

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-22

August 25, 2006

RE: May former employee benefit from contract with former agency?

DECISION: No, for six months.

This opinion is issued in response to your July 31, 2006 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the August 25, 2006 meeting of the Commission and the following opinion is issued.

You provide the following relevant facts as follows. Recently, the Division for Air Quality (the "Division"), within the Department for Environmental Protection of the Environmental and Public Protection Cabinet (the "Cabinet"), advertised for bids for a permit outsourcing project using the Finance and Administration Cabinet's Request for Proposal process. One of the three successful bidders on the project was an employee-owned environmental consulting company, which was awarded one of three contracts the Division was letting for the project. Representatives of the environmental consulting company have already signed the contract, but neither the Division, nor the Cabinet has done so.

An employee of the environmental consulting company is a former Cabinet employee who held three successive non-merit positions while employed by the Cabinet, from February 15, 2004 until his resignation on April 15, 2006, including Executive Director of Regulatory Affairs, Chief of Staff, and Acting Director of the Environmental Quality Commission. After leaving the Cabinet employment, the employee returned to his former business, the environmental consulting company, of which he previously was an owner and employee.

The current president and chief executive officer of the environmental consulting company is the former employee's spouse. The former employee is now a part-time employee, but has no ownership interest and no management responsibilities. He has not worked on the Division's project, and currently is providing consulting services to businesses outside Kentucky or to entities that have no regulatory relationship with the Cabinet. You state that while

employed by the Cabinet, the employee did not work on any Division matters, supervise any Division employees, or work on any issues connected with the permit outsourcing project.

You ask two questions: First, is the environmental consulting company prohibited from signing or negotiating a contract prior to the expiration of six months from when the employee resigned? You advised the Division that pursuant to KRS 11A.040(6), in order to avoid the appearance of impropriety, the Division and the environmental consulting company should take a broad view of the phrase "directly involved," and should wait until October 15, 2006 before entering into any contract. You also advised that the former employee should not work on any aspect of the contract before that date.

Second, you ask if the former employee ethically may work on the project after October 15, 2006. Your preliminary advice to the Division was that he would be permitted to do so since there would not be any overlap between the various job duties he had in his three positions with the Cabinet and what the environmental consulting company will be responsible for under the contract. The former employee had no direct involvement in matters covered by the contract while he was a Cabinet employee.

Please find enclosed the pamphlet, *Leaving State Government?*, which provides guidance for post-employment activities.

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

(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.

KRS 11A.040(6), stated above, provides that within six months of leaving employment neither the former employee, nor anyone else for his use or benefit, may contract or have an agreement with the agency by which he was formerly employed. The Commission believes that within the Cabinet are several separate agencies (Offices, Departments, etc.) that are of a separate independent nature. Thus, the former employee (and his spouse) would be prohibited from benefiting from a contract or agreement only with those agencies within the Cabinet for which the former employee worked or supervised. However, since he worked at the Cabinet level as chief of staff, he may be considered to have had direct involvement in all agencies within the Cabinet, if the heads of such agencies were under his supervision or if he was involved in matters of the agency.

Consequently, prior to October 15, 2006, neither the former employee nor his spouse (since the Commission assumes that he would benefit from his spouse), nor any company of which he or his spouse holds an ownership interest of at least 5%, may hold a contract with the Division if the former employee had any ultimate supervisory responsibilities over the Division.

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-22

August 25, 2006

Page Four

If, as Chief of Staff, the former employee did not have any supervisory responsibilities over the Department for Environmental Protection, and thus was not considered an employee of that agency, then he would not be prohibited from benefiting from the contract between the environmental consulting company and the Division may negotiate the contract prior to October 15, 2006.

KRS 11A.040(7), stated above, allows the former employee to return to his former profession with the environmental consulting company provided, for six months, he doesn't work on any matters in which he had direct involvement during his state tenure. Thus, again the former employee must determine which agencies within the Cabinet that he had responsibility over, and thus with which he would be considered to have been directly involved. Until October 15, 2006, he should not work on any matters for the environmental consulting company which were before any such agencies within the Cabinet during his state tenure.

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.

Further, after October 15, 2006, the former employee is not prohibited from benefiting from a contact with the Division or working on the permit outsourcing project for the environmental consulting company provided he does not communicate for an additional six months with the Division concerning specific matters (i.e. projects) with which he was directly involved during his tenure.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosure: *Leaving State Government?*