

Public Employment in Alabama and the “Revolving Door.”

The phrase “revolving door” is commonly used to refer to the transition of a public employee, at retirement or otherwise, into private sector employment that is related to their public employment. It may also refer to the rehire of such an employee by the previous public employer. The federal government and most states have ethics rules that impose some restrictions on the ability of a public employee to move through the “revolving door.” Alabama is no exception. In fact, questions about “revolving door” issues have for some time been predominate at the Alabama Ethics Commission. In 2005, at least 45% of all advisory opinions issued by the Alabama Ethics Commission have involved interpretations of the “revolving door” statutes. At UAH, the “revolving door” environment is regulated by both state law and university policy.

I. The Rule

The Alabama Ethics Commission states the reach of the “revolving door” statute in broad, sweeping terms, as indicated by this statement from an opinion issued earlier this Fall:

The “Revolving Door” provisions of the Ethics Law prohibit certain activities by public officials and public employees for a period of two years after leaving their public employment. Specifically, a public official or public employee may not, for a period of two years after leaving employment with the public entity, have business dealings back with that public entity on behalf of either himself/herself, his or her new employer or clients . . . It does not matter what the former public official’s or public employee’s job responsibilities were while employed with the public entity, nor does it matter what his or her current activities are. It is an across-the-board prohibition that applies to everyone in the public sector equally.

Advisory Opinion No. 2005-31.

II. The Exception

Can a retiring public employee continue to work on a part-time basis, or otherwise provide services, to his former public employer? The seemingly all-encompassing scope of the quoted rule would appear to answer the question in the negative. However, the Alabama Ethics Commission, in its advisory opinions, has recognized an exception: if the former public employee did not hold a “position of authority,” he or she may be re-hired by his/her former employer, at least on a part-time basis.

What is a “position of authority?” The Ethics Commission has given guidance on defining this term on several occasions. In Advisory Opinion No. 2005-25, the Commission said that “an average line employee, with absolutely no authority to hire, fire, make purchases, etc.” is *not* in a “position of authority.” In Advisory Opinion No. 98-44, the Commission stated that someone who “did not hold a position of authority nor had the authority to make purchases, approve or grant contracts nor was involved in the hiring process” could accept part-time re-

employment with his/her former public employer. The Commission has also stated that a “front line” employee is not in a “position of authority.” See Advisory Opinion 2005-12.

The leading statement on who is and who is not in a “position of authority” is given in the Reconsideration of Advisory Opinion No. 98-44, which was explored in an earlier Legal Watch article. See *LegalWatch* Vol. 6-98. In this opinion, the Ethics Commission stated as follows:

[C]ertain individuals by virtue of their position, such as public officials, directors, departmental or division chiefs, etc., have inherent in their job classification, certain responsibilities and have the authority to determine to some degree the outcome of the contractual process, grant process and hiring process. It is clear that these individuals, as well as those individuals with the express authority to make purchases or negotiate or approve contracts, grants or awards, may not retire or leave public service and contract back with that governmental agency for a period of two years. Otherwise, these individuals would potentially have the leverage to arrange for themselves, part-time employment prior to their retirement.

On the other hand, those individuals without the above authority, such as the average line employee, secretaries, clerical aides, etc., do not have the ability to influence or affect contracts, purchases or the hiring practices of that department. It is these individuals, who under certain circumstances, may be allowed to return to the department or agency from which they retired or left.

III. A Variation on the Exception?

The above-quoted rules seem fairly clear. However, Reconsideration of Advisory Opinion No. 98-44 gave seven examples of employees who, the Ethics Commission assumed, were *not* in a “position of authority.” One of these employees was a university professor who wanted to retire but continue to teach one or two classes a quarter at the university from which he had retired. The Ethics Commission’s assumption that university professors may not hold “positions of authority” is consistent with the following statement, also from Reconsideration of Advisory Opinion No. 98-44: “[I]n numerous situations, any benefit derived from the rehiring of a former employee will accrue to the agency or department rehiring that individual and not necessarily to that former employee.” The Ethics Commission seemed to be implying that if the rehire is more beneficial to the agency than to the retiring employee, the rehire may then be permissible. Does the “weighing of benefits” of a rehire impact the “position of authority” analysis? Those looking for a straightforward answer to this question from the Ethics Commission will be disappointed.

In 2003, the Mobile Area Water and Sewer System asked the Commission if it could rehire several retiring employees on a part time basis. Three of the retiring employees held positions that required them to be “responsible for the safe and efficient operation of chemical and plant controls and for maintaining plant equipment.” The Ethics Commission decided that these were not “positions of authority” and that the retiring employees could be rehired on a part time basis. The Commission’s view of another System employee, however, was different.

According to the System, this position “trains employees, assigns and monitors the work activities of employees, coordinates between collections, billing and meter reading units to secure special readings needed to complete billing or satisfy customers, investigates complaints, etc.” This job was found to be a “position of authority.” and the retiring employee could not be rehired for two years. *See* Advisory Opinion No. 2003-50.

In another advisory opinion, the Director of the Russellville Foster Grandparent Program had been on the job for less than a year. The Coordinator/Bookkeeper of the program was retiring after 30 years in her position. The Director wanted to rehire the Coordinator/Bookkeeper on a part time basis after her retirement. The only other employee of the program was a secretary. The Coordinator/Bookkeeper said that she did not have any discretionary managerial responsibility but was responsible for bookkeeping and preparing checks and other documents for the Director’s signature. The Ethics Commission said that the Coordinator/Bookkeeper was a “position of authority” and that she could not be rehired for two years. Advisory Opinion No. 2003-47.

A ruling issued one year earlier involved the Deputy Commissioner for Field Administration with the State of Alabama Department of Human Services, who was a licensed attorney. One of his responsibilities was to assist the Department in the defense of a class action lawsuit that had been filed against the Department by recipients of child support payments. Following his retirement, he entered private law practice and joined a law firm. He wanted to continue to represent his former employer in his post-retirement private practice status. In allowing the retired attorney to continue to represent his former employer, the Ethics Commission stated:

In addition, from a practical matter, it is more efficient and less costly for the State of Alabama to have an attorney who is familiar with the litigation to continue to represent the State after his or her retirement, than it is to retain new counsel who would have to familiarize himself/herself with the litigation and basically start over.

Advisory Opinion No. 2002-18

It is evident that the rules on re-employment of retiring public employees enunciated by the Alabama Ethics Commission and its application of those rules to specific facts are less than clear. Each situation must be carefully analyzed on a case by case basis by any employee interested in returning to a prior public employment position.

IV. Statutory Earnings Limitation

The rules of the Alabama Ethics Commission are not the only source of guidance when a retiring public employee is considering part-time re-employment with his former employer. Another pertinent statute provides that participants in the Alabama retirement programs may “perform duties in any capacity” with “any employer participating” in the retirement program, provided that the participant is not employed full-time and his/her annual earnings do not exceed

a statutory maximum. § 16-25-26, *Alabama Code* (1975). The statutory maximum changes each year with the Consumer Price Index. It is now set at \$19,000.

V. Board of Trustees Policy

In 2002, The Board of Trustees of The University of Alabama adopted Board Rule 310, which articulates Board policy with regard to the “revolving door.” Board Rule 310 prohibits the University from hiring anyone receiving benefits under the Alabama Teachers’ Retirement Systems (TRS) or from contracting with any company that employs anyone receiving TRS benefits. Exceptions are made to the contracting prohibition if the contract is awarded by competitive bidding, if the TRS participant has no role in the contract, or if the participant waives his or her right to receive retirement benefits during the contract period. Another exception applies if the TRS participant is not paid more than the statutory maximum described in the preceding paragraph.

It should be noted that this discussion is not an exhaustive review of the “revolving door” rules of the Alabama Ethics Commission. For example, the Commission has another set of detailed interpretive rules that govern restrictions on subsequent employment for retiring public employees who had responsibility for the direct regulation, audit, or investigation of private entities. Finally, it bears repeating that the burden of non-compliance with the Ethics Law falls on the employee, not the employer. A violation could result in criminal prosecution of the employee. Though prosecution has apparently been rare, the possibility of criminal culpability certainly raises the stakes for an employee who is attempting to safely negotiate the “revolving door.”