

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 96-40**

September

RE:            May former auditor accept employment as Treasurer of fiscal court?

DECISION: Yes, if official position not used to secure the position.

This opinion is in response to your August 5, and August 27, 1996, requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 5, 1996, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. As Auditor of Public Accounts you received a letter of resignation dated July 31, 1996 from an employee of your office advising that his resignation would be effective August 15, 1996. The letter also advised that he would be pursuing the appointment as Treasurer of the Daviess County Fiscal Court on August 15, 1996. The employee requested annual leave from August 1 through August 15, and stated that his appointment as Treasurer would be made on August 1, but that he would not begin employment until August 16, 1996

The employee has been employed as a county auditor since April 1993, and has been directly involved in the audit of the Daviess County Fiscal Court on numerous occasions. However, he is not in a major management position and thus is not considered an officer as defined by KRS 11A.010(7). You seek an opinion as to whether his acceptance of this position is allowable under the Executive Branch Code of Ethics.

In addition, you submit the following questions on restrictions which may apply to your employees when they leave the employ of your office:

- 1)     May an employee who has audited an entity accept employment with that entity as an internal auditor, external independent auditor, or bookkeeper/accountant where the duties require that person to maintain accounts and be custodian of records requiring direct communication with and being subject to the scrutiny of your office during subsequent audits?
  
- 2)     Is the answer to question 1 different for an auditor and a clerical employee, non-auditor administrator, or non-auditor professional support person?

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- 3) Given the fact that your office audits both state government and local political subdivisions, does the answer to question 1 differ for employees who audit state agencies from the answer for employees who audit local political subdivisions?
  
- 4) Is the answer to question 1 different for an employee who did not participate in the audit of the entity, even though the subsequent employment requires direct communication with and scrutiny by your office?

KRS 11A.040 (6), (7) 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.

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(7) A former public servant shall not act as a lobbyist or lobbyist's principal 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.

(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.

Regarding your first request, because the employee is not considered an officer, he is not subject to the provision of KRS 11A.040(6) above. Accordingly, the former auditor is free to accept employment with the Daviess County Fiscal Court, effective August 16, 1996, as long as he did not use his official position to secure such employment. Such use of his official position would violate KRS 11A.020(1)(d) which provides:

(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.

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However, as a former public servant, he is subject to the provisions in KRS 11A.040(7) and (8) above. Therefore, for one year upon termination from state employment, the former auditor may not act as a lobbyist for the county. In addition, for one year he is prohibited from representing the county before the Auditor of Public Accounts, because such representation would involve matters in which he was directly involved during his state employment. He is not prohibited from working on such matters as long as he does not communicate with your office concerning such matters.

Regarding your second request, employees of your agency who are not major management personnel and thus are not considered officers as defined by KRS 11A.010(7), are not prohibited from accepting employment with entities with which they have had direct involvement during their state employment. However, employees who are considered officers are prohibited, for six months, from accepting employment from persons or entities with which they have had direct involvement during the last three years of their state employment, unless the former employee is returning to his former profession or occupation. If a former officer is returning to his former profession, he may accept employment with an entity with which he had direct involvement as long as, for six months, he refrains from working on any matters in which he was directly involved as a state employee.

Additionally, for one year, a former employee (an officer or non-officer) is prohibited from acting as a lobbyist in any matter, or from representing a person or entity before the state in matters in which the employee was directly involved during his state tenure. Therefore, if an auditor were to accept a position with a local government he had audited, for one year he would be prohibited from communicating with your office on matters involving prior and subsequent audits. An employee who had no direct involvement with a local government may communicate with your agency as a representative of the local government as long as he had no involvement during his state tenure in the matters about which he is communicating.

The post-employment provisions referred to above do not apply to employees who transfer to other positions within state government. However, they do apply to employees who accept positions with local political subdivisions.

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These provisions do not prohibit your office from developing in-house policies concerning auditors' communication for future employment with state or local government agencies which they are engaged to audit.

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BY: Ruth H. Baxter, Chair