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ADVISORY OPINION NO. 2017-01

Mr. Tim L. Gothard
Executive Director
Alabama Wildlife Federation
3050 Lanark Road
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Millbrook, Alabama 36054

Use Of Office For Personal Gain/City
Council Member Employed By Nonprofit
Organization Participating In Fundraising
Efforts On Behalf Of That Organization

An employee of the Alabama Wildlife Federation (AWF), a private nonprofit corporation and registered principal, who is an elected public official, may after becoming a public official continue to solicit donations from businesses or individuals, including principals, who have historically donated to AWF prior to his becoming a public official. He may not, however, convert those donations to his personal use.

An employee of the Alabama Wildlife Federation (AWF) may not solicit donations for his employer from any of the following even if they have historically donated to AWF: (a) those individuals or businesses who are seeking official action by the City of Millbrook or its designated actors (such as the mayor and department heads); (b) those individuals or businesses who do business with the City of Millbrook; (c) those individuals or businesses who have interests that may be substantially affected by performance or nonperformance of the

public official's official duties as a member of the Millbrook City Council based on their relationship to issues pending before the City (for example, a property owner who might benefit from re-zoning even though they are not the ones asking for it); or (d) those entities who qualify as an organization a majority of whose members are described in (a) through (c).

An employee of the Alabama Wildlife Federation (AWF) may not solicit a lobbyist for anything other than a campaign contribution without violating Ala. Code § 36-25-23(c). Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not for the purpose of corruptly influencing official action. Finally, an employee of AWF who is also a public official cannot lobby on behalf of his employer, the Wildlife Federation, contrary to 23(a)'s clear terms, before any legislative body.

Dear Mr. Gothard:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows and the application of this opinion is limited to these facts:

The Alabama Wildlife Federation (AWF) is Alabama's oldest and largest nonprofit conservation organization, dedicated to the preservation and wise use of Alabama's wildlife and natural resources. In furtherance of this mission, AWF relies heavily on each member of its 15-person staff to help raise funds for the organization.

AWF currently employs a staff member, Jimmy Harris, whose job as Strategic Marketing Director is to fundraise on their behalf. He is a full-time employee and this is Mr. Harris's only job. Mr. Harris began work with AWF in 2007 and worked there through 2013 in the position of Director of the Alabama Nature Center. He came back to AWF to his current position in February 2016. Throughout his employment, Mr. Harris has been involved in fundraising. He became a member of the Millbrook City Council after being elected in August 2016. As a Council member, he is a public official subject to the Alabama Ethics Law and the AWF is a business with which he is associated.

His job duties include: promoting and securing support for AWF's Alabama Nature Center facility and operations through increased program participation and revenue through paid and/or sponsored field trip attendance, summer camp attendance, corporate facility rentals, and specialty programs; promoting and securing support for AWF's Wild Game Cook-off program through sponsorship procurement, including statewide sponsorship and local sponsorship, associated with AWF's Wild Game Cook-off Series held in 16 locations across the state (Mobile, Andalusia, Selma, Thomasville, Auburn/Opelika, Tri-County Area/Montgomery, Lake Martin, Birmingham, Tuscaloosa, Talladega, Decatur, Guntersville, Athens, Huntsville, Quad Cities, and State Finals in Millbrook); and promoting and coordinating activities of the AWF Student Chapters at the University of Alabama and Auburn University. "Promoting and securing support" specifically includes fundraising to achieve those goals. He is an employee-at-will, meaning he can be terminated at any time for any reason not prohibited by law. It stands to reason that if he does not do his job well, which includes fundraising, then he could be terminated.

Moreover, the Alabama Wildlife Federation is a registered principal in Alabama, and Mr. Gothard, the requester of this Opinion, is their registered lobbyist. Based on their Articles of Incorporation, one of AWF's many purposes is "to sponsor and support legislation" as well as to oppose legislation contrary to their mission. This mission can be accomplished before any legislative body which includes a local City Council such as the one on which Mr. Harris serves.

Therefore, the issue here involves a public official who is and has been an employee of a principal and whether his newly-acquired official status places any restriction on his ability to solicit donations on behalf of his employer, a key feature of his job. The Wildlife Federation is uncertain whether this employee can continue to be involved in fundraising even if his fundraising is not connected to his public position. They specifically ask the following questions:

- 1) May an AWF employee who happens to have been elected to a local City Council solicit donations to AWF from a principal when the employee is a salaried employee,

is not paid on a commission basis, and does not receive a percentage of the funds raised?

- 2) Besides any restriction on soliciting principals and lobbyists, is an AWF employee who is also a City Council member subject to other restrictions when he is seeking donations for AWF?
- 3) Do restrictions on an AWF employee/City Councilman soliciting donations for AWF apply only to prospective AWF donors who are located in the relevant municipality or do they apply to prospective AWF donors from across the state?

The Code defines Business as, "Any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, or **any other legal entity**." Ala. Code § 36-25-1(1) (emphasis added). It defines Business With Which The Person Is Associated as, "Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business." Ala. Code § 36-25-1(2). The only exceptions the Commission has recognized are consistent with and grow out of the holding in Lambert v. Wilcox County, 623 So. 2d 1065 (Ala. 1993), which concluded that the word "business" applies to private enterprises, not governmental agencies. See, e.g., AO 2016-37. The Alabama Wildlife Federation is Mr. Harris's private employer which makes it a business with which he is associated.

Ala. Code § 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." (Emphasis added.)

Ala. Code § 36-25-5.1 states, "...no public employee or public official or family member of the public employee or family member of the public official shall solicit or receive a thing of value from a lobbyist, subordinate of a lobbyist, or principal...."

The restrictions in the Act must be construed in harmony with the purposes and principles of the Ethics Law as set out in Ala. Code § 36-25-2, which among them is the directive that public officials are not to be deprived of the ability to acquire or retain private economic interests, which include those held prior to public service. In Mr. Harris's case, that would

include his job. This same section, however, requires the Act “to be liberally construed to...insure that the public interest is fully protected.” *Id.* The analysis is complicated by the fact that whether Section 5(a) has been violated requires an analysis of whether the public office has been used to benefit the employer as opposed to Section 5.1’s strict prohibition on soliciting and/or receiving a “thing of value.”

Ala. Code § 36-25-5 requires some affirmative act on the part of the public official (e.g., solicitation) but an inference of whether there has been a use of position can be drawn from the relative position of those who solicit and those who are solicited including their past dealings. If before Mr. Harris became a public official certain businesses or individuals contributed to AWF, then after becoming a public official Mr. Harris may continue to solicit from those same businesses or individuals except as limited below. The fact that they have historically given money to AWF is relevant and is a fact supporting the conclusion that the donation is unrelated to Mr. Harris’s public position. Therefore, absent additional facts which create a presumption that Mr. Harris’s public position is relevant to them, as explained below, Mr. Harris may continue to solicit from these donors without violating Ala. Code § 36-25-5(a) provided he not convert any of the donations to his personal use.

With respect to soliciting from principals, Ala. Code § 36-25-5.1 prohibits the act of soliciting or receiving a “thing of value” from a principal. The definition of “thing of value” includes the word “favor,” which could include responding to solicitations for funds in the right context, such as donating to a public official’s employer after being requested to do so by the public official whose at-will employment depends on raising funds. Section 5.1 is a strict prohibition, but there are exceptions which could apply here. One of those exceptions includes “non-governmental business activities **under circumstances which make it clear** that the thing is provided for reasons **unrelated to the recipient’s public service.**” Ala. Code § 36-25-1(34)(b)10 (emphasis added). With respect to those businesses or individuals who may be principals, and therefore trigger a 5.1 analysis, the fact that they have historically given money to AWF is relevant and is a fact supporting the conclusion that the donation is unrelated to Mr. Harris’s public position. This fact is outweighed, however, by evidence that the public official is in a position to benefit the donor.

When a particular business or individual does not do business with, seek business, or have some other interest pending or anticipated to come before the body the official represents, there is a lowered risk that the official’s public position matters to the one being solicited, and the reverse is true, as well. Regulations of the Federal Office of Government Ethics provide some support for this idea in the context of soliciting or directly receiving things of value from a

“prohibited source,” and the logic underlying the definition has some applicability in this limited context, as well.¹

In fact, the Commission has previously recognized the relevance of “scope of influence” in Advisory Opinions concerning solicitation going back to 2011. More recently, in Advisory Opinion No. 2015-14, the Commission addressed this issue from the perspective of a public official soliciting on behalf of her employer. That opinion held that a member of the Legislature, who had taken a job after becoming a member of the Alabama House of Representatives, may be involved in limited fundraising for her employer as long as in doing so she did not violate Sections 36-25-5, 5.1 or 23(c), and for that reason could not solicit from “lobbyists, subordinates of a lobbyist and principals; individuals or entities that have matters pending before the Legislature in which the public official as a legislator would take official action; and any other individual or entity that may feel coerced to contribute given her position.”

