

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-28

September 30, 2004

- RE:**
- 1) May Executive Director accept post-employment with company to perform a specific function that will fulfill a contract between the company and the Cabinet for which he currently works?
 - 2) May Cabinet Secretary provide job referral for employee?

- DECISION:**
- 1) Yes, if the contract directly involves entitlement funds.
 - 2) Yes, provided the Cabinet Secretary does not make referral to company that has business or regulatory relationship with the Cabinet.

This opinion is issued in response to your August 17, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 30, 2004 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are currently the Executive Director of the Office of Fiscal Affairs with the Cabinet for Health and Family Services (the "Cabinet"). You have held that position since February 1, 2004. Previously you served as the Director of Financial Management within the Department for Medicaid Services. In both positions, your job has been to report and analyze financial data. Your only involvement with an outside company, as part of your official duty, occurred in October of 2003 when you assisted the Cabinet Secretary and outside actuaries in negotiating a contract with an entity that provides managed care for Medicaid recipients in Louisville. You have not worked with the company awarded the contract since becoming Executive Director, but rather your functions have all related to Cabinet-level reporting, forecasting, and analyzing data. Most of what you did in this capacity related to the reorganization plan and was strictly internal, meaning that you did not have any contact with outside entities while functioning in your official capacity.

You are considering resigning from your current position and leaving state government. Prior to working in state government, you worked for three years in health care consulting and five years in health insurance and insurance holding companies. You ask the following questions regarding your post-employment:

(1) If I leave employment with the state of Kentucky, am I allowed to work for an outside company to perform a specific function within the Cabinet for Health Services? An example would be to work for a company that manages pharmaceutical benefits for the State to Medicaid recipients. Can I work for this firm immediately, or do I have to wait six months to start with the firm? I have not worked on the development of the RFP and not [been] involved in the negotiations or scope of work either with the state or the outside company but the RFP may be drafted.

(2) Can the Cabinet Secretary or key state government staff refer me to an outside company for employment? Is so, what are the guidelines that they have to follow?

As an executive director in the Cabinet you are an officer as defined in KRS 11A.010(7) of the Executive Branch Code of Ethics (the "Code"). Thus, you are subject to the Code's post-employment provisions set forth at KRS 11A.040(6)-(7), reprinted below:

(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.

You have indicated that you may seek post-employment with a company that does not currently contract with the Cabinet, but may obtain a contract with the Cabinet, and the work you would provide for the company would fulfill part of that contract. The provisions contained in KRS 11A.040(6) generally prohibit you for six months from fulfilling or “enjoying” part of a contract with your former state agency. See Advisory Opinion 02-16 (enclosed). However, if the contract would be paid by public funds as administrative costs for the operation of an entitlement program, the Commission believes, in that case, the provisions in KRS 11A.040(6) would not apply. See Advisory Opinion 96-3 (enclosed).

Regarding the provisions of KRS 11A.040(7), you are prohibited for six months after leaving your position from accepting employment or compensation from any company with which you or anyone under your supervision had direct involvement during the last three years of your state tenure. However, if you will be returning to the profession or occupation in which you were involved prior to your state employment, you may immediately accept employment with a company that does business with the state in matters in which you may have been directly involved, but for six months may not work on any matters in which you or anyone under your supervision was directly involved.

It appears from the information you have provided that you have not been directly involved with any outside companies except for the company with which the Cabinet contracted

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to provide managed care for Medicaid. You may, immediately upon leaving state employment, accept employment with or compensation from a company with which neither you nor anyone under your supervision has had direct involvement, regardless of whether that company has had direct involvement with the Cabinet, provided you otherwise comply with the statutes reprinted above and you do not use your official position to give yourself an advantage in violation of KRS 11A.020(1)(d), which provides:

(1) No public servant, by himself or through others, shall knowingly:

...

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large..

Additionally, the Commission has previously stated in Advisory Opinion 00-6 (a copy of which is enclosed) that a state employee should not discuss any future employment options with a potential employer if the state employee is at the same time involved in matters regarding the potential employer. Based on the facts you provided, this does not appear to be a concern.

You must also comply with the post-employment provisions in KRS 11A.040(8) and (9) provided below:

(8) A former public servant shall not act as a lobbyist or lobbyist's principal in matters in which he 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.

(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:

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- (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.

Thus, for one year from the date you leave state government, you may not act as a lobbyist for your new employer for matters in which you had direct involvement during the last thirty-six (36) months of your state employment. Also, you may not represent your new employer before the Cabinet in matters in which you were directly involved during the last thirty-six (36) months of your state employment. You would not be prohibited from working on such matters for your employer so long as you comply with KRS 11A.040(7) above and you do not communicate with the Cabinet concerning such matters.

In regard to your second question, while there is no specific prohibition against the Cabinet Secretary or other state officials serving as a reference for you, they must be careful that any actions they take to assist you in obtaining outside employment do not violate KRS 11A.020(1)(d) provided above. Specifically, they should not provide a reference for you to a company that has a business or regulatory relationship with the Cabinet or seeks something, such as a contract or grant, from the Cabinet. Such a referral may present a conflict of interest for the Cabinet Secretary or other state officials.

In sum, you may immediately accept employment with an outside employer without waiting six months as long as it is not with a company with which you or anyone under your supervision has been directly involved in the past three years. You must also follow the restrictions set forth in KRS 11A.040(8) and (9), and you must be careful not to use your official position while with state government to secure such employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 00-6
Advisory Opinion 02-16
Advisory Opinion 96-3