

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 04-35**

September 30, 2004

**RE:** May former Commissioner pursue future employment options with healthcare company or provider?

**DECISION:** Yes, if compensation is paid by public funds disbursed through an entitlement program.

This opinion is issued in response to your September 13, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 30, 2004 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You currently serve as the Commissioner for the Department for Medicaid Services (the "Department"). Prior to your serving in this position, you served as the Director of the Hospital and Outpatient Services Division (the "Division") for the Department. You plan to leave the Department and would like to seek employment in the healthcare industry. You ask the following regarding your future employment options.

(1) *Since Medicaid is an entitlement program that receives 70-90% of funds from the Federal Government am I allowed to pursue employment with a healthcare company, not currently under contract with the Commonwealth, that would perform certain administrative functions for the Department?*

(2) *Can I pursue employment with a healthcare provider (Hospital, Physician clinic etc) since these entities have contracts and are reimbursed for providing services to Medicaid recipients[?]*

Relating to employment after you leave state employment, KRS 11A.040(6) and (7) 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.

(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.

As the Commissioner of the Department, you are an “officer” as defined in KRS 11A.010(7), and you are considered to be directly involved in all matters of the Department. Similarly, during your tenure as a Division Director with the Department, you also were an “officer” and were considered to have had direct involvement in all matters of the Division. Thus, you would be subject to the post-employment provisions stated above

Although the provisions in KRS 11A.040(6) appear to prohibit you from “enjoying” or fulfilling a part of a state contract with the Department, if the funds used to pay the contract you would be enjoying are public funds distributed for administrative costs of an entitlement program (Medicaid), then the provisions in KRS 11A.040(6) are not applicable. Thus, in any future employment you accept, you would not be prohibited from fulfilling a part of a state contract with the Department if the contract would be paid with public funds for the administrative costs of the operation of Medicaid, an entitlement program, and if you otherwise comply with applicable post-employment statutes in KRS 11A.040(7), detailed below.

You may immediately seek future employment with a healthcare company or provider with which neither you, nor anyone in the Department has had direct involvement during the last three years. Also, you may immediately seek employment with a healthcare company with which you or someone in the Department has had direct involvement, provided you are returning to the profession in which you were directly involved prior to your state employment and provided you do not work on any matters related to the Medicaid program for six months. Although you state you have been in the healthcare industry for 20 years, you do not state whether you were in the healthcare profession prior to your state employment.

If you will not be returning the profession in which you were involved prior to your state employment, then for six months after your separation from state employment, you should not accept employment with any healthcare company or provider with which you or any one within your Department was directly involved during the last three years, unless the compensation that you would receive from such employment involves public funds disbursed directly from an entitlement program. If the work you will be performing for the healthcare company or provider results in direct reimbursement to you of public funds disbursed through an entitlement program, then the provisions in KRS 11A.040(7) are not applicable and you are not prohibited from such employment or compensation

The Commission believes that the entitlement exception in the provisions above do not allow you to accept employment with a healthcare company or provider with which you have been directly involved simply because the healthcare provider is reimbursed by Medicaid, but only if you are receiving public funds disbursed directly from the entitlement program for your work. Also, see Advisory Opinions 04-28 and 96-3 which are enclosed.

Further, you must comply with the post-employment provisions in KRS 11A.040(8) and (9) provided below:

(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.

Thus, for one year from the date you leave state government, you may not act as a lobbyist for your new employer for matters in which you had direct involvement during the last thirty-six (36) months of your state employment. Also, you may not represent your new employer before the Cabinet in matters in which you were directly involved during the last thirty-six (36) months of your state employment. You would not be prohibited from working on such matters for your employer so long as you comply with KRS 11A.040(7) above and you do not communicate with the Cabinet concerning such matters.

In sum, you are not prohibited from future employment that fulfills part of a contract paid with entitlement funds or that is paid directly by public funds disbursed through entitlement funds. However, the Commission cautions you not to use your official position while you are still employed to give yourself an advantage in future employment. Such action may violate KRS 11A.020(1)(d) provided below.

(1) No public servant, by himself or through others, shall knowingly:

...

EXECUTIVE BRANCH ETHICS COMMISSION  
ADVISORY OPINION 04-35  
September 30, 2004  
Page Five

(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.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

---

BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 04-28  
Advisory Opinion 96-3