

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-50

November 22, 2002

RE: May former Commissioner immediately accept employment with entity that does business with the state agency by which the Commissioner was formerly employed?

DECISION: No, unless the entity is a political subdivision.

This opinion is in response to your September 24, 2002, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the November 22, 2002, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You retired from your position as Commissioner for the Department for Training and Re-Employment in the Cabinet for Workforce Development (the Department) on September 30, 2002. The Department is responsible for passing federal funds to eleven local workforce investment areas throughout the state including area development districts, the City of Louisville, and the Eastern Kentucky Concentrated Employment Program. The Department also contracts with various public and private firms for services involving the administration of the program.

It is your intention to return to the employment and training field within the next few months. You are seeking guidance as to what positions you may pursue at this time. Specifically, you present several scenarios and questions relating to those scenarios as follows:

1) *You are approached by a consulting firm that does business throughout the United States, although to your knowledge, none of that business has been in Kentucky in recent years. As such you would be providing advice and technical assistance to various local workforce investment areas and boards throughout the country. The consulting firm would employ you. Is this allowable? When could you take assignments within the Commonwealth? Could you work for the consulting firm as an independent contractor?*

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2) *A firm that currently has a contract with your former state agency to design statewide performance standards and assist in implementing a "swipe card" system for gathering information offers employment. May you accept employment, probably as an independent contractor, even if the work is not in Kentucky?*

3) *A national organization (National Center for Education and the Economy) that provides technical assistance throughout the country for cities, states and local/state workforce investment boards is interested in your working with them. Kentucky currently pays a \$25,000 flat fee to the organization to belong to its High Skills State Consortium. Is it permissible to do contract work for them?*

4) *You belong to the Southeastern Employment and Training Association. You currently serve as Second Vice President to the organization and have been representative from Kentucky on the Executive Board for the past four years. Both offices are elected by the appropriate memberships. You have paid your own dues, yet the Commonwealth paid for you to attend conferences and planning sessions where you spoke on what was occurring in Kentucky. Your official title was used on agendas, etc. The Executive Board has asked you as a dues-paying member to remain in office and continue to guide the organization. Is there any problem with this? Further, could you do work as an independent contractor for the agency or agencies that provide staffing services to the organization?*

KRS 11A.040(6), (7), (8) and (9) provide:

(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.

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(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.

(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.

In Advisory Opinion 99-18 (a copy of which is enclosed), the Commission stated that a former director could perform consulting work for a subcontractor of a company that contracted with the employee's former state agency since the work for the subcontractor was not related to the contractor's work for the state and since the subcontractor was not contracting directly with the employee's former state agency.

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In your scenario, it does not appear that the local workforce investment areas contract or seek business with the Department, but merely receive federal funds from the Department through a predetermined formula. Thus, it does not appear that the Department does business with, regulates, or makes any discretionary decisions regarding the eleven local workforce investment areas. Additionally, some of the local investment areas do not appear to be persons or businesses, but are political subdivisions (City of Louisville). In Advisory Opinion 00-54 (a copy of which is enclosed), the Commission concluded that a political subdivision, such as a county or city, is not a person or business as defined in KRS Chapter 11A. Consequently, the Commission believes that you are not prohibited from accepting employment with or compensation from a consulting firm that provides technical assistance to various local workforce investment areas.

However, upon your retirement from your position as Commissioner, you must wait one year before representing any person or business before the Department. For example, you should not communicate with the Department for one year on behalf of the consulting firm concerning matters that were before the Department during the last three years of your tenure. You are not prohibited from immediately communicating with the Department on behalf of a city or other political subdivision.

You may not accept employment, for six months, with a firm that currently has a contract with the Department to design statewide performance standards and assist in implementing a "swipe card" system for gathering information, even if the work is not in Kentucky. As the Commissioner of the Department, you are considered to have been directly involved in all matters of the Department and thus, pursuant to KRS 11A.040(7) above, you are prohibited from such employment for six months unless you are returning to your former business or occupation in which you were involved prior to your state employment.

Similarly, the Commission does not believe that you may accept employment, for six months, with an organization that the Department pays a flat fee for services. The Commission views this as a business relationship between the Department and the organization.

Furthermore, for six months you may not contract with, enjoy a part of a contract with, or have any agreement with the Department. See Advisory Opinion 00-7, enclosed.

And, finally, you may continue to serve as a board member on the Southeastern Employment and Training Association. Such an association does not appear to present any post-employment conflicts. However, if the Department has a business relationship with the

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Association (paid dues or purchased products from), for six months you should not work as an independent contractor for the Association. If no business relationship exists between the Department and the Association, you may immediately provide services for the organization.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Cynthia C. Stone, Esq.

Enclosures: Advisory Opinion 99-18
Advisory Opinion 00-54
Advisory Opinion 00-7