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June 3, 2020

ADVISORY OPINION NO. 2020-01

Michelle Eubanks
1642 Decatur Avenue
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Conflict of Interest/Member of City Council

A member of the City Council of the City of Florence, Alabama may vote on, attempt to influence or otherwise participate in legislation affecting her public employer, the University of North Alabama, provided the legislation itself does not present a conflict of interest, as defined in the Ethics Act, for the public official.

Dear Ms. Eubanks:

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.

FACTS

The facts presented to the Commission are as follows: "I'm writing today seeking a formal opinion related to my current employer as well as my role as the District 4 Representative for the City of Florence. On April 29, 2019, I began my tenure as the Interim Associate Director of Communications and Marketing for the University of North Alabama. As a City Councilwoman, I believe there will be times when a vote regarding UNA will arise as part of the normal course of business.

My limited understanding of what would constitute a potential ethics dilemma is complicated by two advisory opinions which your office issued. In 2011, the State of Alabama Ethics Commission responded to my predecessor, Dr. Barry Morris, (AO 2011-03(B)) with the following opinion:

A member of the Florence City Council, who is also an employee of the University of North Alabama, may not vote, attempt to influence or otherwise participate in the sale of property from the City to the University, as a general conflict of interest exists, and he cannot best serve the City's interests and the employer's interests at the same time.

While the aforementioned advisory opinion appears to deal specifically with a matter related to a real estate transaction, an advisory opinion issued in 2016 to the Mayor of Montgomery (AO 2016-33), the Honorable Todd Strange, seems to take a broader approach. It reads:

A member of the Montgomery City Council may vote on City Council agenda items that benefit his or her employer who is a government agency, such as the Montgomery Public Schools, provided neither the public official nor his or her family member received personal gain from the allocation.

In reaching out to you for a formal opinion, I am asking for clarification and guidance related to my employer as well as my obligations to the residents in the Fourth District of the City of Florence."

QUESTIONS PRESENTED

May a member of the City Council of the City of Florence, Alabama vote on, attempt to influence or otherwise participate in legislation affecting her public employer, the University of North Alabama?

ANALYSIS

Beginning in 2015, the Commission recognized that public entities generally are not considered "businesses" as contemplated in the ethics law, specifically as it relates to the application of Ala. Code §36-25-5. In 2015-15 (Boucher) the Commission held,

It should be noted that prior to 1995, the definition of a "business with which associated" included the language "and any other legal entity." Subsequent to 1995, that language was changed to "or any other legal entity." Moreover, the ethics issues involved in Lambert related in part to "direct personal financial gain," another term that has subsequently been altered simply to the broader "personal gain." These distinctions make little difference in our analysis of this opinion and Lambert is still good law.

That does not mean that there are no limits to the matters on which they can vote.

Obviously, fact patterns exist which are not addressed herein and which would change this opinion, and these employees and officials still cannot violate the sections which deal with their own unique, certainly financial, interests or those of their families or businesses with which they are associated. In reading the Ethics Law and applying the Lambert case, however, it appears that the intent of Section 36-25-1 (2) is not to prohibit participation and voting on boards which have as their function assisting a governmental entity in better performing their public responsibilities, or which exist for the population relying on governmental services even if some government services or entities benefit to the exclusion of others. The key is that the recipient of the benefit, however applied, is the public. The caveat, however, is that Section 36-25-9(c) specifically prohibits members of county and municipal entities from voting or participating in a matter in which they or a member of their family, or a business with which they are associated, has any interest. Therefore, any issue where their personal interest is involved (e.g., and although not an exhaustive list, job security or benefits) would present a conflict and those are issues to which this opinion would not apply and on which they could not vote. Moreover, the application of the Opinion can only be made within the narrow set of facts presented herein, and if an employee or official has a question regarding whether their interests are affected in an impermissible way, our advice is that they abstain from participating.

In Advisory Opinion 2016-37 (Lee Armstrong) the Commission held, specifically with respect to a public university:

In the case of *Lambert v. Wilcox County*, 623 So. 2d 1065 (Ala. 1993), the Court recognized that county governmental agencies (in that case, the county school board) are not "businesses" as contemplated in the Act. The Supreme Court differentiated between a private employer and a public employer. The Court stated, "Under § 36-25-1 (1), the enumerated classes of things preceding the general term 'any other legal entity' are in the nature of private enterprises, not county governmental agencies." The Commission has recognized this same distinction in previous Advisory Opinions, including as it relates to universities. See AO 2011-11 (University of North Alabama does not fit within the definition of "business."); see also, AO 2015-15.

The conclusion in AO2011-03(B) was based on a finding of a "general conflict of interest" in a member of the Florence City Council voting on an issue that affected his public employer, the University of North Alabama. "Conflict of Interest" is defined twice in the Code, and if the alleged conduct does not fit within one of those definitions, then it is not a "conflict of interest" under the ethics law.¹ The Commission is not authorized to find a "general conflict of

¹CONFLICT OF INTEREST. 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 §36-25-1(8).

interest” outside the definitions the legislature supplied. Clearly, within these definitions and as the Commission set out in the Advisory Opinions referenced above, voting on a matter that affects the public official, a member of their family, or any of their businesses personally and uniquely is a conflict.² Absent being uniquely affected, a member of the city council may vote on matters that affect the public official’s public employer and whose ultimate beneficiary is, as we said in Boucher, the public.³

CONCLUSION

A member of the City Council of the City of Florence, Alabama may vote on, attempt to influence or otherwise participate in legislation affecting her public employer, the University of North Alabama, provided the legislation itself does not present a conflict of interest, as defined in the Ethics Act, for the public official.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on June 3, 2020.



Judge Charles Price, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission

“A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation. Ala. Code §36-25-5.

² See also Ala. Code §36-25-9(c): “No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest.”

³ Other sections of the Act to remain mindful of include Ala. Code § 36-25-7’s prohibition on soliciting or receiving anything for the purpose of corruptly influencing anyone’s official actions and Ala. Code § 36-25-8’s prohibition on the use of confidential information.