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Executive Branch Ethics Commission
ADVISORY OPINION 14-02
May 19, 2014

RE: Was a former Assistant State Highway Engineer in the Kentucky Transportation Cabinet an “officer” as that term is defined in KRS 11A.010(7)?

DECISION: Yes.

This opinion is issued in response to your request for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”) regarding whether an Assistant State Highway Engineer in the Kentucky Transportation Cabinet (“KYTC”) was an “officer” as defined in KRS 11A.010(7) during his employment with KYTC.

You state that this individual’s job title was Assistant State Highway Engineer, and that in that position he served as the Local Public Agency (“LPA”) Projects Coordinator. You indicate that his primary duty was to shepherd local agencies through the process of obtaining grants. In that capacity, he might become involved in the design and construction of projects on an advisory basis, answering questions about design or construction standards or placing local agencies in contact with individuals who could answer those questions. He did not manage or directly design the projects, nor did he select consultants, contractors, or suppliers for the projects. He did assist local agencies in developing bidding documents for their projects.

You further state that the former Assistant State Highway Engineer had no employees working under his supervision. He did not directly assist the Secretary of Transportation, or supervisors within KYTC responsible for highway design or project delivery. Essentially, according to your request, he worked autonomously. The LPA projects sometimes involved design issues on which he would provide advice, but none of those projects were administered or managed by Highway Design, but rather by the local government agencies.

According to your letter, the former Assistant State Highway Engineer is now employed by an engineering firm on a salary basis. He is paid solely from revenue that the firm receives from sources other than the Commonwealth of Kentucky. He plans to work with the firm in submitting proposals for, and pursuing new projects with, the Commonwealth of Kentucky. The projects in which the firm is primarily interested will be administered and managed by Highway Design. However, the former Assistant State Highway Engineer will not work on any existing projects for the Commonwealth on which the engineering firm has done work as a subcontractor.

You ask whether the former Assistant State Highway Engineer was an “officer” when he was in his state position. You feel that because he had no subordinates, did not make decisions about the awarding of grants, and did not himself design or manage the projects as to which he assisted local agencies, he seems to have a good argument that he was not involved in any “major management” duties and so was not an “officer.”

You next ask, in short, that should the Commission disagree and conclude that the former Assistant State Highway Engineer was an “officer,” whether his current compensation arrangement with the engineering firm presents any concerns under KRS 11A.040(6), after which you discuss the application of KRS 11A.040(7) to his current situation.

You then present an analysis to support your position that the former Assistant State Highway Engineer was not an “officer; and to support your opinion as to what restrictions are imposed by the Executive Branch Code of Ethics on former “officers.”

KRS 11A.010(7) defines “officer” as follows:

"Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, executive directors, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Kentucky Teachers' Retirement System board of trustees, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Kentucky Occupational Safety and Health Review Commission, the Kentucky Board of Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

The Commission has reviewed its files and ascertained that the Commission has considered the position of Assistant State Highway Engineer to be an “officer” since at least 2009. Everyone holding that position, including the individual in question, has filed annual Statements of Financial Disclosure (“SFDs”) with the Commission since that time, as all “officers” are required to do. This particular Assistant State Highway Engineer filed SFDs for calendar years 2011 and 2012, and was expected to file for calendar year 2013 and the portion of 2014 during which he served in that position, but was granted an extension by the Executive Director pending the issuance of this advisory opinion.

In determining whether a position meets the definition of “officer,” the Commission reviews, among other considerations, job specifications, when they are available. The Commission has reviewed the job specification for Assistant State Highway Engineer, and it is the opinion of the Commission that the position should be considered “major management” as that term is used in KRS 11A.010(7). This opinion is based on both the characteristics of the job and the examples of duties or responsibilities of the job classification. For example, the position is a Grade 19, a high grade on a scale that goes from Grade 5 to Grade 21. Further, the characteristics of the job are described as follows:

Coordinates and supervises the activities of a component of the state highway engineering program such as construction, pre-construction, or operations. Serves as a staff engineer to the State Highway Engineer; and performs other duties as required.

According to KRS 176.020(1), the State Highway Engineer (the "SHE") is appointed, with the prior approval of the Governor, to serve as the technical advisor to the Commissioner of Highways, under whose direction he supervises all construction and maintenance work of the Department of Highways. Based on information obtained from KYTC, it is the understanding of the Commission that the Assistant State Highway Engineer functions as a representative of the SHE's office and, subject to the direction of the SHE, has all the authority conferred on that office by statute. The Assistant State Highway Engineer speaks for the SHE in the areas delegated to him and is most often the liaison between the Commissioner of Highways or the Secretary of KYTC, the SHE, and other functional units. Clearly when acting in such a capacity, the Assistant State Highway Engineer is performing "major management" activities.

