

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-7

February 18, 2005

RE: May former director who has returned to his former profession immediately work on project for another state that involves an interstate agreement with Kentucky?

DECISION: Yes, if neither he, nor anyone under his supervision, had any involvement with the project during the last 36 months of the director's state tenure.

This opinion is issued in response to your February 2, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 18, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are a licensed professional engineer and a licensed professional land surveyor in Kentucky. Prior to being licensed as a professional engineer and land surveyor, you were certified as an engineer-in-training ("EOT") and as a land surveyor-in-training ("LSIT"). Your EIT and LSIT certifications were earned prior to your employment with the Transportation Cabinet.

You accepted employment with the Transportation Cabinet in January 1976 upon earning your degree in civil engineering in December 1975. You worked for the Cabinet through December of 1980. You were employed by the Transportation Center at the University of Kentucky, College of Engineering from January 1981 through January 1989. In February 1989 you returned to employment with the Transportation Cabinet through December 2004.

You retired from state employment effective close of business on December 31, 2004. At the time of your retirement, you were the Director for the Division of Highway Design (the "Division") in the Transportation Cabinet.

After reviewing Advisory Opinions 95-25 and 97-12, and others issued by the Commission, you accepted employment with a consulting engineering firm based on the belief that you were returning to your former profession as an engineer. You are aware that you must refrain from working on any matters in which you were directly involved during the last 36 months of your state tenure. You also understand that for one year you may not represent a person before a state agency in a matter in which you were directly involved the last 36 months.

You state that since leaving your state employment you have not worked on any Transportation Cabinet projects, and have worked only on projects outside Kentucky. Your new employer is considering responding to a request for proposal to provide engineering services for a project for the Ohio Department of Transportation. The Ohio Department of Transportation is the lead state for the project, however Kentucky is involved in the project as well through an interstate agreement. You ask the following:

- 1) *Since the Ohio Department of Transportation is the lead agency on this project and if my new employer chooses to respond to this request for a proposal for engineering services (either as a prime consultant or subcontractor), are they permitted to list me as an employee available to work on the project without my being subject to the six month exclusion for work on Kentucky projects?*
- 2) *If the response to the above question is "yes" then the second question is moot. However, if it is determined that I would be subject to the six month exclusion for the work in Kentucky on this project, then the second question is "Can I be listed in the proposal as an employee available to work on this project but with a noted caveat that I am not permitted to work on this project until July 1, 2005 (six months after the date of my retirement)."*

Please find enclosed for your review the brochure entitled, *Leaving State Government?*, which provides KRS 11A.040(6) (7), (8) and (9) as stated 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.

(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:

(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 provided in Advisory Opinion 02-27 (a copy of which is enclosed), a division director is considered to have direct involvement in all matters of the division. Thus, as a former officer who returned to his former profession, you are prohibited, for six months, from working on any matters with which the Division had any involvement during the last 36 months of your state employment. (KRS 11A.040(7))

If neither you, nor any of the employees with the Division, had direct involvement with the aforementioned project during the last three years of your state tenure, then you would not be prohibited from immediately working on this project, and your new employer could certainly list you as an employee available to work on the project.

However, if you or any employees within the Division had any direct involvement with the aforementioned project during the last three years of your state employment, including meetings concerning the project, then the Commission believes that you should not work on this project until July 1, 2005. If your new employer wishes to list you in their response as an employee available to work on this specific project, your employer should include a statement in the response that your services will not be available until July 1, 2005

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Further, KRS 11A.040(6) prohibits you, as an officer, from “enjoying” for six months a part of a contract with the Transportation Cabinet. If you are employed to work on matters that fulfill part of a contract (or subcontract) with the Transportation Cabinet within six months of your retirement, you may be in violation of the above provision.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 02-27