

Executive Branch Ethics Commission
ADVISORY OPINION 08-10
May 9, 2008

RE: May the former Commissioner of Parks provide volunteer service for the Kentucky State Park Foundation?

DECISION: Yes.

This opinion is issued in response to your March 31, 2008 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 9, 2008 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You were appointed on June 1, 2006 as Commissioner of Kentucky's Department of Parks and subsequently worked toward the goal of establishing an independent foundation to support the Kentucky parks, similar to other foundations that support state agencies, such as the Kentucky Historical Society Foundation, the Kentucky Horse Park Foundation, and the Kentucky Educational Television Foundation. The Kentucky State Park Foundation (the "Foundation") incorporated in February 2007 as a non-profit 501(c)(3) charitable organization to advocate for and receive grants, bequests, and gifts from individuals, corporations, and others in support of Kentucky state parks and historic sites. The board of the Foundation, assembled initially as private citizens, with the Commissioner of Parks serving as an ex-officio member. The Foundation's board is self-perpetuating, as its members are not appointed by the Governor or any governmental entity.

On December 13, 2007, you were terminated from your position as Commissioner of the Department of Parks, and since your departure have been duly elected as a member of the Foundation board of directors by a vote of the board of directors. In order to advance the mission of the Foundation, you continue to volunteer your time by actively participating on Foundation committees. You co-chair the Education and Outreach Committee, and serve on the Development Committee which prepares marketing materials to be used in soliciting donations from individuals, businesses and other organizations.

In your volunteer service, you have expended personal funds on behalf of the Foundation for memberships and resources with the understanding that you would be reimbursed. You hold no contract with the Foundation, do not represent the Foundation as a lobbyist, are not an

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employee of the Foundation, and have not represented the Foundation before a state agency. Until your meeting with the Commission's Executive Director on March 25, 2008, you believed the Foundation to be a private entity, not a state agency, and thus not an entity to which the Department of Parks has any regulatory control.

You ask for advice as to what restrictions exist on your relationship with the Foundation and the Department of Parks. Specifically, you ask the following:

- 1. Are there restrictions on my participation on the KSPF Board of Directors?*
- 2. Are there restrictions on my ability to be reimbursed for expenditures I make on behalf of the KSPF?*
- 3. Are there restrictions on my ability to speak with legislators or state employees when doing so on behalf of the KSPF or the Department of Parks?*
- 4. Are there restrictions on my ability to participate in fund-raising activities, such as meeting with individuals, businesses and other organizations to solicit donations from them on behalf of the KSPF, which exists for the exclusive benefit of Kentucky's state parks and historic sites?*
- 5. May I be reimbursed for mileage or other expenses incurred while traveling on behalf of the KSPF's fund-raising efforts?*
- 6. What other restrictions apply to my relationship with the KSPF and the Department of Parks?*
- 7. Would the answers to the questions noted above be different if the KSPF made me an employee with a nominal stipend or salary?*
- 8. If there are restrictions, what is the time-limitation of said restrictions?*

The first issue relative to your request that the Commission will attempt to address is whether the Foundation is, or is attached to, an executive branch agency of state government. A representative of the Finance and Administration Cabinet, Office of Statewide Accounting believes that the Foundation is similar in nature to the World Games 2010 Foundation, Inc. The Office of Statewide Accounting initially concluded that the World Games 2010 Foundation, Inc., was a component unit within the financial reporting entity of the Commonwealth, but now due to further information is questioning that conclusion. Thus, at this point, the Office of Statewide Accounting has made no determination yet as to whether or not the Foundation is within the financial reporting entity of the Commonwealth. Thus, the Commission cannot conclude yet whether the Foundation is considered to be within the executive branch of Kentucky government for purposes of applying the Executive Branch Code of Ethics.

If the Foundation is determined to be within the financial reporting entity of the Commonwealth, and thus within the executive branch of Kentucky government, then KRS 11A.040(6) would apply as stated below:

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(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.

KRS 11A.040(7), (8) and (9) also provide:

(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.

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(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 within the executive branch, the question of this scenario then becomes whether the Foundation is considered to be attached to the Kentucky Department of Parks or whether it is considered a separate state agency for purposes of applying KRS Chapter 11A. If considered to be attached to the Department of Parks, then you would be prohibited for six months from having a contract or agreement with the Foundation, since it would be considered to be the agency by which you were previously employed. However, service on a board of directors of a Foundation that is attached to an agency, and reimbursement of expenditures, do not appear to the Commission to be considered “contracts” or “agreements” in the context so used in the provision above. Thus, even if the Foundation is considered to be within the executive branch of state government and attached to the Department of Parks, you would not be prohibited from serving on the board of the directors for the Foundation, nor from accepting reimbursement for expenditures you make on behalf of the Foundation, including mileage while traveling on behalf of the Foundation’s efforts.

Further, if the Foundation were to be determined to be an executive branch agency, as a member of the board of directors, rather than an employee of, you would not be subject to the Executive Branch Code of Ethics and thus there would be no restrictions on your participation in fund-raising activities such as meeting with individuals, businesses, and other organizations to solicit donations from them on behalf of the Foundation. If you were hired as an employee, rather than serving as a board member, likewise you would not be prohibited from such solicitation pursuant to KRS 11A.055(1), below, which allows employees to raise funds for 501(c)(3) nonprofit organizations that are charitable. Also, as an employee or a board member you would not be required to register as a lobbyist, and thus any attempts to influence legislation and/or executive agency decisions in your official capacity would not be considered “lobbying.”

11A.055 Raising of funds for certain activities permitted.

(1) Any provision of KRS Chapter 11A to the contrary notwithstanding, a state agency or a public servant may raise funds, either individually or as a department or agency, for a charitable nonprofit organization granted a tax exemption by the Internal Revenue Service under Section 501c of the Internal Revenue Code without violating the provisions of this chapter. Raising of funds shall include but not be limited to holding events for the benefit of the

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charitable organization, contacting potential donors, providing prizes, and engaging in other forms of fundraising and providing the funds thus raised to the charitable organization.

On the contrary, if the Foundation is determined not to be within the executive branch of state government, but rather a private, nonprofit entity, then only the provisions in KRS 11A.040(7), (8), and (9) would apply to your post-employment activities. In such a scenario, although for six months you would be prohibited from accepting employment or compensation from a person or business with which you had direct involvement as a part of your official capacity, the Commission believes that as long as you are not compensated by, nor have any “employment” with the Foundation, but merely serve on the board of directors in a voluntary position, you may continue to do so and may be reimbursed for any expenditures you make on behalf of the Foundation. There would appear to be no restrictions on any fundraising activities, as well. However, for one year you may not act as a lobbyist (engaged for compensation), or represent the Foundation before the state, in those matters (cases, projects, programs) regarding the Foundation with which you had direct involvement as a part of your official duties for the Commonwealth. Any attempts to influence legislation or executive agency decisions for which you are not “engaged” (compensated) would not be prohibited.

The Commission advises you to contact the Office of Statewide Accounting, within the Finance and Administration Cabinet, to determine whether it has concluded as to the status of the Foundation for financial reporting purposes, which also will determine whether the Foundation is within the executive branch for purposes of applying KRS Chapter 11A, the Executive Branch Code of Ethics. In both scenarios, though, the Commission believes that you would be permitted to serve on the board of directors of the Foundation, accept reimbursement for expenditures you make on behalf of the Foundation, including mileage while traveling on behalf of Foundation efforts, and participate in fund-raising activities on behalf of the Foundation.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb