

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 96-8

February 6, 1996

RE: May a former Secretary of the Cabinet represent a hospital in a "certificate of need" matter?

DECISION: No, if such representation involves communication with or appearance before the Health Policy Board.

This opinion is in response to your January 18, 1995, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 6, 1995, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. During the previous administration, you served in several positions including General Counsel to the Governor (1991-1994), State Budget Director (1994-1995), and Secretary to the Governor's Executive Cabinet (1994-1995). Prior to your public service, you were employed by a law firm and were engaged in a general civil practice including the representation of hospitals in "certificate of need" ("CON") matters. Upon your termination from state government, you returned to your former profession and law firm.

You ask if you may represent a hospital to obtain a CON to perform open heart surgery and not violate the post-employment provisions of the ethics code. As part of your official duty for the positions listed above, you were never directly involved in the CON function for the Cabinet for Human Resources or, later, for the Health Policy Board when it took over such function. You are not aware of any CONs applied for or received by the hospital during your tenure with state government. In addition, the issue in dispute regarding the CON for which you wish to represent the hospital arose only recently. The matter was not at issue during your state tenure, thus you could not have had any involvement with the matter during your state employment.

Although the hospital which you wish to represent was regulated by the Cabinet for Human Resources and the Kentucky Health Policy Board during your tenure, you were not involved in any matters concerning the hospital during your employment other than general matters relating to health-care reform. You were involved in the drafting of the house bill which created the Health Policy Board.

KRS 11A.040(6) and (8) provide:

(6) No present or former officer or public servant listed in KRS 11A.010 (9)(a) to (i) shall, 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 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, 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 represent a person in a matter before a state agency in which the former public servant was directly involved, 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.

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The Commission takes note that you were not directly involved with the hospital or CON matters during your state employment. However, the hospital which you wish to represent was regulated by the Cabinet for Human Resources and the Health Policy Board during your state tenure; and as head of the Governor's Executive Cabinet, you were considered to be directly involved in all matters of the Cabinets within your jurisdiction, unless you disclosed your intention to abstain in certain matters because of a personal interest. See Advisory Opinion 95-10.

The Health Policy Board, although not directly within your jurisdiction as Secretary of the Cabinet, was an entity created as a result of your efforts and thus, the Commission believes you were directly involved in matters of the Health Policy Board during your tenure, and you should refrain, for one year, from representing any hospital in a matter before the Health Policy Board.

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BY: Lynda Thomas, Vice Chair