

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-39

September 30, 2004

- RE:**
- 1) May state employee accept employment with former employer upon leaving state government?
 - 2) Will state employee's ability to work with former state agency be impacted by Executive Branch Code of Ethics?
- DECISION:**
- 1) Yes, within limitations.
 - 2) Yes.

This opinion is in response to your September 20, 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 are currently employed by the Kentucky Housing Corporation ("KHC") as the Director of the Design and Construction Review Team and as the Director of the Appalachian Housing Program. You directly supervise nine staff members. You have been employed by KHC since January 2000. Prior to your employment with KHC, you worked for Frontier Housing Inc. ("Frontier"), a non-profit corporation that provides housing opportunities for low-income families in a seven county area of North East Kentucky. You were the Executive Director of Frontier from 1974 to December 31, 1999. Frontier has worked with KHC since 1977. KHC has provided Frontier with millions of dollars in housing resources that have financed the construction of over 500 homes for low-income families.

You have been approached by Frontier's Executive Director regarding a new position with Frontier as the Director of their Red River Initiative in Morgan, Menifee, Wolfe, and Magoffin counties.

In your position as Director of the Design and Construction Review Team, construction specialists under your supervision review and approve plans and inspect Frontier homes that are under construction. Your division typically inspects about 20% of the homes Frontier builds using KHC funds. As of the date of your letter no Frontier units were being inspected.

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In your position as Director of the Appalachian Housing Program, you are one of a team of three KHC employees who make recommendations to the Chief Officers of KHC regarding Appalachian Regional Commission (“ARC”) funding. While Frontier is not a direct recipient of these funds, KHC uses ARC funding to fund the Federation of Appalachian Enterprises, which then distributes the ARC funds to its Kentucky membership based on the number of units produced. Frontier is a member of the Federation.

You also have recently been a member of a team at KHC that wrote and applied for a U.S. Department of Housing and Urban Development Rural Housing and Economic Development Grant. The \$400,000 that KHC is to receive through this grant will be passed through to various non-profits working in 18 targeted ARC Distressed Appalachian counties, and also to non-profits building specialized housing (homeless, spouse abuse victims, mentally handicapped, physically handicapped) in any of the 35 ARC distressed counties. Frontier is one of many non-profits participating in this program that will receive up to \$5,000 per unit of housing produced.

You indicate that you are interested in the position at Frontier but wish to know how leaving KHC would potentially impact your ability to work with KHC as an employee of Frontier.

Please find enclosed the Commission’s *Leaving State Government?* brochure. As a director at KHC you are an officer as defined in KRS 11A.010(7) of the Executive Branch Code of Ethics (the “Code”). Thus, you are subject to the Code’s post-employment provisions set forth at KRS 11A.040(7), reprinted below:

(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

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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.

Regarding the provisions of KRS 11A.040(7), you are prohibited for six months after leaving your position from accepting employment or compensation from any company with which you had direct involvement during the last three years of your state tenure. As a director, you are presumed to have had direct involvement in all matters under your supervision. However, if you will be returning to the profession or occupation in which you were involved prior to your state employment, you may immediately accept employment with a company that does business with the state in matters in which you may have been directly involved, but for six months may not work on any matters in which you or anyone under your supervision was directly involved.

It appears from the information you have provided that either you or someone under your supervision has been directly involved with matters involving Frontier during the last three years. In your position as Director of the Design and Construction Review Team, construction specialists under you have reviewed and approved plans submitted by Frontier and inspected homes under construction by Frontier. Furthermore, through your other job duties you have been involved in the distribution of funds received indirectly by Frontier and applied for a grant from which Frontier will benefit. While these facts would normally prevent you from accepting employment from Frontier for six months after leaving your position with KHC, because you would be returning to the profession or occupation in which you were involved prior to your state employment, you may immediately accept employment with Frontier, provided that you do not, for six months, work on any matters in which you or anyone under your supervision at KHC was directly involved during the 36 months prior to your departure from KHC.

Please be advised that while still employed at KHC you should not use your official position to give yourself an advantage in violation of KRS 11A.020(1)(d), which provides:

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

...

(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.

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Additionally, the Commission has previously stated in Advisory Opinion 00-6 (a copy of which is enclosed) that a state employee should not discuss any future employment options with a potential employer if the state employee is at the same time involved in matters regarding the potential employer. If you wish to seek employment with Frontier, you should abstain from all matters involving Frontier and document such abstention in writing pursuant to KRS 11A.020(3) provided below:

(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.

Regarding how your ability to work with KHC as an employee of Frontier would be impacted by the Code, please be aware of the following concerns. 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 Frontier for matters in which you (or anyone under your supervision) had direct involvement during the last thirty-six (36) months of your state employment. Also, for one year, you may not represent Frontier before the state in matters in which you (or anyone under your

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supervision) 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 Frontier during the year so long as you comply with KRS 11A.040(7) above, and you do not communicate with KHC concerning such matters.

In sum, you may immediately accept employment with Frontier without waiting six months due to the fact that you would be returning to your former profession or occupation, provided that you do not, for six months, work on any matters in which you or anyone under your supervision at KHC was directly involved during the 36 months prior to your departure from KHC. You must also follow the restrictions set forth in KRS 11A.040(8) and (9), and you must be careful not to use your official position while with state government to secure such employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosures: *Leaving State Government?*
Advisory Opinion 00-06