

Executive Branch Ethics Commission
ADVISORY OPINION 07-33
October 19, 2007

RE: Post-employment guidance and clarification for transportation engineer branch manager regarding project with which he had direct involvement.

This opinion is issued in response to your September 12, 2007 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 19, 2007 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You currently are employed as a transportation engineer branch manager for the Division of Construction within the Transportation Cabinet (the "Cabinet") and are considering retiring from state employment. You wish to go to work for a consulting firm that is part of a tri-venture coordinating the design phase of the Ohio River Bridge project. In 2006, your division administered the first construction project of the Ohio River Bridge project for a ramp realignment, the design of which was coordinated by the tri-venture.

You understand because you are not an "officer" you can immediately go to work for this consultant and can work on the design phases of the Ohio River Bridge project, but are prohibited from immediately representing the firm before the Cabinet concerning the Ohio River Bridge project. You also understand that you may attend public meetings on the Ohio River Bridge project and can be identified in literature and on a website as having a title for your new employer on the Ohio River Bridge project.

You ask the following:

- *If I am allowed to work on the project, can I infer that I can be billed to that project? In other words, could this tri-venture show hours for me in billings to the Cabinet?*
- *If a phase of this project was under contract for construction and a design issue was raised in the field and required presence of the designer, could I go into the field to evaluate the issue as long as any technical advice was not directly relayed to the Cabinet?*

- *Can you provide me with the clarification as to why involvement in a phase different than my tenure with the Cabinet applies to KRS 11A.040(9)?*

You further explain that once the tri-venture submits to the Cabinet the plans, specifications and estimates in the design phase of a project, the Division of Construction Procurement controls the letting for bids and award process for a construction contractor; the Division of Construction has no involvement in that phase. Even if the Division of Construction has access to construction plans, specifications and estimates prior to letting and discovers an error, the decision to let or not resides with the Division of Construction Procurement. Only after an award for the project is made to a contractor is the Division of Construction responsible for the project. Once, the construction contract is awarded, the tri-venture may advise, but has no decision-making responsibility for the project. Decisions on matters of contract administration are made by the Division of Construction. Similarly, decisions made during the design phase are made by the tri-venture/project manager, although the Division of Construction may be asked to provide technical advice during this phase.

Because you are not an “officer” as defined in KRS 11A.010(7), you are correct in your assessment that once you retire from your state employment as a transportation engineer branch manager you immediately may accept employment or compensation from a firm that is part of a tri-venture coordinating the design phase of the Ohio River Bridge project, provided you have not used your position with the Cabinet to give yourself an advantage in any way in obtaining such employment. Such use of one’s official position to obtain an advantage in obtaining future employment could be in violation of KRS 11A.020(1)(d) provided below:

- (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.

Further, in any future position that you accept you are subject to the following provisions in KRS Chapter 11A regarding lobbying and representation, cited 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.

“Represent” is defined in KRS 11A.010(17) to mean “attend a proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else.” As provided in Advisory Opinion 07-29 (a copy of which is enclosed), you may not represent any new employer before the state in any project with which you had direct involvement during the last three years of your tenure even if such representation of the project is not the same phase in which you were directly involved during your tenure.

The commission agrees that you immediately may allow the tri-venture to list your name on a website as having certain responsibilities for the project. You also may attend public meetings on behalf of the tri-venture regarding the Ohio River Bridge project. However, due to your involvement with the project during the last thirty-six months of your tenure, for one year after your retirement you should exercise caution in that your participation in any such public meetings does not “represent” the tri-venture regarding the Ohio River Bridge project. For one year, you should not have any communications with employees of the Cabinet regarding the Ohio River Bridge Project on behalf of a firm or the tri-venture in public meetings or private settings.

You are not prohibited from immediately working for the tri-venture on the Ohio River Bridge Project, and may allow your name and hours worked to be included on any invoice sent to the Cabinet in order to charge the Cabinet for services, as long as you refrain from any written correspondence directly from you to the Cabinet regarding the project. You are not prohibited from immediately going into the field to evaluate issues regarding a design issue if it is feasible for you to do so without representing the tri-venture before Cabinet employees. The Commission warns that in such circumstances it may be impossible for you not to act as a representative for the tri-venture and not to communicate with Cabinet employees.

In response to your last question, the Commission believes that involvement in any phase of a particular project is considered to be “a matter in which an employee was directly involved,” and may give an employee an advantage in representing a person or business before the state concerning that project. Moreover, it appears from the information that you have provided that the Division of Construction may have some involvement in the design phase of projects, and the tri-venture may have some involvement in the construction phase, although neither may have final decision-making ability within the separate phases.

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You would not be prohibited from representing a firm or the tri-venture before the Cabinet in a “new” project in which you have had no involvement during your tenure.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb

Enclosures: Advisory Opinion 07-29
Leaving State Government?