

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 00-4

April 28, 2000

- RE: (1) May former principal assistant with the Kentucky Revenue Cabinet represent taxpayer before state agencies in matters in which the principal assistant was not directly involved?
- (2) May former principal assistant with the Kentucky Revenue Cabinet represent taxpayer before state agencies in matters in which the principal assistant was directly involved?

- DECISION: (1) Yes.
- (2) No.

This opinion is in response to your January 14 and February 18, 2000 requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"), as well as in response to a January 24, 2000 request for an advisory opinion from the General Counsel of the Kentucky Revenue Cabinet ("KRC"). On February 25, 2000, you appeared before the Commission to answer questions regarding this matter. This matter was reviewed at the February 25 and April 28, 2000, meetings of the Commission and the following opinion is issued.

The relevant facts provided by you and the KRC are as follows. You were employed as a Principal Assistant to the Commissioner of Property Valuation, KRC, from August 1, 1997 until November 9, 1999. In this position you performed expert appraisal services for Property Valuation Administrators (PVAs) who specifically requested your assistance for properties under threat of appeal. Your job was to provide appraisals and testimony after an appeal had been filed, not to recommend assessed valuations before an appeal. In appeals where you were requested by a PVA to testify before the Kentucky Board of Tax Appeals, your evaluations of property were absolutely independent of the PVA's assessment. You had no authority over PVAs and have never advised a PVA as to what value he should assess any parcel of land.

As a part of your official duty for the KRC, you were directed to develop guidelines on the valuation of subsidized housing in order to assist the PVAs in the valuation of this type of property. You wrote a memorandum pertaining to federally subsidized housing

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entitled "Guidelines for the Assessment of Subsidized Housing" ("Guidelines"). This 10-page memorandum, dated December 9, 1998, explains why and how to use the income approach to value subsidized apartments. The income approach is one of three widely accepted approaches to valuing income property. The memorandum was not the policy of the Revenue Cabinet, but a suggested guideline that was intended to be distributed to PVAs.

While employed by the KRC, you were subpoenaed by a property owner, Franklin Asset Management, Inc., ("Franklin"), a company that owns subsidized housing projects across the state, to testify at a Scott County PVA evaluation hearing on its behalf. Your testimony did not concern the value of the property, but concerned the income approach as the proper method of valuation to be used in subsidized apartments. You were not representing the KRC at the hearing, but were testifying against the local PVA. The KRC believes that it is apparent from your testimony that you worked extensively with Franklin to develop and refine the Guidelines. When the KRC learned that you had been subpoenaed to testify on behalf of Franklin against the PVA, the KRC decided not to distribute the Guidelines to PVAs until the KRC could review and reconsider them.

Additionally, you are a professional real estate appraiser, with a certified general real estate appraisal license in Kentucky. You were a self-employed real estate appraiser for 19 years prior to your employment with the KRC. While you were self-employed, you represented several taxpayers in assessment matters. You have returned to the profession of real estate since leaving your state employment. Since your return to the real estate profession, you have been authorized by Franklin to represent it in protest conferences with PVAs concerning the year 2000 assessments for subsidized housing projects owned by Franklin. These protest conferences are held each year pursuant to KRS 133.120. In December of 1999, you sent protest letters to several PVAs stating the included Guidelines were prepared by you while serving as the principal assistant to the Commissioner of Property Valuation. You also state in the letters that you testified as an expert witness at a property tax hearing before the Kentucky Board of Tax Appeals as to the validity and reliability of the Guidelines.

In returning to your former profession, you would like to act as a tax representative and/or appraiser of corporate taxpayers in appeals of the assessed valuation of parcels of land with which you have never had any direct involvement, as part of your official duty for the KRC. You ask whether you are permitted under existing statutes to act as an appraiser or tax

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representative for an individual or company before a PVA, a local board of assessment appeals, or the Kentucky Board of Tax Appeals, provided you have had no involvement with either the assessment or the appeal of the specific parcel of land involved.

Additionally, you would like to act as a tax representative and/or appraiser for Franklin in the appeal of the assessed valuation of federally subsidized apartments for which you have never recommended a specific value to the PVA or any other employee of the KRC during your term of employment. Also, you have never discussed the specific property with Franklin during your term of employment with the KRC. You ask whether you are permitted under existing statutes to act as an appraiser or tax representative of federally subsidized housing for an individual or company before a PVA, local board of assessment appeals or the Kentucky Board of Tax Appeals if you have had no involvement with the assessment or the appeal of the specific parcel of land as part of your official duty for the state.

The KRC asks whether your actions of working closely with a taxpayer to develop the Guidelines and later testifying on behalf of the taxpayer against a PVA are in a violation of KRS 11A.020 which provides:

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

Additionally, the KRC asks whether you may have violated KRS 11A.040(9) in your representation of Franklin in a matter (the matter of valuation of subsidized housing) in which you were directly involved during your tenure with the KRC.

KRS 11A.040(7) and (9) provide:

(7) No present or former officer or public servant listed in KRS 11A.010(9)(a) to (h) shall, within six (6) months following termination of his office or employment, accept employment, compensation, or other economic benefit from any person or business that contracts or does business with, or is regulated by,

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the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of six (6) months, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to, filing tax returns, filing applications for permits or licenses, or filing incorporation papers, nor shall it prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs.

- (9) A former public servant shall not represent a person or business before a state agency in a matter in which the former public servant was directly involved during the last thirty-six (36) months of his tenure, for a period of one (1) year after the latter of:
- (a) The date of leaving office or termination of employment; or
 - (b) The date the term of office expires to which the public servant was elected.

As a principal assistant to the Commissioner of the Department of Property Valuation, you were considered an officer as defined in KRS 11A.010(7), and thus are subject to KRS 11A.040(7) above. Thus, although you have returned to your former profession of real estate, if you accept compensation from a person or entity with whom you had direct involvement during your state tenure, for six months you are prohibited from working on any matter in which you had direct involvement during your state tenure. It appears that you were directly involved in matters of the valuation of subsidized housing during your state tenure, and thus are prohibited, for six months following your termination, from accepting compensation from entities with which you had direct involvement during your state tenure concerning subsidized housing matters. It also appears to the Commission that, as a part of your official duty, you had direct

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involvement with Franklin to develop the Guidelines. Thus, the Commission believes that, for six months, you should not work on any matters for Franklin concerning the valuation of subsidized housing.

You are not prohibited from representing taxpayers before state agencies in matters in which you did not have any direct involvement. Thus, you may immediately act as an appraiser or tax representative for an individual or company before a PVA, a local board of assessment appeals, or the Kentucky Board of Tax Appeals, provided, as a part of your official duty, you did not have any involvement with either the assessment or the appeal of the specific parcel of land involved, and such assessment or appeal does not involve subsidized housing matters involving Franklin.

However, in Advisory Opinion 94-47 (a copy of which is enclosed), the Commission concluded that for one year a former employee could not represent clients before his former state agency in hearings involving advisory opinions he had drafted or motions that were pending while he was a public servant. Similarly, the Commission believes that for one year following your termination of employment, you are prohibited from representing Franklin before the Revenue Cabinet (or any PVA) and the Kentucky Board of Tax Appeals concerning subsidized housing guidelines, because the Commission believes these are matters in which you had direct involvement during your state tenure. Additionally, if the local board of assessment appeals is a state agency, then, for one year following your termination, you should not represent the taxpayer before it as well.

Because you were subpoenaed to testify, your action of working with Franklin to develop the Guidelines and then appearing as a witness on behalf of Franklin against the Revenue Cabinet, does not appear to violate KRS 11A.020(2), unless you were compensated or offered a position by Franklin which may then appear to be furthering your professional or private interest.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Bertie Oldham Salyer, M.A., A.M.E.

Enclosures: Advisory Opinion 94-47