The Commission further held, “She may participate in fundraising activities in which her use of public office could not reasonably be questioned which would include fundraising efforts where she works behind the scenes or directs the actions of others and does not directly or publicly solicit money. She may interact with individuals for whom her public position is objectively irrelevant such as out-of-state individuals or other organizations whose members have no matters before the legislature and who could not reasonably have any during her tenure as a public official but she, and her office, will have to be the judge of the nature of those relationships.”

In AO 2016-31 the Commission stated in relation to a Legislator’s ability to obtain new clients for his business and Ala. Code § 36-25-5, “Senator Chambliss should exercise caution in retaining new clients that he did not do business with prior to being elected to the Senate such as expanding his business into areas that are outside his field of expertise, or working for clients that may benefit from his official position or have interests pending in the Legislature.”

Likewise, in AO 2016-34, the Commission recognized that outside the context of Ala. Code § 36-25-5.1, the relative positions of the parties matter for both a Section 5 and 7 analysis. The Commission said, “The Ethics laws have as their purpose the prevention of official

¹ The Federal law contains a concept called the “prohibited source,” which is defined as follows:

(d) **Prohibited source** means any person who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;
- (3) Conducts activities regulated by the employee's agency;
- (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or
- (5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

corruption. Therefore, with that purpose in mind and outside of the Act's clear prohibitions, the relative positions of the giver and the recipient are relevant, including whether their relationship presents an opportunity for corruption."

In the facts before the Commission, Mr. Harris, as a member of the Millbrook City Council will always be a public official, and is both permitted to and limited in making solicitations from potential donors as outlined above. Even though Mr. Harris does not receive compensation based on either a commission basis or as a percentage of funds raised, the AWF is nonetheless a private entity which employs him and, therefore, falls under the definition of "business." As such, he cannot use his official position to benefit the AWF without violating the clear terms of Ala. Code § 36-25-5. For the Commission to conclude otherwise would require us to disregard the language of the Code.

Therefore, he may solicit donations from those individuals or businesses, principals or otherwise, who have historically given to the AWF unless they: (a) are seeking official action by the City of Millbrook or its designated actors (such as the mayor and department heads); (b) do business with the City of Millbrook; (c) have interests that may be substantially affected by performance or nonperformance of Mr. Harris's official duties as a member of the Millbrook City Council based on their relationship to issues pending before the City (for example, a property owner who might benefit from re-zoning even though they are not the ones asking for it); or (d) qualify as an organization a majority of whose members are described in (a) through (c). Other staff members of AWF are not restricted in their ability to solicit from these groups, however, unless they, likewise, are covered under the Act and for whom a similar analysis would apply.

In addition to the above prohibitions, no public official or public employee can solicit a lobbyist for anything other than a campaign contribution without violating Ala. Code § 36-25-23(c). Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not for the purpose of corruptly influencing official action. Under no circumstances can the public official convert the donations to his personal use. Finally, the employee/public official cannot lobby on behalf of his employer, the Wildlife Federation, contrary to Ala. Code § 36-25-23(a)'s clear terms.

CONCLUSION


An employee of the Alabama Wildlife Federation (AWF), a private nonprofit corporation and registered principal, who is an elected public official, may after becoming a public official, continue to solicit donations from businesses or individuals, including principals, who have historically donated to AWF prior to his becoming a public official. He may not, however, convert those donations to his personal use.

An employee of the Alabama Wildlife Federation (AWF) may not solicit donations for his employer from any of the following even if they have historically donated to AWF: (a) those individuals or businesses who are seeking official action by the City of Millbrook or its designated actors (such as the mayor and department heads); (b) those individuals or businesses who do business with the City of Millbrook; (c) those individuals or businesses who have interests that may be substantially affected by performance or nonperformance of the public official's official duties as a member of the Millbrook City Council based on their relationship to issues pending before the City (for example, a property owner who might benefit from re-zoning even though they are not the ones asking for it); or (d) those entities who qualify as an organization a majority of whose members are described in (a) through (c).

An employee of the Alabama Wildlife Federation (AWF) may not solicit a lobbyist for anything other than a campaign contribution without violating Ala. Code § 36-25-23(c). Likewise, Ala. Code § 36-25-7(a) prohibits the solicitation or receipt of anything, whether a "thing of value" or not for the purpose of corruptly influencing official action. Finally, an employee of AWF who is also a public official cannot lobby on behalf of his employer, the Wildlife Federation, contrary to 23(a)'s clear terms, before any legislative body.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on February 1, 2017.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission