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Executive Branch Ethics Commission
ADVISORY OPINION 19-11
November 19, 2019

RE: An officer and public servant serving in various roles of major management in the previous three years of state service seeks post-employment advice pursuant to KRS 11A.040(6)-(9).

This opinion is issued in response to your September 5, 2019 and November 5, 2019 requests for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the "Commission"). The Commission reviewed your request at the September 23, 2019, and November 19, 2019 meetings and issued the following advisory opinion.

Pursuant to KRS 11A.110(1), the Commission must keep your identity confidential. Nevertheless, you agreed to waive those provisions so that the Commission may render a more specific opinion. As such, the following opinion is written to address your specific concerns for your individual and unique scenario. However, those wishing to follow this advice for their individual scenarios should seek further guidance from the Commission before proceeding as the nuances in the Executive Branch Code of Ethics may apply differently given a varying set of facts.

During the last three years of your public service, you have served in policy-making and major managerial roles for three different state entities under the authority of the Executive Branch Code of Ethics. In each of these roles, you have maintained responsibilities that included the regulation of thousands of private businesses across the Commonwealth. You are an attorney by trade, having attained both your juris doctor and license to practice law prior to your state service. In your roles for these agencies, you are considered to be an "officer" pursuant to KRS 11A.010(7) under the Executive Branch Code of Ethics. Therefore, all of the post-employment provisions will apply to you when you leave state service.

Since June of 2018, you have served as the Chief of Staff for the Secretary of the Education and Workforce Development Cabinet (“Cabinet”). In this capacity, you advise the Secretary and assist in the development of policy initiatives and the overall management of the Cabinet. From January 2016 to June 2018, you served in a similar capacity as the Chief of Staff for the Kentucky Labor Cabinet.

In September of 2018, the Secretary designated you as the *ex officio* chair of the Unemployment Insurance Commission (“UI Commission”). Pursuant to KRS 341.110 and 341.340, the UI Commission hears appeals from lower authority decisions concerning unemployment insurance administrative matters, such as the eligibility of individual claimants for unemployment benefits, the status of claimants as employees or independent contractors, liabilities for fines and penalties under UI statutes, and successorship determinations, according to which contribution rates and reserve accounts of one employer are transferred to another, “successor” employer that receives all or part of the predecessor’s trade or business. Though its caseload varies each year, more than 2,800 lower authority decisions were appealed to the UI Commission in each of the past two years. Employers are parties to most of these cases.

You are generally concerned about the application of the post-employment rules under KRS 11A.040(6) through (9). However, specifically, you request guidance as to whether KRS 11A.040(7) would prohibit you from engaging in the following forms of post-employment within your first year of post-employment from state service with the thousands of employers and businesses that have come before your agency in the last three years of public service or that may have engaged in business relationships with the Cabinet. You ask whether you may take:

1. A position as legal counsel (either as in-house or outside attorney);
2. A position other than as legal counsel (such as in providing government affairs/relations services); and
3. A position that combined the provision of legal and non-legal services.

The applicable post-employment provision that only apply to officers, apply during the first year post-employment.¹ KRS 11A.040(6) provides:

A former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year 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

¹ SB 6 from the 2019 General Assembly Session, enacted on June 27, 2019, amended KRS 11A.040(6) and (7) to change the stated post-employment time period of six (6) months to one (1) year.

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) provides:

A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year 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 one (1) year, 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). “Directly involved” is defined in KRS 11A.010(18) to mean “to work on personally or to supervise someone who works on personally.” The term “doing business with” is defined by KRS 11A.010(14) to mean “contracting, entering into an agreement, leasing, or otherwise exchanging services or goods with a state agency in return for payment by the state, including accepting a grant, but not including accepting a state entitlement fund disbursement.” The term “regulated by” is not defined in the Executive Branch Code of Ethics.

The time frames in KRS 11A.040(6) and (7) apply for one year from the time you left each of your officer positions. Therefore, the one year time from when you left the Labor Cabinet ended on June 2019. As such, you should only be concerned about the one year time frame from when you will vacate the Chief of Staff position at the Economic Development Cabinet and the position with the UI Commission.

In your role as Chief of Staff, your position of authority means that you may have had widespread involvement with many matters of your agency either through working directly on them or supervising those individuals who work directly on the matters that are regulated by the Cabinet through statute and administrative regulation and the businesses that do business with the Cabinet. As such, you will have to be diligent in ensuring you abstain for one year from working on any matters that you worked on directly while you were the Chief of Staff of the Cabinet.

However, the unique question is whether the UI Commission is considered to be regulatory. Black's Law Dictionary, 11th Edition, defines "regulate" as "to fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." The U.S. Supreme Court has stated "the power to regulate commerce is the power 'to prescribe the rule by which commerce is to be governed.'" *United States v. Darby*, 312 U.S. 100, 114 (1941).

The UI Commission adjudicates matters, but does not establish regulations or enforce those regulations. It may interpret statutes and regulations in making adjudications. Adjudication is the legal process by which an arbiter or judge reviews evidence and legal arguments set forth by opposing parties to come to a decision which determines the rights and obligations of those parties under the law. The Ethics Commission must determine whether this conduct fulfills the definition of the term "to regulate."

Pursuant to KRS 341.115(1), the Cabinet Secretary "shall have the power and authority to adopt, amend, or rescind such rules and regulations as he deems necessary or suitable for the proper administration of this chapter. The commission shall determine its own organization and methods of procedure." Furthermore, KRS 341.115(2) states that "[r]egulations shall become effective in the matter and at the time prescribed by the secretary" and not the UI Commission. Finally, the only regulatory powers the UI Commission has are established by KRS 341.115(3), which states

The commission shall serve as an appeals board to hear and decide appeals filed in accordance with the provisions of KRS 341.430 and shall adopt regulations governing the manner of filing appeals and the conduct of hearings and appeals consistent with the provisions of this chapter.

Therefore, the Ethics Commission determines that the UI Commission is adjudicatory and may not be considered to be regulatory because it does not establish the regulations about which it is making determinations. KRS 11A.040(7) is not applicable to service on the UI Commission as it relates to the term "is regulated by."

As for the remaining post-employment provisions, the provisions that apply to every employee post-employment apply for one year post-employment and are contained in KRS 11A.040(8) and (9). They are as follows:

- (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.

KRS 11A.010 (17) defines “represent” to mean “attend an agency proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else.” The Ethics Commission has defined the term “matter” to mean “any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill.” 9 KAR 1:025, Section 1(4).

Generally, as a former officer, you may not accept or enter into a contract, either directly or indirectly, with your former agency for one year post-employment. Furthermore, you may not accept employment with an entity that contracts or does business with or is regulated by your former agencies in matters in which you were directly involved during your last thirty-six (36) months with the state for a period of one (1) year after leaving employment with the Economic Development Cabinet and the UI Commission, unless you are returning to your former business or profession.

However, as an attorney that received his license to practice law prior to working for the state, you may return to work in your former profession as an attorney. You may immediately work for an entity that is regulated by or doing business with your former agencies. However, for a period of one year, you must abstain from working on any matters that you worked on directly or supervised someone who worked directly on during the last three years of your state service. After that one-year period expires, you may work on those matters.

Furthermore, for one year after you leave state service, you also need to be concerned with following the provisions of KRS 11A.040(8) and (9). These provisions determine that you must wait one year before you can 1) act as a lobbyist in regard to any matter in which you were directly involved during your last three years in state service, and 2) represent a person or business before a state agency in any matter in which you were directly involved during your last three years in state government. Therefore, until the one-year post-employment period passes, you may not lobby on behalf of or represent your new employer on any matters that you, or anyone under your supervision, worked on during your last three years of state service. This restriction does not prevent you from dealing with or working on new “matters” for your future employer.

As to your specific questions, you ask whether you may take a position as legal counsel (either as in-house or outside attorney). KRS 11A.040(7) specifically provides that you may return to your former profession and work for any possible employer as long as you abstain for one year from working on matters in which you were directly involved while you worked for the state for the final three years of service. Therefore, you may work as legal counsel for a future employer.

Secondly, you ask whether you may take a position other than as legal counsel (such as in providing government affairs/relations services). The answer to this question is determined on where you want to go work, whether that employer is included in the prohibitions listed in KRS 11A.040(7), and whether you worked on matters related to that employer during your state service. The Commission cannot definitively answer these questions without more information about your intended prospective employer.

Finally, you ask whether you may take a position that combine the provision of legal and non-legal services. As long as you will be fulfilling an attorney role, you may rely on the exception listed in KRS 11A.040(7) even though you may also be performing non-attorney functions for your future employer.

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: Christopher L. Thacker