

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-14

March 30, 2005

RE: May former Associate Commissioner for the Department of Education accept compensation from the Education Professional Standards Board?

DECISION Yes.

This opinion is issued in response to your March 7, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 30, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You retired from your employment as the Associate Commissioner of the Office of Assessment and Accountability, Department of Education, Education Cabinet (the "Department") on November 30, 2004. The Office of Assessment and Accountability manages the administration and scoring of the Commonwealth Accountability Testing System ("CATS"), which is used to generate performance indexes for public schools and districts.

The Education Professional Standards Board ("EPSB"), a separate state agency within the Education Cabinet, has approached you about serving as a project consultant in a study using existing education data (including accountability data developed by the Office of Assessment and Accountability) to develop an index for the purpose of evaluating the performance of approved Kentucky teacher training programs. Your function as a project consultant would be to advise the EPSB staff and other consultants about the nature, structure, and usability of CATS and other education data for its intended purpose. You would serve in an advisory capacity only, and would not influence policy or procedure in the Office of Assessment and Accountability.

You understand that within six months of your retirement you cannot contract with the agency by which you were employed, the appointing authority of which is the Commissioner of the Department of Education. The EPSB, has a different appointing authority than the

Department of Education, and thus you believe is a separate state agency, although within the same Cabinet.

Since you were involved in the development and reporting of CATS and accountability index data in your previous employment for the Department, you want to be sure that no conflict exists for you to provide such consulting services to the EPSB, and ask the Commission for its consideration of this matter.

Please find enclosed the brochure entitled "*Leaving State Government?*" which includes KRS 11A.040(6) and (7) that 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.

You are correct in your understanding that, as a former “officer” defined in KRS 11A.010(7), you may not within six months of your retirement contract or have an agreement with the state agency for which you formerly worked. The Commission also agrees with your assumption that the Department and the EPSB are separate state agencies, pursuant to the definition of “agency” in KRS 11A.010(10) provided below, as they each have separate appointing authorities and they each have separate missions unique and distinct from each other.

KRS 11A.010(10) provides:

"Agency" means every state office, cabinet, department, board, commission, public corporation, or authority in the executive branch of state government. A public servant is employed by the agency by which his appointing authority is employed, unless his agency is attached to the appointing authority's agency for administrative purposes only, or unless the agency's characteristics are of a separate independent nature distinct from the appointing authority and it is considered an agency on its own, such as an independent department;

Thus, although you must wait six months before you may provide services to the Department, you immediately may contract with the EPSB to provide consulting services even if such services involve matters in which you had previous involvement as a state employee. Further, you are not prohibited by KRS 11A.040(7), stated above, from accepting compensation from the EPSB involving matters in which you had direct involvement because a state agency is not included in the definition of “person” or “business” as defined in KRS Chapter 11A.

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Thus, the Commission believes that you immediately may serve as a project consultant for the EPSB in the study you have proposed.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite