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**ADVISORY OPINION 94 - 64**

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December 15, 1994

RE:            May an executive branch employee own stock or other interest in an entity which is regulated by, or does business with, his employing state agency?

DECISION:    No, except in limited circumstances.

This opinion is issued by the Executive Branch Ethics Commission (the "Commission") on its own initiative. This opinion was adopted at the December 15, 1994, meeting of the Commission.

On several occasions throughout the past year, the Commission and its staff have been asked on an informal basis whether an executive branch employee may own stock in an entity which is either regulated by his agency or which does business with his agency. The Commission believes the question to be an important one, possibly affecting many state employees, and therefore reviewed the matter at its December 15, 1994 meeting, from which the following opinion is issued.

KRS 11A.005 provides:

11A.005 Statement of public policy.

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
  - (b) Government policy and decisions be made through the established processes of government;
  - (c) A public servant not use public office to obtain private benefits;
- and
- (d) The public has confidence in the integrity of its government and public servants.

(2) The principles of ethical behavior for public servants shall recognize that:

- (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
- (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
- (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.020 states that:

- (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.

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

(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.

Based on the provisions of the two statute set out above, the Commission believes that, in most situations, it is a conflict of interest for an employee to own stock in an entity which is regulated by or does business with his employing agency. A person owns a percentage of a corporation when he buys its stock. He then has a personal, direct financial interest in the success of the company, such that his interest increases if the company is treated well by his agency. He often has the right to vote on corporation personnel, management and long-range policy issues. If he owns more than five percent of a corporation (or any other entity) which does business with any state agency, he is in clear violation of KRS 11A.040(4), which provides:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by any state agency. This provision shall not apply to a contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain or to agreements which may directly or indirectly involve public funds disbursed through entitlement programs.

The Commission believes that ownership interest of a lesser amount of a corporation which is regulated by or does business with the employee's agency could impair his ability to make important agency decisions in a fair and impartial manner. Even if the employee is not in a policy making position, he may occasionally influence decisions affecting the company in which he has an ownership interest. He could also be exposed to confidential or other information which is not typically available to the "average" investor. If he takes some action on the confidential information, he would be in violation of KRS 11A.040(10), which states:

(1) No public servant, in order to further his own economic interests, or those of any other person, shall knowingly disclose or use confidential information acquired in the course of his official duties.

The employee might also consider whether his action violates any federal securities or other laws. The Commission additionally believes that to use, or even have access to, information about the company that is not available on a general basis to the "average" investor would result in a conflict for the employee. He might be perceived as using his office for his own personal gain in contravention of KRS 11A.020(c) or as using his office to obtain private benefits in contravention of KRS 11A.005(10)(c). In any case, the public's confidence in government would be negatively impacted by such ownership.

Therefore, except as provided below, an executive branch employee should not own stock in an entity which is regulated by or does business with the agency for which the employee works. The spouse of an executive branch employee should likewise not own stock in any company whose stock the employee could not own. Other family members can own stock in such a company provided the family member is not holding the stock for the benefit of the employee or the employee's spouse.

As long as the restrictions of KRS 11A.040(4) are met, the Commission believes an employee or the employee's spouse may own stock or other interest in a company or other entity which is regulated by or does business with the employee's agency if:

1) The stock or other interest is purchased exclusively through participation in a publicly traded mutual fund where the purchasing and selling decisions are completely out of the control of the employee or the employee's spouse.

2) The company or other entity does business with the employee's agency on a limited basis. "Limited basis" means the entity does not receive more than \$5,000 in state funds in any one calendar year from the employee's agency. The Commission believes the personal financial interests of a stock-holding employee or spouse would not be significantly affected in such circumstances.

3) The company or entity is not regulated by the employee's agency but does business with the agency, and if the employee is not in a policy making position within the agency and does not have direct control over any matter in which the company does business with the agency.