

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-2

February 17, 2006

RE: May Deputy Director of Kentucky Horse Park immediately accept employment with the World Games 2010 Foundation, Inc.?

DECISION: Yes, if returning to former business or profession and he abstains from working on any matters in which he had direct involvement.

This opinion is issued in response to your February 10, 2006 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 17, 2006 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The World Games 2010 Foundation, Inc. ("Foundation") is a non-profit Kentucky 501(c)(3) corporation created to enter into a contract ("Staging Agreement") with the Federation Equestre Internationale ("FEI"), and the United States Equestrian Federation, to host, promote and organize the World Equestrian Games 2010 ("Games 2010"). The Foundation's membership consists of various state officials, a local government official, and a member of the equine industry. The Commonwealth of Kentucky originally intended to enter into an agreement with the FEI to host the Games 2010; however, in the event of a dispute, FEI could not subject itself to the jurisdiction of the Commonwealth, a requisite of the Model Procurement Code in KRS Chapter 45A when the Commonwealth is a party to a contract. Thus, the Foundation was organized specifically to enter into the contract with the above named organizations.

The Commonwealth of Kentucky subsequently entered into a Memorandum of Agreement ("MOA") with the Foundation to host the Games 2010. Per the MOA, the Commonwealth provided the Foundation with \$2,000,000 to be held in an escrow account as an

assurance to the FEI that funds will be available to pay installments of the “fixed fee” owed to the FEI pursuant to the Staging Agreement. The Foundation will repay the escrowed money to the Commonwealth with funds generated in connection with the Games 2010.

The Foundation seeks to hire a Chief Administrative Officer (“CAO”) and is considering employing the current Deputy Director of the Kentucky Horse Park. The Deputy Director has vast experience in the equine industry, has hosted equine events in his official position for the Horse Park, and has participated in international equine events. The Foundation has reviewed KRS Chapter 11A and believes that although the Foundation has accepted money from the Commonwealth which is being held in escrow, the Foundation does not “do business with”, nor is it “regulated by” the Commonwealth. The Foundation is the promoter and organizer of the Games 2010 and will work in partnership with the Horse Park, the equine industry, the Commerce Cabinet, the City of Lexington, and various other organizations.

The Foundation requests an opinion as to the propriety of the Foundation employing the current Deputy Director of the Horse Park as the CAO of the Foundation.

Please find enclosed the brochure, *Leaving State Government?*, which provides statutory guidance to employees departing state employment. In the brochure, KRS 11A.040 (6) through (9) provides:

(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.

(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.

“Person” is defined as an individual, proprietorship, firm, partnership, limited liability partnership, joint venture, joint stock company, syndicate, business, trust, estate, company, corporation, limited liability corporation, association, club, committee, organization, or group of persons acting in concert.

“Does business with” or “doing business with” is defined as contracting, entering into an agreement, leasing, or otherwise exchanging services or goods with a state agency in return for payment by the state, including accepting a grant, but not including accepting a state entitlement fund disbursement.

In Advisory Opinion 96-35 (a copy of which is enclosed), the Commission had occasion to address a similar situation where the Executive Director of the Kentucky Real Estate Commission proposed to leave his position and accept employment with the Kentucky Real Estate Education Foundation, a non-profit 501(c)(3) corporation. The Education Foundation had a contract with the Real Estate Commission to conduct seminars for real estate licensees. The Commission advised that KRS 11A.040(6) (now KRS 11A.040(7)) prohibited the Executive Director, as an “officer,” from immediately accepting employment with the Education Foundation unless the Executive Director would be returning to the same occupation or profession in which he was involved prior to state employment.

Similarly, although the Foundation does not appear to be doing business with the Horse Park in that the Horse Park has an agreement with the Foundation to “loan” the Foundation \$2,000,000 which will be repaid with Games 2010-generated funds, if the Horse Park will be compensating the Foundation for any administrative services (i.e. the CAO’s compensation), then it does appear that a business relationship will exist between the Foundation and the Horse Park. Thus, if such a business relationship exists and the Deputy Director was involved in matters regarding the Games 2010 during the last three years of his employment, for six months he may not accept compensation or employment from the Foundation unless he is returning to his former profession.

If a business relationship exists, and the Deputy Director, in his employment by the Foundation, will be returning to the same profession or occupation in which he was involved prior to state employment, then he is not prohibited from immediately accepting the position with the Foundation so long as he refrains from working on any matters in which he was directly involved the last thirty-six months of his state employment. As a deputy director, he is considered an “officer” as defined in KRS 11A.010(7), and thus is considered to be directly involved in all matters at the Horse Park. If it will be impossible for the Deputy Director not to

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be involved in matters that were before the Horse Park during the last three years, then for six months he should not accept the position with the Foundation. The Commission is not authorized to allow exceptions to this law.

If the Horse Park will not be compensating or granting money to the Foundation in any way, and thus no business relationship exists between the two entities, then the Deputy Director may immediately accept employment with the Foundation.

Further, for one year the Deputy Director, pursuant to KRS 11A.040(8) and (9), should not represent the Foundation before the state in any matter in which he was directly involved during the last three years, and for one year he should not act as a legislative agent or executive agency lobbyist, or employ either.

Sincerely

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosures: Leaving State Government?
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