

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 96-43**

September 5, 1996

RE: May Director accept employment with local air pollution control district?

DECISION: Yes, however, must refrain from lobbying or representing for one year.

This opinion is in response to your August 25, 1996, request 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. You serve as director of the Division of Air Quality within the Natural Resources and Environmental Protection Cabinet (the "Division"). You have recently been invited to apply for the position as director of a local air pollution control district (APCD). This position is similar to the position you now hold in state government, except on a local level.

The local APCD regulates sources of air pollution locally under authority provided in KRS 77 and KRS 224. However, the Division which you direct retains the general authority over the local area to ensure that it complies with applicable state and federal regulations. The APCD establishes its own regulations for the local area, but they must be at least as stringent as those required for the rest of the state.

You state that the Cabinet does not regulate the APCD, but maintains concurrent jurisdiction over the entities that the APCD regulates. Such concurrent jurisdiction is granted by the Cabinet and may be suspended, revoked or modified by the order of the Cabinet, if a district program is not being administered in accordance with the statutes and regulations. The Division and the APCD maintain a memorandum of understanding which outlines the duties concerning operational oversight of each agency. Periodically, the Division reviews the local area's programs to assist the area in meeting Environmental Protection Agency ("EPA") requirements. The division receives, reviews and forwards the local area's program revisions to the EPA because such revision must be submitted by the Cabinet.

You are aware of the requirement that you may not accept employment, for six months, with a person or business that contracts or does business with the state in matters in which you were directly involved during the last three years of your state tenure. However, you do not believe that the APCD is a person or business, nor do you believe that the APCD is doing business with or is regulated by the Division. You believe the relationship between the Division and the APCD is one of "sister agencies," working together for a common purpose.

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In addition, you are aware that you may not represent a person before the Division for one year after leaving your current position, but are unclear as to whether the APCD would be considered a person as defined in KRS Chapter 11A. You ask whether you may accept the position as director of the local APCD.

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.

(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.

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It appears from the information provided that the APCD is not regulated by the Cabinet although its power as the primary enforcement agency in the local area could be removed by the Cabinet if it does not administer the pollution control program as specified by law. The Commission does not view such a relationship as a regulatory relationship. Consequently, the APCD is not considered to be doing business with the Cabinet. Therefore, although you have been directly involved in matters concerning the APCD during your state tenure, you are not prohibited from accepting employment, immediately upon your termination from state government, because the APCD is not considered to be doing business with the Division.

However, you are prohibited, for one year as acting as a lobbyist in any capacity. In addition, for one year upon your termination, you may not represent the APCD before the Division which you currently direct. "Representation" includes attending an agency proceeding, writing a letter, or communicating with an employee of an agency on behalf of someone else. Such representation would constitute a violation of KRS 11A.040(8) above, as "person" defined in KRS 11A.201(13) means "an individual, proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business, trust, estate, company, corporation, association, club, committee, organization, or group of persons acting in concert."

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BY: Ruth H. Baxter, Chair