



## AlaFile E-Notice

03-CV-2019-901622.00

Judge: BROOKE E REID

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

BIRMINGHAM AIRPORT AUTHORITY V. ALABAMA ETHICS COMMISSION ET AL  
03-CV-2019-901622.00

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**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

BIRMINGHAM AIRPORT AUTHORITY,	)	
Plaintiff,	)	
	)	
V.	)	Case No.: CV-2019-901622.00
	)	
ALABAMA ETHICS COMMISSION,	)	
FIELDING JERRY L.,	)	
PRICE CHARLES ASSOCIATION,	)	
BRADY BEVERLYE N. ET AL,	)	
Defendants.	)	

**ORDER**

This matter comes before the Court on cross-motions for summary judgment filed by Plaintiff Birmingham Airport Authority (“Plaintiff” or “Authority”) (Doc. 142), and Defendants Alabama Ethics Commission (“Commission”); Charles Price, Beverlye N. Brady, John M. Plunk, Jacquelyn L. Stuart, and Stanton H. McDonald, in their official capacities as Commissioners of the Alabama Ethics Commission (collectively, “Commissioners”); and Tom Albritton, in his official capacity as Executive Director of the Alabama Ethics Commission (all Defendants collectively, “Defendants”, and collectively with the Authority, the “Parties”). Having considered the pleadings in this matter, the evidentiary submissions, and oral arguments of the Parties’ counsel, the Court GRANTS Plaintiff’s Motion for Summary Judgment and DENIES Defendants’ Motion for Summary Judgment .

**PROCEDURAL HISTORY**

This is a timely appeal and declaratory judgment proceeding arising from the issuance by the Alabama Ethics Commission (“Commission”) of Advisory Opinion 2019-07 (“Opinion”) to Mr. Sylvester Lavender on August 7, 2019. At the time, Mr. Lavender was Interim CEO of the

Authority.<sup>[1]</sup> The Authority brought this action pursuant to Ala. Admin. Code § 340-x-1-.02(4), and initiated this appeal and declaratory judgment action in the Circuit Court of Montgomery County on August 28, 2019 (Doc. 2). The Authority subsequently filed a First Amended Complaint (Doc. 26) on September 6, 2019, seeking a declaratory judgment of the applicability of the Alabama Ethics Act (“Ethics Act”) to employees of the Authority.

On October 9, 2019, Defendants filed a Motion to Dismiss, asserting (1) the Complaint and Amended Complaint failed to state a claim upon which relief can be granted, and (2) that this Court lacked subject-matter jurisdiction under the Declaratory Judgment Act. Defendants asserted there is no “justiciable controversy” on grounds the Authority’s appeal can only be brought under Alabama’s Administrative Procedures Act (“AAPA”) pursuant to Ala. Code § 41-22-20. This Court denied Defendants’ Motion to Dismiss on the basis the Authority properly instituted this appeal pursuant to Ala. Admin. Code § 340-x-1-.02, and that the Commission’s Opinion presents a justiciable controversy in that it places affirmative obligations upon the Authority and its employees as “public employees” and creates criminal exposure for said employees regardless of whether they have been overtly threatened with fines or prosecution. (Doc. 127).

Following this Court’s denial of Defendants’ Motion to Dismiss, the Parties submitted cross-motions for summary judgment and related briefing. On May 20, 2020, this Court held a hearing (“May 20 Hearing”) at which counsel for the Parties presented oral argument.<sup>[2]</sup>

In addition to the pleadings and arguments from the Parties, numerous non-parties filed motions for leave to file *amicus curiae* briefs (“Motions for Leave to File”) in support of the Authority’s positions in this appeal. Motions for Leave to File were filed by the Alabama Rural Water Association (Doc. 82); the Huntsville-Madison County Airport Authority and the Dothan-

Houston County Airport Authority (Docs. 89 and 178); the Alabama Water and Wastewater Institute (Docs. 93 and 180); the General Retirement System for Employees of Jefferson County (Doc. 96); the Alabama Municipal Electric Authority (Doc. 111); the Alabama Public Utilities Association (Doc. 102); and the Mobile Airport Authority (Doc. 105). This Court granted the Motions for Leave to File and has subsequently reviewed the submitted *amicus curiae* briefs and accorded them the weight this Court deemed appropriate to its consideration of the pending appeal. (Doc. 127).

### **SUMMARY JUDGMENT STANDARD**

A motion for summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ala. R. Civ. P. 56(c)(3). Once the moving party has made a prima facie showing that there is no genuine issue of material fact, the non-moving party must rebut that showing by presenting substantial evidence creating a genuine issue of material fact. *Ex parte First Alabama Bank*, 883 So. 2d 1236, 1239–40 (Ala. 2003). “[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.” *Id.* at 1240 (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989)). Further, the non-movant may oppose such motions only with admissible evidence. *Chatham v. CSX Trans. Inc.*, 613 So. 2d 341, 344 (Ala. 1993).

### **NARRATIVE STATEMENT OF UNDISPUTED FACTS**

The Authority is a public nonprofit corporation organized under the provisions of the Code of Alabama, Title 4, Chapter 3, Article 2. (Doc. 26 at ¶ 2). The Authority is responsible for managing and operating the Birmingham-Shuttlesworth International Airport (“Airport”), which

is owned by the City of Birmingham. (*Id.*). The Authority is governed by a seven-member Board of Directors (“Board”). (*Id.*). Funding for the operations of the Airport, including the salaries of all Authority employees, is derived exclusively from user and landing fees paid by the airlines and from rental, concession, and other fees paid by lessees, concessionaires, and other users of airport property and facilities. (*Id.* at ¶ 11). Capital improvements at the Airport are funded through various grants from the Federal Aviation Administration, from passenger facility charges and from the proceeds of industrial revenue bonds. (Doc. 27 at p. 2). The grants are for specific capital projects which must be separately accounted for. (*Id.*). The FAA holds the funds for approved projects and periodically reimburses the Airport Authority for approved expenditures. (*Id.*). Money used for salaries and operating expenses is not co-mingled with grant money. (*Id.*).

Defendant Commission is a five-member commission established pursuant to Ala. Code § 36-25-3, and it is responsible for the administration and enforcement of the Ethics Act. (Doc. 26 at ¶ 3). Defendant Commissioners are named in this lawsuit in their official capacity as commissioners of the Commission. (*Id.* at ¶ 4). Defendant Mr. Albritton is named as a defendant in this lawsuit in his official capacity as the Executive Director of the Commission. (*Id.* at ¶ 5).

On January 8, 2019, the Authority submitted to the Commission, through Mr. Albritton, a request for a formal Advisory Opinion (“Request”) seeking guidance related to several questions posed by the Board. (Doc. 26 at ¶ 10; Doc. 28). One of the questions posed in the Request was whether Authority employees are considered “public employees” under the Ethics Act. (Doc. 26 at ¶ 10; Doc. 28). The Ethics Act defines “public employee” as follows:

**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 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.

Ala. Code § 36-25-1(26) (emphasis added).

The “public employee” question arose due to conflicting guidance given to other similarly situated airport authorities. (Doc. 26 at ¶ 12). In a formal advisory opinion issued in 1996 to the Mobile Airport Authority, the Commission concluded employees of the Mobile Airport Authority were “public employees” subject to the Ethics Act, but that opinion did not address whether the funds used to pay those employees were “state, county, or municipal funds” under the Ethics Act. (*Id.*; Doc. 29). In 2011, however, the Commission’s then-General Counsel issued an informal advisory opinion advising the Huntsville-Madison County Airport Authority that its employees were not “public employees” under the Ethics Act because “they are not paid in whole or in part from state, county or municipal funds . . . .” (Doc. 26 at ¶ 12; Doc. 30).

At the Commission’s August 7, 2019 meeting (“August Meeting”), the Commission considered and adopted the Opinion concluding that Authority employees are “public employees” under the Ethics Act. (Doc. 26 at ¶ 28; Doc. 47 at p. 29). Because of the Opinion’s conclusion that Authority employees are “public employees” under the Ethics Act, all Authority employees who fall within one of the enumerated categories of Ala. Code § 36-25-14(a) are now required to file Statements of Economic Interest with the Commission. (Doc. 26 at ¶ 29). Those categories include, for example, Authority employees whose base pay is \$81,000 or more (*see* Ala. Code § 36-25-14(a)(2)) and all full-time employees serving as a supervisor (*see* Ala. Code § 36-25-14(a)(25)).<sup>[3]</sup>

## OPINION

The outcome of this appeal turns on the question of whether Authority employees are “public employees” under the Ethics Act. Ala. Code § 36-25-1(26) defines a “public employee” as “[a]ny person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities . . . who is paid in whole or in part from state, county, or municipal funds.” Thus, under the circumstances of this appeal, the answer to that determinative question depends on whether Authority employees are “paid in whole or in part from state, county, or municipal funds.”

This Court finds that the funds used to pay Authority employees are self-generated revenues that are not derived from or linked to actual taxpayer contributions, and therefore those funds do not constitute “state, county or municipal funds” as that phrase is used in the Ethics Act. Therefore, Authority employees are not “public employees” under the Ethics Act.

The Authority argues that the Opinion’s conclusion that self-generated funds of the Authority constitute “state, county, or municipal funds” under the Ethics Act contradicts several decisions from various Alabama courts. In support, the Authority cites *Water Works & Sewer Bd. of City of Selma v. Randolph*, in which the Alabama Supreme Court examined the specific definition of the statutory term “funds belonging to the state, county or municipality” in Ala. Code § 13A-14-2(a), and concluded that self-generated revenues that could not be linked to actual taxpayer contributions were not “funds belonging to the state, county or municipality” under Ala. Code § 13A-14-2(a) simply because they belonged to a public corporation. 833 So. 2d 604, 608 (Ala. 2002).

The Commission argued that *Water Works and Sewer Board of the City of Talladega v.*

*Consolidating Publishing, Inc.*, 892 So. 2d 859 (Ala. 2004) was “decided two years later” than *Randolph*, and therefore, the *Consolidated Publishing* decision—in which the Alabama Supreme Court recognized that employees of a public corporation can function as “agents” of the municipality that created them—controls. The Authority countered in its briefing and at the May 20 Hearing that *Consolidated Publishing* is distinguishable, stating that in *Consolidated Publishing*, the statute at issue was not the Ethics Act, but the Open Records Act, and the Open Records Act’s definition of “public officers or servants” does not contain the exception present in the Ethics Act’s definition of “public employees” for individuals who are not paid “in whole or in part from state, county, or municipal funds.” See Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Judgment at pp. 8–10.

The Authority also cites two Alabama circuit court cases which determined that employees of public corporations who are paid from self-generated funds—rather than state, county, or municipal funds—are not public employees under the Ethics Act. See CV-2017-901088, *General Retirement System for Employees of Jefferson County v. Alabama Ethics Commission* (Montgomery County, Judge Hobbs), Final Order dated January 8, 2018 (“GRS Order”); CC-2001-574, -575, -577, and -578, *State v. McKee et al.* (Etowah County, Justice Perry Hooper, Sr. (specially sitting as Circuit Judge)), Order dated November 19, 2001 (“McKee Order”).

This Court is persuaded by the authorities cited by the Authority. In *Randolph*, the Alabama Supreme Court examined the specific definition of the statutory term “funds belonging to the state, county or municipality” in Ala. Code § 13A-14-2(a) (which has since been repealed). *Randolph* concerned public meetings under the Sunshine Law, the application of which required proof “that public funds or grants received or disbursed by the Board were ‘funds

belonging to the state, county or municipality.” *Randolph*, 833 So. 2d at 608. The *Randolph* Court noted that the statutory basis for the creation of the board at issue, Ala. Code § 11-50-314, “contemplates that the monies used by such a public corporation in the operation of its business shall come from the revenues generated by the operations of its system and through the borrowing of money.” *Id.* The *Randolph* Court concluded that self-generated revenues which could not be linked to actual taxpayer contributions were not public funds belonging to the affiliated municipality simply because they belonged to a public corporation. *Id.* Like the self-generated funds in *Randolph*, the funds used to pay Authority employees are self-generated revenues that are not derived from or linked to actual taxpayer contributions, and therefore those funds do not constitute “state, county or municipal funds” as that phrase is used in the Ethics Act.

This Court is further persuaded by the reasoning cited in the *McKee* and *GRS* Orders referenced *supra*. In the *McKee* Order, Justice Hooper found it is “material and relevant in concluding whether Defendant Brian McKee is paid in whole or in part from state, county or municipal funds, to consider evidence on the nature of the funding of the Etowah Solid Waste Disposal Authority,” the public corporation for which the defendant worked. *McKee* Order at 6. Justice Hooper specifically noted the Etowah County Solid Waste Authority was “funded from users,” employees of the Etowah County Solid Waste Authority were “not employees of Etowah County and were not paid by Etowah County,” and “the Etowah County Commission has never contributed any monies to the operation of the Solid Waste Authority, nor has it paid in whole or in part, any of the employees of the Solid Waste Authority.” *Id.* Based on that evidence, the court found that under the definition of “public employee” in the Ethics Act, the defendant employee “was not an employee of a governmental instrumentality paid in whole or in part from state,

county or municipal funds.” *Id.* at 7. Like the Etowah County Solid Waste Authority, (a) the salaries of Birmingham Airport Authority employees are funded by users, (b) Authority employees are not employees of the City of Birmingham, (c) Airport employees are not paid in whole or in part by the City of Birmingham, and (d) the City of Birmingham does not contribute funds to the operation of the Authority.

In the *GRS* Order, Judge Hobbs found that the trust fund from which employees of the Jefferson County General Retirement System were paid could only be utilized for the exclusive benefit of the GRS pension system members such that those employees could not be considered “public employees” under the Ethics Act. *See GRS* Order at unnumbered 21–24. In the *GRS* Order, Judge Hobbs also noted that the employees at issue were “not Jefferson County employees and Jefferson County takes no part in setting the compensation of” these employees. *Id.* at unnumbered 22. Similarly, Authority employees are not employees of the City of Birmingham, and the City of Birmingham is not involved in providing funding or setting the compensation of Authority employees.

Additionally, as reflected in the *amicus* briefing, there are numerous public corporations in the State of Alabama whose employees have never before been deemed public employees under the Act and who have relied, without penalty, on the statutory carve-out for individuals who are not paid in whole or in part from state, county, or municipal funds.

For the foregoing reasons, this Court hereby FINDS AND ORDERS as follows:

- Plaintiff’s Motion for Summary Judgment (Doc. 142) is hereby GRANTED;
- Defendants’ Motion for Summary Judgment (Doc. 145) is hereby DENIED;
- The funds used to pay Authority employees do not constitute “state, county, or municipal funds” as that term is used in the Ethics Act’s definition of “public employee;”

- Authority employees are not “public employees” as defined in the Ethics Act;
- Because they are not “public employees” subject to the Ethics Act, Authority employees do not have to file Statements of Economic Interest with the Commission.

[1] As of June 1, 2019, Mr. Ronald Mathieu assumed the role of CEO for the Authority.

[2] Due to concerns related to the COVID-19 pandemic, this hearing was conducted via video conference. *See* March 23, 2020 Order (Doc. 163).

[3] On September 9, 2019, the Court entered an order staying the operation of the Opinion as it relates to Authority employees being considered “public employees” under the Act pending the outcome of this action.

**DONE this 11<sup>th</sup> day of June, 2020.**

**/s/ BROOKE E REID**  
**CIRCUIT JUDGE**