

ADVISORY OPINION 97-2

February 4, 1997

RE: May employee who is not directly involved with company seeking incentives own more than a value of \$10,000 in stock of the company?

DECISION: Yes.

This opinion is in response to your September 20, 1996, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 29, 1996, December 17, 1996, and February 4, 1997, meetings of the Commission, and the following opinion is issued.

The relevant information is provided as follows. You believe that the Commission erred in its interpretation of KRS Chapter 11A upon the issuance of Advisory Opinion 96-32. Because you see a possibility for circumstances similar to the situation in the advisory opinion to occur again, you request review and reconsideration of Advisory Opinion 96-32 and a response to the following questions:

1. *Does the Commission believe the conflict resolution mechanism set forth in Opinion 96-32 (i.e., divestiture) applies if the officer in question has no involvement in the transaction?*
2. *Is the Commission's position different if the Economic Development Cabinet (the "Cabinet") makes a decision not to grant the incentives?*
3. *To whom should the Secretary of Economic Development (the "Secretary") disclose a conflict and delegate authority? In this regard, you should know that the Secretary reports to the Board of the Kentucky Economic Development Partnership (the "Partnership"), not to the Governor as is the case with other Cabinet Secretaries. This is an important feature of the economic development reform passed in 1992 which is intended to depoliticize Kentucky's economic development operations.*
4. *Does the Commission intend to recognize the validity of KRS 11A.030(4), which allows an official to consider "the need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the Executive Branch" in determining whether or not to abstain in the event of a conflict? If so, what circumstances does the Commission believe would justify continued involvement in a matter, without divestiture, when a real or potential conflict exists?*
5. *What other matters required to be disclosed pursuant to KRS 11A.050 does the Commission intend to "read into" KRS 11A.040 so as to require*

divestiture as a remedy? For example, if an official owes a bank more than \$10,000 (see 11A.050(3)(1), does the official have to pay the debt in the event the creditor applies for incentives or otherwise does business with the Department where the officer works? If a company from which the official's spouse receives compensation applies for incentives, must the spouse quit his or her job in order to remove the conflict? These may sound like far-fetched hypotheticals, but when matters disclosed under KRS 11A.050 are required to be eliminated as the only means for remedying a conflict, consideration must be given to all matters subject to disclosure under KRS 11A.050.

The Commission is not in the position of rendering opinions on hypothetical situations, but will be glad to address the questions you have presented which outline specific facts.

Divestiture of stock with a value which exceeds \$10,000 is not required of an officer of the Cabinet if he has no direct involvement in any matters concerning the company of which he owns an interest. However, if the officer is directly involved in matters of the company of which he owns an interest, the officer should not own more than \$10,000 or 5% of the company, even if the Cabinet votes not to grant incentives to the company. Therefore, the Commission declines to reconsider Advisory Opinion 96-32.

Based on the fact that the Secretary is hired by and reports to the Kentucky Economic Development Partnership, and not to the Governor, the Commission believes that when a matter arises from which the Secretary should abstain because of a potential conflict, he should disclose that fact in writing to the Partnership. Decisions, actions and recommendations concerning that matter should then be made by the Partnership and not by anyone under the authority of the Secretary. If any matters regarding a company are handled by any employees of the Cabinet, the Secretary is considered directly involved in such matters. Thus, if the Secretary owns more than a value of \$10,000 or 5% of a company which has matters pending before the Cabinet, a conflict may exist for the Secretary.

The Commission does recognize the validity of KRS 11A.030(4) which provides:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

...

(4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch.

However, the Commission also recognizes the importance of the KRS 11A.030(1), (2), (3) and (5) which state:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant

should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter; or
- ...
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

The Commission believes that, although there are times when special knowledge an employee may have on a particular matter may necessitate his involvement in a matter, the employee should not be involved in the matter if the other four provisions in KRS 11A.030 outweigh the need for his involvement. It is impossible for the Commission to envision all circumstances which could arise that would justify an employee's involvement in a matter where a potential conflict could exist. The Commission will be happy to address any questions you have concerning specific situations.

Interpretation of the Code of Ethics is an authority which has been vested with the Commission. Each request for advice concerning the Code is reviewed by the Commission and answered for a specific set of facts. Therefore, it is difficult to give an opinion on the hypothetical situations for which you request advice unless the Commission is provided with specific information. Specifically, the Commission would need to know the employee's position within the Cabinet, whether on not the employee or spouse have any ownership interest in the outside companies, and the spouse's position with the outside company. Factors such as these are considered when the Commission is providing advice to individuals who seek to uphold the public trust.