learned that its City Engineer, Mr. Tim Westhoven, who is an employee of the City, resigned his employment effective August 6, 1999 to become employed with a private sector engineering and consulting firm. The City does not currently transact any business with Mr. Westhoven's new employer and, to their knowledge, the firm is not currently representing the interest of any third party before any agency or board of the City.

Mr. Westhoven has done an outstanding job for the City and has been personally involved in the negotiation, design, review, study and approval of many significant projects which were not completed upon his departure on August 6. Mr. Westhoven's resignation was a surprise to the City and they are certain that it will take an extended period of time to find an acceptable and qualified replacement. This situation places the City at a great disadvantage with respect to the management of the day-to-day engineering affairs of which Mr. Westhoven has been so personally involved. In particular, they have significant projects related to a Department of Transportation venture for a fly-over bridge and access ramp for the Riverchase Galleria, they are currently improving waste water treatment facilities on and along the Cahaba River in coordination with the Alabama Department of Environmental Management and they have significant residential subdivision approvals which are both in the process of development and pending before their Planning and Zoning Board. Each of these matters requires the advice, counsel and assistance of a civil engineer and Mr. Westhoven's unique and particular experience with these projects is invaluable to the City of Hoover and cannot adequately be replaced.

Although the City completely accepts and understands that Mr. Westhoven will be subject to the Ethics Law's two-year representation restraints concerning consulting and representing third parties before the City or its boards, the City would like, if at all possible, to have Mr.

Westhoven be employed under an independent contract to continue to provide engineering services needed to continue the City's projects and to eliminate the possibilities of delays to these important matters. The City does not believe that such an employment arrangement with Mr. Westhoven will be or present a conflict of interest with any other citizen or corporation who has business before the City and will indeed be a benefit to the community and the City government as a whole.

Mr. Bates has indicated that he will advise Mr. Westhoven that he will not be permitted to represent the interest of third parties seeking approvals or requests before the City of Hoover agencies and boards during the two-year prohibition period. The City of Hoover currently does not have adequate engineering professionals on staff to replace the contribution Mr. Westhoven makes to the organized planning and professional development of the City of Hoover and his services are indispensable to the City until a suitable replacement can be obtained.

As City Engineer, Mr. Westhoven reported directly to the City's Director of Operations, Mr. Allen Pate. Although Mr. Westhoven may have been involved in advising the City on its various engineering projects, final authority to hire and fire, negotiate or award contracts or make purchases resided either with the Director of Operations or with the City Council itself. Mr. Bates points out that no city employee has authority to bind a city government by contract without express resolution and final approval by the governing body, in this case, the City Council.

Likewise, although Mr. Westhoven could interview or make recommendations for hiring personnel in his department, final authority on employment decisions had to be given in accordance with the City's personnel policies and procedures and made at the direction of the Department of Human Resources and his supervisor, the Director of Operations.

Moreover, although Mr. Westhoven, like any other City employee, could submit a request for a purchase, final approval and payment of all bills and expenditures by the City is formally provided by the City Council in its regularly scheduled meetings which occur twice each month. It would therefore stand to reason that all purchases would require final approval of the City Council.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) defines a public employee as:

“(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 36-25-5(a) states:

"(a) 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. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

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 36-25-13(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.”

On August 4, 1998, the Alabama Ethics Commission rendered Advisory Opinion No. 98-44. In that opinion, the Commission stated:

“An individual who, prior to his or her retirement, or otherwise leaving public service, held a position of authority with hiring and firing authority, or the authority to recommend employment, purchasing or contracting authority, may not, for a period of two years after retiring or otherwise leaving public service, contract back, accept part-time employment or re-employment with the entity from which he or she retired or otherwise separated from public service.”

In the situation before the Commission, it appears that Mr. Westhoven had the authority to make recommendations regarding the hiring of personnel, as well as being personally involved in the negotiation, design, review, study and approval of many significant projects prior to his retirement.

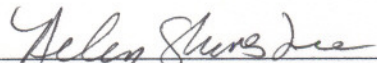
Based on the facts as provided and the above law, a former city engineer may not contract back with the city for a period of two years after retirement or otherwise leaving public service, as he held a position of authority with the city, in that, he had the authority to make recommendations regarding the hiring of personnel; was personally involved in the negotiation, design, review, study and approval of many significant projects; therefore, holding a position of authority with the city.

CONCLUSION

A former city engineer may not contract back with the city for a period of two years after retirement or otherwise leaving public service, as he held a position of authority with the city, in that, he had the authority to make recommendations regarding the hiring of personnel; was personally involved in the negotiation, design, review, study and approval of many significant projects; therefore, holding a position of authority with the city.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 6, 1999.



Helen Shores Lee
Chair
Alabama Ethics Commission