



COMMISSIONERS

Raymond L. Bell, Jr., Esq., Chairman
Linda L. Green, Vice-Chairman
Nancy Edwards Eldridge
John H. Cooper, Esq.
Cameron McDonald Vowell, Ph.D.

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

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE www.ethics.alaline.net

October 6, 2004

ADVISORY OPINION NO. 2004-16

Mr. L. Joe Austin
Chief Executive Officer
Huntsville Hospital
101 Sivley Road
Huntsville, Alabama 35801

Conflict Of Interest/Member Of Alabama Statewide Health Coordinating Council (SHCC), Who Serves As Chief Executive Officer Of A Health Care Facility, Representing The Health Care Facility Before The Certificate Of Need (CON) Review Board, The Governing Body Of The State Health Planning And Development Agency (SHPDA), When SHCC Prepares, Reviews And Revises The State Health Plan In Conjunction With SHPDA

A member of SHCC, who also serves as the Chief Executive Officer of a health care facility, may represent that health care facility before the CON Review Board, the governing body of SHPDA, when he is appearing in a purely informational capacity; and provided further, that he discloses to the CON Review Board his membership on SHCC; that he does not attempt to lobby the members of the CON Review Board prior to the meeting; and, that he does not attempt to use his position as a member of SHCC to interpret the State Health Plan.

Mr. L. Joe Austin
Advisory Opinion No. 2004-16
Page two

Dear Mr. Austin:

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 Chief Executive Officer of a health care facility, who serves as a member of the Alabama Statewide Health Coordinating Council (SHCC), represent that health care facility before the Certificate of Need (CON) Review Board?

FACTS AND ANALYSIS

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

L. Joe Austin serves as the Chief Executive Officer of Huntsville Hospital, a health care facility located in Huntsville, Alabama. Mr. Austin also serves as a member of the Alabama Statewide Health Coordinating Council (SHCC).

The Alabama Legislature has provided that health care resources, facilities and services in this state should be planned for and regulated pursuant to a system of mandatory reviews carried out by two state agencies. The two agencies, SHCC and the State Health Planning and Development Agency (SHPDA), were established to adopt the State Health Plan and enforce the Certificate of Need (CON) program in a manner consistent with the State Health Plan for the express public purpose of assuring "that only those healthcare services and facilities found to be in the public interest shall be offered or developed in the state." Section 22-21-261, Code of Alabama, 1975, as amended.

SHCC is a state agency authorized and organized pursuant to Sections 22-4-7 and 22-4-8, Code of Alabama, 1975, to advise SHPDA on matters relating to health planning and resource development. SHCC's primary responsibility is to prepare, review and revise the State Health Plan. Both SHCC's By-Laws and Executive Order 13, require that a majority of the 16 members must be "consumers of health care who are not also providers of health." The Executive Order also specifies that the remainder of the members be health care providers, at least a third of which must be "direct providers of health care."

SHCC serves in an advisory capacity and never has direct contact with, nor any authority over, the Certificate of Need Board or SHPDA. During the process of developing the State

Health Plan, SHPDA serves in an administrative support capacity. SHCC adopts the State Health Plan through the Administrative Procedures Act, and the CON Review Board interprets the State Health Plan; however, it does not have to strictly adhere to it, and may administer it as it deems necessary.

The State Health Plan is a comprehensive plan intended and designed to provide for the development of health programs and resources to assure that quality health services will be available and accessible in a manner which assures continuity of care, at reasonable costs, for all residents of this state. Section 22-21-260(13), Code of Alabama, 1975, as amended.

In addition to general statements regarding health planning priorities and statistical data, the State Health Plan prescribes, implements and describes state health planning policy and procedure and contains general requirements for certain types of health care services and providers. The State Health Plan is utilized by SHPDA's CON Review Board pursuant to Alabama law. This requires SHPDA to enforce the CON statutes in a manner consistent with the State Health Plan. Section 22-21-263(a) specifically mandates that "no institutional health services which are subject to this article shall be permitted which are inconsistent with the State Health Plan."

The State Health Plan applies uniformly to all health care facilities in the state. For instance, the State Health Plan determines whether there is statistical need for additional acute care beds in the state as a whole and/or within a particular county. Once such a determination is made, any individual and/or entity may seek a CON, authorizing it to operate those beds. However, said entity or person would have to demonstrate that the proposal satisfies all of the applicable review criteria, which includes compliance with the State Health Plan.

An amendment to the State Health Plan must be adopted in accordance with the rule-making procedure contained in the Alabama Administrative Procedure Act. The State Health Plan also allows the SHCC to make adjustments to the State Health Plan which do not apply to the state as a whole. An example of an adjustment would be a decision to deviate from the formula contained in the State Health Plan to increase the number of allowed hospital beds in a particular county.

