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December 6, 1995

ADVISORY OPINION NO. 95-113

Mr. E. J. "Mac" McArthur
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Conflict Of Interests/ Public
Employee Seeking Outside
Employment.

A public employee may accept outside employment; provided there is no use of public property, time, labor, equipment, materials that the public employee or official did not use his or her position to obtain the employment, and if the secondary employment does not conflict with the public employment.

Dear Mr. McArthur:

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 a public employee or public official accept secondary employment and be compensated for that secondary employment?

FACTS AND ANALYSIS

In August of 1995, Dr. Henry J. Hector, the Executive Director of the Alabama Commission on Higher Education asked the Ethics Commission to render an opinion on whether or not he could Chair a fifteen month study concerning diversity of students at Purdue University. In August of 1995, at its regular meeting, the Commission ruled that a public employee of the Alabama Commission on Higher Education could not accept said Chair position of the diversity study at Purdue University while remaining an employee of the Alabama Commission on Higher Education. The opinion was silent as to whether or not Hector could serve as a member of this study in a non-chair capacity. The opinion focused on the use of public property to acquire personal gain and an unavoidable conflict of interest. Subsequent to this ruling, Dr. Hector requested that the opinion be reconsidered. It was done so on October 23, 1995.

At the October meeting, the Ethics Commission ruled "Based on the aforementioned statutes and facts as provided by Mr. Henry Hector, it is the opinion of the Alabama Ethics Commission that Mr. Hector may not accept a Chair position of the diversity study at Purdue University while remaining Executive Director of the Alabama Commission on Higher Education. However, Mr. Hector may accept said Chair position if the duties of the Chair are carried out as part of his State duties, and the consultant fees and expenses are paid to the State of Alabama..."

Since the October meeting of the Ethics Commission, the Commission has been inundated by calls from all over the State of Alabama. Apparently, there has been much misinformation concerning the contents of this opinion. Without question many teachers and other public employees engage in consulting and outside teaching. Based on the October 23, 1995, opinion as well as the various requests we have received subsequent to this time, the Director of the Ethics Commission has asked that a policy be instituted regarding the practice of public employees performing outside consulting and teaching.

The Alabama Ethics law, Code of Alabama, 1975, Section 36-25-2(b) states:

"It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of

interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-5(c) states:

" No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy." (emphasis added)

Section 36-25-1(24) states:

" 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(25) states:

" 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 36-25-5(a) states:

" 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."

Public employees as well as employees in the private sector should not be denied the opportunity to receive economic gain. This opinion, the primary opinion (95-58) and the Ethics law does not prohibit outside employment; however, a problem arises when that public employee uses his or her position as a public employee to receive the personal gain.

Several factors must be considered in analyzing this question:

1. Is there any use of public property, time, labor, equipment, materials, or other public property under his or her discretion or control?
2. Did the public employee or public official use his or her position to obtain this secondary employment?
3. Is there any personal gain to the employee?
4. Is the secondary employment part of said public employee's or public official's primary job duties?
5. Will the secondary employment conflict with the public employee's or public official's primary job duties?
6. Is said secondary employment pursuant to a lawful employment agreement with the public employee's or public official's primary employer?

Clearly, some public employees by virtue of their job duties and expertise would be uniquely qualified for certain secondary employment. These employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests. However, they may not use their public positions to obtain this secondary employment,

and thereby obtain personal gain.

It is a generally accepted premise that people in the education field, particularly higher education, are uniquely qualified to provide certain consulting or educational services.

There are several options available to the public employee who is seeking outside employment, however, certain guidelines must be met.

It is clear under the Ethics law that a public employee may not use his position for personal gain. In other words, he cannot use his public position to generate outside employment opportunities. Likewise, he may not use equipment, facilities, time, materials, human labor, or other public property under his discretion or control for personal gain to himself or others.

Should the work be done on the employee's own time, be it days off, annual leave, etc., and no public equipment is used then the public employee may properly accept compensation; provided there is no conflict of interest.

In other words, the compensation may be accepted by the employee if the outside employment is totally removed and not part of the public employee's job duties.

Notwithstanding the above, Section 36-25-5(c) provides that public equipment, facilities, etc., may be used "pursuant to a lawful employment agreement regulated by agency policy."

CONCLUSION

Based on the facts as presented and the aforementioned statutes, it is the opinion of the Alabama Ethics Commission that a public employee may accept outside employment; provided there is no use of public property, time, labor, equipment, materials, that the public employee or official did not use his or her position to obtain the employment, and if the secondary employment does not conflict with the public employment.

It appears that this statute would apply in any situation where the agency's policies establish the terms and conditions of employment and those policies include a policy which addresses whether and under what conditions or restrictions employees may engage in outside employment. Such a policy could even allow public equipment, etc., to be used in the outside employment should the public entity so choose and provided such is clearly reflected in the agency's policy.

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AUTHORITY

By 5 - 0 vote of the Alabama Ethics Commission on December 6, 1995.

A handwritten signature in black ink, appearing to read "H. Dean Buttram, Jr.", written over a horizontal line.

H. Dean Buttram, Jr.
Chair
Alabama Ethics Commission