COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 09-18
May 21, 2009

RE: Does a conflict of interest exist when a company owned by an employee of the Department for Environmental Protection, Division of Water bids on a contract and performs work pursuant to a contract with the Department for Natural Resources, Division of Abandoned Mine Lands?

DECISION: The contemplated contractual relationship is prohibited because the Department for Environmental Protection and the Department for Natural Resources are in the same agency, and therefore a statutory conflict would exist.

This opinion is issued in response to your April 16, 2009 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The matter was reviewed by the Commission on May 21, 2009 and the following opinion is issued.

You are employed as an Environmental Inspector III for the Kentucky Division of Water, Department of Environmental Protection in the Energy and Environment Cabinet. You ask whether it would be a conflict of interest for you, individually or through a company in which you have an ownership interest, to bid on and enter into competitively awarded contracts with the Department for Natural Resources, Division of Abandoned Mine Lands in the Energy and Environment Cabinet for the Abandoned Mine Lands Program. You confirmed that you would own more than five percent (5%) of the company.

The Commission has learned that the officials who have been designated as your appointing authorities are at the level of the Secretary of the Energy and Environment Cabinet and above, and serve as appointing authorities for all employees of the Cabinet, including employees of both the Department for Natural Resources and the Department for Environmental Protection.

The statutes within the Executive Branch Code of Ethics (the "Code") pertaining to a possible conflict of interest are KRS 11A.005 and KRS 11A.020.

KRS 11A.005 provides:

> (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
>
> (a) A public servant be independent and impartial;
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> (b) Government policy and decisions be made through the established processes of government;
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> (c) A public servant not use public office to obtain private benefits; and
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> (d) The public has confidence in the integrity of its government and public servants.
>
> (2) The principles of ethical behavior for public servants shall recognize that:
>
> (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
>
> (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
>
> (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.020 provides in relevant part:

> (1) No public servant, by himself or through others, shall knowingly:
>
> (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
>
> (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
>
> (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
>
> (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.

> (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
>
> (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

You ask whether a conflict of interest would exist if you, as an employee of the Division of Water, Department for Environmental Protection in the Energy and Environment Cabinet, contracted to perform services for the Division of Abandoned Mine Lands, Department for Natural Resources in the Energy and Environment Cabinet. The Division of Water manages, protects and enhances the water resources of the Commonwealth through voluntary, regulatory and educational programs. You work as an Environmental Inspector III in one of the Division's regional offices, and you are responsible for taking water samples, investigating citizen complaints, and inspecting permitted facilities. The Division of Abandoned Mine Lands works to correct health and safety problems caused by mining that occurred before 1982, including water issues caused by mining operation. The Division of Water is not involved in water resource issues pertaining to mining operations before 1982. It is unlikely that a direct conflict of interest would exist, since you are not in a position to influence the decisions of officials in the Division of Abandoned Mine Lands, and you do not have access to information that could be used to create an advantage for yourself.

Although it is unlikely that a direct conflict of interest would exist, the Code of Ethics prohibits you from having a contract with your agency. KRS 11A.040 (4) provides in pertinent part:

> (4) A public servant shall not knowingly himself or through any business in which he owns or controls an interest of more than 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 is employed or which he supervises, subject to the provisions of KRS 45A.340…

KRS 11A.010 (10) provides:

> (10) "Agency" means every state office, cabinet, department, board, commission, public corporation, or authority in the executive branch of state government. A public servant is employed by the agency by which his appointing authority is employed, unless his agency is attached to the appointing authority's agency for administrative purposes only, or unless the agency's characteristics are of a separate independent nature distinct from

> the appointing authority and it is considered an agency on its own, such as an independent department;

Whether or not you may enter into a contract with the Department for Natural Resources depends on if your "agency" for purposes of KRS Chapter 11A is the Department for Environmental Protection, or if your agency is the Energy and Environment Cabinet. You are employed by the agency by which your appointing authority is employed, unless your agency is attached to the appointing authority's agency for administrative purposes only, or unless the agency's characteristics are of a separate independent nature distinct from the appointing authority and it is considered an agency on its own, such as an independent department.

The officials who serve as your appointing authorities are at the level of the Secretary of the Energy and Environment Cabinet and above. Neither the Department for Environmental Protection nor the Department for Natural Resources is attached to the Energy and Environment Cabinet for administrative purposes only. Accordingly, your "agency" for purposes of KRS Chapter 11A is the Energy and Environment Cabinet, unless the Department for Environmental Protection has characteristics that are of a separate independent nature distinct from the appointing authority.

In order to determine whether a Department is separate and independent from its Cabinet, the Commission in Advisory Opinion 97-11 advised that a determining factor is whether the Department is an integral part of the Cabinet. The overview of the Energy and Environment Cabinet and the mission of the Department for Environmental Protection below establish that in this instance, the Department is in fact an integral part of the Cabinet.

The website for the Energy and Environment Cabinet explains:

> "Energy and the environment – two parts of our daily lives that seem at first glance to be counter to each other. Yet, in Kentucky, we firmly believe these two areas can and should be part of the same discussion. That is why Gov. Steve Beshear brought the two together under the Energy and Environment Cabinet (EEC). In Kentucky's EEC, we take seriously our role of overseers of how we carefully and thoughtfully address the energy needs of our citizens. Whether from our historic coal operations and seeking ways in which to mine and deliver that mineral more safely and cleanly, or developing stringent regulations that make certain Kentucky's natural beauty is not harmed, EEC employees continue to work diligently to bring vital services to all Kentuckians."

The stated mission of the Department for Environmental Protection is "...to protect and enhance Kentucky's environment. This mission is important because it has a direct impact on Kentucky's public health, our citizens' safety and the quality of Kentucky's valuable natural resources - our environment."

The Commission further explained in Advisory Opinion 99-41, as amended by Advisory Opinion 01-11, that departments sharing an appointing authority and administrative services such as personnel management and purchasing function as a single agency for purposes of the Code of Ethics, even though the missions of the departments may be separate and distinct from each other. The Department for Natural Resources and the Department for Environmental Protection, along with other entities within the Energy and Environment Cabinet, share administrative services including legal, purchasing, and personnel administration.

For purposes of KRS Chapter 11A, the agency of the employees in both the Department for Environmental Protection and the Department for Natural Resources is the Energy and Environment Cabinet. Therefore, an employee of the Department for Environmental Protection cannot hold a contract with the Division of Abandoned Mine Lands in the Department for Natural Resources.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

Gwen R. Pinson

By Chair: Gwen R. Pinson