

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 09-4
January 23, 2009

RE: May a state employee be paid a sum of money due him from a previous employer from an Employee Stock Ownership Plan, where the employee in the course of performing his job regularly deals with his former employer?

DECISION: Yes, but the employee must abstain from any involvement in matters concerning his former employer for a reasonable length of time.

This opinion is issued in response to your January 5, 2009, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 23, 2009, meeting of the Commission and the following opinion is issued.

You have been employed since 2001 by the Transportation Cabinet, in the Department of Highways. You are responsible for advising engineers who directly oversee contractors on highway construction projects. You state that you are usually the last person at the district level to see any correspondence from the contractor before it is sent to the Transportation Cabinet Central Office. You deal directly with contractors arranging meetings to review work requirements and schedules, oversee personnel responsible for making contract payments, and you perform final project inspections.

Prior to your state employment you were employed by Bush & Burchett, Inc., a bridge and heavy concrete construction contractor, from April 1982 until the end of September 2001 when you resigned. You were informed in December 2008 by Bush & Burchett that you had a vested interest in their retirement plan. You state that the Employee Stock Ownership Plan ("ESOP") was begun while you were still employed with them. However it was your understanding when you left their employ, that you had no interest in the plan since you had been employed less than the 5 years the ESOP charter required for an employee to be vested in the ESOP account.

On December 18, 2008 you received a letter from Bush & Burchett signed by the office manager, informing you that you had \$45,000 in their ESOP plan and they intended to repay

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you that amount over the next 5 years. You provided correspondence from the CEO of Bush & Burchett where he explains the circumstances that occurred since you resigned. Apparently in 2005, after a Department of Labor audit, the company hired a new ESOP Administrator who rewrote the plan and included you as a vested employee. The company had several objections to the rewritten plan including objections to you being deemed vested.

A new administrator was hired in 2006 and an issue arose with the Internal Revenue Service ("IRS") relating to the ESOP. The plan was once again rewritten and your name was once again included in the list of employees who were due an allocation. The company again questioned whether you should have been included and discovered that the administrator had "buried" a clause in the plan that vested all employees eligible on January 1, 1999. Since the IRS had never made a ruling on the ESOP and there remained a possibility the plan could have been dissolved, the company chose not to notify you until their letter of December 18, 2008.

You have requested an advisory opinion from the Commission and in the interim, have removed yourself from any decision making or other involvement with projects involving Bush & Burchett as the contractor. All matters involving those projects are referred to your supervisor. You have however, been in contact with Bush & Burchett regarding the possibility of receiving the ESOP allocation as a lump sum payment or putting the total sum in escrow instead of yearly allocations over the next five 5 years. Bush & Burchett has not yet responded to your request.

The statutory provisions relevant to your question are KRS 11A.020(1) and (3) which provide:

- (1) No public servant, by himself or through others shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (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.

* * * * *

- (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.

Although there appears to be no advisory opinion directly on point, the Commission has addressed questions which were similar in some respects. In Advisory Opinion 06-13 we

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addressed the question of whether a potential employee who formerly owned a mine and had sold his mining interests but was still receiving payments from the new owner, could avoid a conflict by abstaining from inspections of that mine. We held that the potential employee could abstain and avoid the conflict, but the abstention had to be in writing and would have to continue for a reasonable time after the payments stopped to avoid the perception of a conflict.

Since you have been identified as entitled to the ESOP payment, but are unsure how the payment will be made, we would advise you to continue your course of abstention and would further advise you to document your intention to abstain in writing if you have not already done so.

Once you have received payment in full, whether by lump sum or by periodic payments, you should continue to abstain from matters involving your former employer for a reasonable length of time to avoid any appearance of a conflict. In Advisory Opinion 08-20 we found that 6 (six) months was a reasonable length of time for a public servant to abstain from matters involving former clients to avoid any appearance of a conflict. However, a potential appearance of impropriety will exist for you for some period of time after the payments cease. Thus, you should abstain from any involvement in matters that concern Bush & Burchett for a period of 6 (six) months after the account is settled in full.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

Enclosures: Advisory Opinion 06-13
Advisory Opinion 08-20

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