While the former Assistant State Highway Engineer may not have directly supervised anyone, this does not, based on the job description, mean that the position is not a supervisory one. According to the job specifications, examples of the duties or responsibilities of the Assistant State Highway Engineer may include coordinating the activities of the engineering divisions, reviewing and recommending for approval by the SHE and the Commissioner of Highways construction program specifications, special provisions, or contract claims. He may serve on departmental engineering related committees, make field inspections of construction projects, and provide technical assistance to district and division engineers. These sorts of duties and oversight responsibilities are among the characteristics of "major management" personnel. This has been confirmed by KYTC, which informed the Commission that "persons occupying the position of [Assistant State Highway Engineer] are functioning at the highest level of project management within the cabinet."

The Commission has also reviewed the three advisory opinions referenced in your opinion request and found nothing in those opinions that supports your assertion that the position of Assistant State Highway Engineer should not be considered an "officer". Advisory Opinion 96-14 deals with a branch manager, and the Commission does not consider branch managers to be officers. Advisory Opinion 00-34 addresses a situation where someone had the working title of "Director" when in reality the person was an "administrative assistant". In the present case, the individual in question held the position that his title indicated. Advisory Opinion 03-4 pertains to an employee with the Kentucky Housing Corporation which has its own personnel system. While the person involved therein was a "director" by title, he was not a director of a division and in all likelihood functioned more as a manager would under the standard state personnel system.

Based on the reasons stated above, the Commission is unable to confirm that the Assistant State Highway Engineer in question was not an "officer." He served in a position that the Commission considers to be an "officer" position and acquiesced to being considered an "officer" since he took the position in 2011 by filing his statement of financial disclosure annually with the Commission. Furthermore, the Commission has confirmed that his own agency, KYTC, considered him to be an "officer" during the time he held the position with that agency. The Commission has traditionally given considerable deference to an agency when making the determination as to which of its employees are considered "major management."

Having concluded that the former Assistant State Highway Engineer was an “officer,” the Commission will now address the application of KRS 11A.040(6) and (7) to his current situation. You affirmatively state that he has no ownership interest in the engineering firm by which he is now employed and that his new employer is compensating him from sources of revenue other than those derived from the Commonwealth, and will continue to do so for a period of six months from the termination of his state employment.

KRS 11A.040(6) states as follows:

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.

So long as the former Assistant State Highway Engineer has no ownership interest in the firm and continues to not “enjoy” any part of a contract or other agreement his new employer may enter into with KYTC for six months from the time he left the agency’s employ, then he is in compliance with the statute. The current arrangement, where he does not receive any compensation derived from the Commonwealth, satisfies this requirement.

KRS 11A.040(7), reads as follows:

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. (*emphasis added*).

Assuming the former Assistant State Highway Engineer received his professional degree or license prior to his state employment, if he returned to the same occupation or profession for which he received a professional degree or license prior to his state employment, this provision permitted him to accept employment immediately upon leaving KYTC from a person or business that contracts or does business with the state in matters in which he was directly involved. Thus there would be no question that he was able to accept employment from his new employer without any waiting period. As correctly stated in your opinion request, he is just not permitted to work on any matter in which he, or anyone under his supervision, was directly involved during the last three years of his tenure. Since you indicate he had no one under his supervision, then all he needs to consider in this regard are matters with which he himself was involved. He must not work on such matters at all for six months and must also keep in mind the provisions contained in KRS 11A.040(9), which states:

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.

“Represent” is defined at KRS 11A.010(17) to mean “to attend an agency proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else.” This means that even after the first six months following his termination of employment with KYTC, during which he will not be able to work on any matter in which he was directly involved the preceding three years, it will be an additional six months before the former Assistant State Highway Engineer will be able to represent his new employer before KYTC regarding any matter in which he was directly involved during the three years prior to his departure. During this second six month period, he may work behind the scenes on matters with which he was involved with KYTC, he just cannot act as a point of contact between the engineering firm and KYTC on those matters.

It should be noted that while the term “matter” is not defined in the Executive Branch Code of Ethics itself, the Commission has defined “matter,” as it is used in the provisions cited above, to mean “any case, project, grant, proceeding, application, determination, issue, contract, claim, investigation, charge, legislation, or question” (*see, e.g.,* Advisory Opinion 07-29). The term is therefore very specific so that the former Assistant State Highway Engineer would be able to work on any new case, project, grant, proceeding, application, determination, issue, contract, claim, investigation, charge, legislation, or question on behalf of his new employer that may arise after he left KYTC’s employment. However, KRS 11A.040(6) would still prevent him, for six months after he left, from receiving any benefit from new contracts or agreements his new employer may enter into with KYTC.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: W. David Denton