

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-4

February 20, 2004

RE: May employee's spouse lease property to a company that has received economic incentives from the agency for which the employee works?

DECISION: Yes, provided the employee has no involvement in the awarding of such incentives and provided the employee is not enjoying a part of the agreement for incentives.

This opinion is in response to your January 27, 2004, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 20, 2004, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. A local economic development corporation board ("EDC") owns a 60,000 square foot speculative building into which an existing Kentucky company (the "Company") would like to expand. The EDC has determined it wishes to sell the speculative building to a developer independently selected by the Company, with the developer making necessary refits and improvements to the building, then leasing the building to the Company.

The EDC is assisting the Company in its application for tax incentives with the Cabinet for Economic Development (the "Cabinet"). You state that the developer-lessor (the "Developer") will not directly benefit from these tax incentives, but will realize an indirect benefit if the Company receives the incentives. The Company has indicated that it will not expand in Kentucky unless it receives those incentives. Your concern with this situation is with the fact that the Developer is married to an employee of the Cabinet.

However, you note that the Developer will not receive any direct inducements from the Cabinet, and that the employee has no decision-making ability or influence in the decision to award the incentives to the Company. Also, you say that as soon as the Cabinet became aware that the Company had selected the Developer, the EDC ensured there was no contact between the Company and the employee by moving the project out of the department in which the employee works.

On the other hand, the Company would not expand into the EDC building, or anywhere else in Kentucky, but for the tax incentives under consideration by the Kentucky Economic Development Finance Authority ("KEDFA"). The Cabinet provides administrative support to KEDFA, but all decisions on award of tax incentives are made by KEDFA, which is an independent board. Your concern is that the Developer will, if tax incentives are granted to the Company, reap an indirect benefit because the incentives will cause the Company to contract

with the Developer to refit the EDC building, and enter into a lease with the Developer for the building.

You ask the Commission's opinion as to whether the marriage relationship between the Developer and the Cabinet employee could result in a violation of KRS 11A, the Executive Branch Code of Ethics (the "Code") if the Company receives incentives from the Cabinet and leases the property from the Developer.

KRS 11A.020(1) and KRS 11A.040(4) provide in pertinent part:

KRS 11A.020(1):

(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;

• • •

(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.

KRS 11A.040(4):

(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.

As you have noted in your request, the Commission has addressed a somewhat similar situation in Advisory Opinion 02-19 (a copy of which is included) in which it stated "a company receiving economic benefits or incentives from the Cabinet has an "agreement" with the Cabinet." Additionally, in Advisory Opinion 96-38 (also included), the Commission advised that an employee could not "enjoy," as a subcontractor, a part of a contract or agreement with his own state agency.

In this situation, the Commission again believes that if the Company is awarded incentives from the Cabinet, it will have an agreement with the Cabinet. However, unlike

Advisory Opinion 96-38, the Developer may not be “enjoying” a part of a state contract or agreement. Based on the information provided to the Commission, the Developer will realize a benefit as a result of the agreement between the Company and the Cabinet, but may not necessarily be providing a service that will fulfill the agreement between the Company and the Cabinet. From the information provided, the Commission cannot tell whether the lease will fulfill part of the agreement between the Company and the Cabinet.

If, based on the agreement between the Company and the Cabinet, the Developer will be providing a service that fulfills part of the agreement, then the Commission believes that under KRS 11A.040(4) the employee would be enjoying a part of the agreement. However, if based on the agreement, the lease between the Developer and the Company does not fulfill part of the agreement between the Company and the Cabinet, then the Commission believes that the employee would not be enjoying a part of the agreement, and thus a violation would not exist.

The Commission also takes note that the Cabinet has already taken steps to remove the employee from any involvement in this project, and thus eliminate any actual conflicts of interest for the employee. Though the Commission commends this effort, it still believes that the employee must abide by the law if, in fact, her spouse (and thus she) will be enjoying a part of the agreement with the Cabinet.

Enclosures: Advisory Opinion 02-19
 Advisory Opinion 96-38

BY CHAIR: Joseph B. Helm, Jr.