

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-46

September 11, 2002

RE: May former director accept position with company that will involve fulfillment of a contract with the state agency by which the director was formerly employed?

DECISION: No.

This opinion is in response to your August 2 and August 21, 2002, requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 11, 2002 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are currently the Director of the Division of Computing Services (the "Division") within the Governor's Office for Technology ("GOT"). Your job involves providing support for the computers and servers located at the state's Commonwealth Data Center. You are considering retirement in the near future. You recently received a letter from the staff of the Commission pertaining to your request regarding your post-employment options. Based on that response, you have some additional questions that need clarification.

You understand that as an "officer" or non-merit employee, after your retirement, you are limited to considering only companies with which you have had no direct involvement during the last three years of your state employment. If you were to resign and go to work for a systems development company that contracts with the state, but with which you have not been directly involved, to what restrictions would you be subject with respect to the projects and assignments on which you could work for the company in fulfillment of a state contract state.

For example, you were recently involved in three assignments that you believe GOT would probably want you to continue to work on, as a contractor, if allowed. You ask: As an employee of a company that contracts with the state, would you be prohibited from working on the three assignments (and other similar assignments)? And, if so, for how long?

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In particular, you were the project manager for the implementation of the Commonwealth's employee self-service application, ClickHR. The Personnel Cabinet purchased the ClickHR software from ProAct Technologies. Part of the software procurement also included software installation and integration services, which involved the actual installation of the ClickHR software, customization of the software, and integration of ClickHR software with the Personnel Cabinet's backend databases. The ClickHR installation and integration services were provided by ProAct Technologies via a subcontractor, Intelligent Document Management Solutions (IDMS), of Frankfort, KY. IDMS routinely does business with various state agencies on imaging and computing projects, but their work on the ClickHR project was entirely as a subcontractor to ProAct Technologies. In fact, IDMS has never had a contract with the Commonwealth relating to ClickHR activities, either before, during, or after the implementation of the ClickHR system. IDMS is currently working as a subcontractor to Mercer Human Resource Consulting in the redesign of the Personnel Cabinet's Health and Life Insurance application.

You ask whether, upon retirement, you could take a job with IDMS to work on state government projects. And specifically, could you work on the ongoing redesign of the Personnel Cabinet's Health and Life Insurance application? You believe that you would not be able to work on ClickHR for six months, as an IDMS employee, but ask if you could work on other state projects with which you have not been involved during the last 36 months of your state employment.

You also ask for clarification as to the meaning of the term "represent" in KRS 11A.040(9), as it would apply to your situation. You are considering working for a contracting company that would not determine your assignments, but would only serve as an intermediary to allow the state to obtain legally the expertise, experience, and skills of a former employee. The state would determine your assignments, projects, priorities, work location, and work schedule via a task order, as though you were a state employee. You ask if in a situation like this, you would be considered "representing" your former employer "before a state agency."

Additionally you ask if you were to come back after retirement as a "second career" merit state employee, instead of a contractor, would there be any restrictions on your work assignments?

KRS 11A.040(6) and (7) provide:

(6) A former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within six (6) months of termination of his employment, knowingly by himself or through any business in which he owns or controls an interest of at least five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he was employed. This provision shall not apply to a contract, purchase, or good faith negotiation made under KRS Chapter 416 relating to eminent domain or to agreements that may directly or indirectly involve public funds disbursed through entitlement programs. This provision shall not apply to purchases from a state agency that are available on the same terms to the general public or that are made at public auction. This provision shall not apply to former officers of the Department of Public Advocacy whose continued representation of clients is necessary in order to prevent an adverse effect on the client.

(7) A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, 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, 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.

As a former officer in state government, you would be prohibited for six months from enjoying any part of a contract with GOT. Thus, if you were employed by a company that does business with GOT, you would be prohibited for six months from working on any matter that would be fulfilling part of a contract between your new employer and GOT. Even if you had no involvement in the matter while you were a state employee, you would still be prohibited from enjoying any part of the contract between your new employer and GOT. Additionally, the above statute prohibits you from directly contracting with GOT for six months following your retirement.

In answer to your specific question regarding future employment with IDMS, the Commission believes that you would not be prohibited immediately upon your retirement from accepting employment with IDMS to work on state projects with which you have not had involvement the last 36 months of your state employment. Although such work would involve fulfillment of a contract with the state, it does not appear that the contract would be with the state agency by which you were formerly employed, GOT, but rather would be with the Personnel Cabinet. Additionally, it appears relative to the ClickHR software project with which you have had direct involvement, that IDMS does not do business directly with the state, but rather is a subcontractor. Furthermore, IDMS' direct contracts with the state do not appear to involve matters in which you had direct involvement.

KRS 11A.040(9) provides:

(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.

If you were to accept employment with IDMS to work on state government projects, for one year, you should not communicate with the state on behalf on IDMS regarding those projects in which you have had direct involvement during the last three years of your state employment (i.e. ClickHR).

And finally, if you were to come back after retirement as a merit employee instead of a contractor, you would have no restrictions on your work assignments in your capacity as a merit employee.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.