Mr. Austin points out that it should be noted that SHCC utilizes the administrative staff of SHPDA, since it does not have its own separate and distinct staff. Otherwise, the two agencies are separate and distinct.

SHPDA is a separate agency of the State of Alabama authorized pursuant to Alabama's CON law, and designated by the Governor as the State's Health Planning and Development Agency. The CON Review Board is the governing body of SHPDA, and the primary rule-

making/adjudicatory body in charge of administering and enforcing the CON program. Subject to certain statutory exceptions, it is charged with reviewing CON applications and determining whether said applications satisfy the requisite review criteria. SHPDA consists of nine members, all of whom are appointed by the Governor. The Board consists of three consumers, three representatives of health care providers and three representatives of the Governor. There is currently no overlapping membership between the SHCC and the CON Review Board.

With certain statutory exceptions, the CON statutes require the issuance of a CON as a prerequisite to the offering or operation of any new institutional health service in this state by any individual or entity. Most proposed new institutional health services must be reviewed by SHPDA and its CON Review Board, which may, in its reasonable discretion, grant authorization to offer said services, as long as they are offered in a manner consistent with the State Health Plan and satisfy the other applicable review criteria.

The CON statute defines "new institutional health services" as including the development of a new health care facility, a change in bed capacity, the offering of certain new services or certain large expenditures.

CON applications are governed by formal notice and hearing procedures contained in the CON statutes, SHPDA Rules, and the Alabama Administrative Procedure Act.

Mr. Austin states that since SHCC includes employees of health care facilities, as well as other health care providers, such as physicians, he wishes to make certain whether or not the Alabama Ethics Law prohibits a member of SHCC from appearing before the CON Review Board in the individual's capacity as an officer, director or employee of a health care facility. He states that such an appearance could be made in support of a CON application of the health care facility or in opposition to, or in support of, an application made by another health care facility.

Section 22-4-8 states that, among other things, SHCC's function shall be to:

"Review annually and coordinate the health systems plans of each of the health systems agencies."

"Prepare, review and revise as necessary, with the assistance of the State Health Planning and Development Agency, and approve or disapprove, the State Health Plan, which shall be made up of the health systems plans modified to achieve their coordination and compliance with statewide health planning criteria and standards."

“Review the State Medical Facilities Plan, pursuant to Title XVI of the Public Health Service Act, prepared by the State Health Planning and Development Agency, and approve the plan as consistent with the State Health Plan and advise and consult with the state agency in carrying out the plan . . .”

“Conduct public hearings on the State Health Plan and the State Medical Facilities Plan.”

“Serve as advisory council to the state agency for the certificate of need program.”

Alabama Government Manual, Tenth Edition, states that SHPDA is the agency designated by the Governor as the sole state health planning and development agency for Alabama, and it has responsibility, along with SHCC, for the preparation and administration of the State Health Plan.

It is further set out that SHPDA advises the Governor on health planning matters, and it is responsible for the initial preparation of a triennial State Health Plan for consideration by SHCC.

According to the *Alabama Government Manual*, the State Health Plan is finalized by SHCC, with final approval resting with the Governor.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24), defines a public official as:

“(24) 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 17-16-2.”

Section 36-25-1(8) defines a conflict of interest as:

“(8) CONFLICT 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."

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."

Due to the fact that there is virtually no interaction between SHCC and the CON Review Board, and that SHCC merely serves in an advisory capacity and adopts the State Health Plan, it would not be a conflict of interest for a member of SHCC, who also serves as the Chief Executive Officer of a health care facility, to appear before the CON Review Board; provided, that he is there for a fact-finding or informational purpose; that he discloses to the CON Review Board his membership on SHCC; that he does not lobby the members of the CON Review Board; and, that he does not use the mantle of his position on SHCC to interpret the State Health Plan for the CON Review Board.

A member of SHCC, who also serves as the Chief Executive Officer of a health care facility, may represent that health care facility before the CON Review Board, the governing body of SHPDA; provided,


- 1) that he is appearing in a purely informational capacity;
- 2) that he discloses to the CON Review Board his membership on SHCC;
- 3) that he does not attempt to lobby the members of the CON Review Board prior to the meeting; and,
- 4) that he does not attempt to use his position as a member of SHCC to interpret the State Health Plan.

CONCLUSION

A member of SHCC, who also serves as the Chief Executive Officer of a health care facility, may represent that health care facility before the CON Review Board, the governing body of SHPDA, when he is appearing in a purely informational capacity; and provided further, that he discloses to the CON Review Board his membership on SHCC; that he does not attempt to lobby the members of the CON Review Board prior to the meeting; and, that he does not attempt to use his position as a member of SHCC to interpret the State Health Plan.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 6, 2004.



Raymond L. Bell, Jr., Esq.
Chair
Alabama Ethics Commission