

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 00-35
June 23, 2000

RE: May employee return to his former profession as a managing engineer?

DECISION: Yes.

This opinion is in response to your April 27 and June 9, 2000, requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the June 23, 2000, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You currently are employed as the Director of Technical Operations for the Office of the Petroleum Storage Tank Environmental Assurance Fund (the Fund). The Fund reimburses eligible underground storage tank facility owners for the cost of corrective action clean-up in the event of a fuel release into the environment. In order for an owner to be eligible for reimbursement, the owner must have a contract with an environmental consultant or contractor to conduct necessary investigative activities and to develop and implement a plan for remedying site contamination. This is a market common to nearly all environmental consulting firms.

As an owner incurs corrective action costs, typically in the form of invoices from the environmental consultant or contractor, he may submit a claim to the Fund and request reimbursement. These claims are reviewed by the Fund staff to determine eligible, reasonable and necessary charges. In your capacity as Director, you supervise a cadre of reviewers and consider their recommendations for reimbursement. If you agree, you pass their recommendations to the Executive Director of the Fund who ultimately requests approval from the Secretary of the Public Protection and Regulation Cabinet for processing of the claim. The Fund does not hold any contracts with environmental consultants or contractors. The contract that governs all work undertaken is between the owner and the environmental consultant or contractor. Payment for reimbursement is not made to the environmental consultant or contractor, but is made to the owner. You believe that because the environmental consultant provides a service to the owner, but does not exchange services or goods with the state, that the consultant or contractor is not doing business with the state. You also believe because the state

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is providing reimbursement without the exchange of goods or services that such outflow of funds could be an entitlement.

Additionally, the Fund neither determines the work to be conducted by an owner nor the company that will conduct the work. The work to be performed is determined by the Underground Storage Tank Branch of the Division of Waste Management in the Natural Resources and Environmental Protection Cabinet. Fund staff are specifically instructed to refrain from expressing opinions, either positive or negative, regarding the qualifications of specific contractors.

As provided by law, the Fund administers a company certification program for consultants and contractors. Consultants and contractors must submit an application to the Fund for certification.

You ask what restrictions or limitations, if any, will be imposed upon you or a potential employer if you seek employment outside of state government. You state that you have a degree in civil engineering and were employed for nine years prior to your state employment with an environmental consulting firm. You ask whether your return to employment with a consulting company in a capacity as a managing engineer would be viewed as returning to the profession that you held prior to your state employment.

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

(7) No present or former officer or public servant listed in KRS 11A.010(9)(a) to (h) shall, 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

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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.

(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.

The Commission believes that the Fund regulates consultants and contractors because it reviews the work of the consultants and contractors for payment of claims to owners, and because consultants and contractors must be certified by the Fund.

Based on the information that you have provided, it appears that you will be returning to your former profession if you accept employment with an environmental consulting company. Thus, you may accept employment with a consulting company immediately upon your resignation from state employment. However, for six months, you should not work on any matters in which you were directly involved during the last six months of your state tenure. The Commission believes that such matters include work on facilities pertaining to claims that you reviewed as part of your official duty for the Fund. You are not prohibited from working on other matters of a facility that you reviewed, provided it does not involve work relating to a claim that you or someone under your supervision reviewed during the last three years of your employment.

Additionally, for one year, you should not represent any consultant before the Fund in matters in which you were directly involved during the last three years of your state employment.

Furthermore, based on Advisory Opinion 00-6 (a copy of which is enclosed), you should not discuss any future employment options with a consultant while at the same time you are involved in matters regarding the consultant. If you wish to seek employment with a particular consultant, you should abstain from all matters regarding the consultant and disclose such intention in writing pursuant to KRS 11A.020(3) below:

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(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.

An employee not under your supervision should handle matters involving the consultant with whom you seek employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Bertie Oldham Salyer, M.A., A.M.E.

Enclosure: Advisory Opinion 00-6