

ADVISORY OPINION 98-16

April 8 1998

RE: Will potential employee's private consulting business create a conflict of interest with his official position?

DECISION: Yes.

This opinion is in response to your March 11, 1998, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the April 8, 1998, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. The Department for Surface Mining Reclamation & Enforcement (the "Department") is interested in employing an individual who co-owns a family business that provides environmental consulting services for various industries, one of which is the coal mining industry that is regulated by the Department. The potential employee is president and co-owner of a business that performs environmental studies for the construction and mining industries and local governments in Ohio, Kentucky, Tennessee and Indiana. His duties for his private business include performing tasks required by the Department, the Division of Water and the U.S. Fish and Wildlife.

The position in the Department for which he has applied, Principal Environmental Scientist, includes such duties as advisor to the Director of Permits on environmental issues and development of in-house monitoring and quality control procedures. You ask the following questions regarding the potential employee:

- 1) *What role, if any, may he play in the function of his private business if the state position is assumed? May stock be retained?*
- 2) *If none, may his family, wife and/or children continue to run and operate the business as now and continue to service the mining industry?*
- 3) *If no, may his private business, under the ownership of family members, continue to provide services to the mining industry?*
- 4) *May his private business continue to provide services to the mining industry which are required by other regulating agencies such as the Division of Water?*
- 5) *May the company or stock be sold and payments received via incremental monthly installments while he is a state employee?*
- 6) *May out of state projects continue to be conducted?*

In Advisory Opinion 94-18 (a copy of which is enclosed), the Commission concluded that an employee could provide private consulting services for an environmental engineering firm, provided the engineering firm and the client to whom the employee would be providing services were not regulated by or doing business with the Department for which the employee worked. Additionally, in Advisory Opinion 97-4, the Commission stated that a potential conflict of interest might exist if the employee provided consulting services to companies seeking permits from the agency for which he worked. Similarly, the Commission believes that a conflict of interest may exist if the potential employee is hired and continues to

own a substantial interest in a business that seeks to do business with coal mining companies regulated by the Department.

Thus, the Commission believes that neither the employee, his spouse, nor his dependent children should own more than a 5% interest in a company that seeks coal mining clients which are regulated by the Department for which the employee works. The Commission does not believe that other family members are prohibited from owning the private consulting business and providing services to the coal mining industry as long as the employee has no involvement in the operation of the private business and does not receive a benefit from the operation of the business. Additionally, in order to avoid the appearance of a conflict, he should refrain from any involvement as a part of his official duties with companies with which his family's consulting firm may do business.

The employee's private business is not prohibited from providing services to companies within the mining industry that are not regulated by the Department for which he works, but are regulated by the Department for Environmental Protection, Division of Water or by another state, even if he retains an ownership interest of greater than 5%. If the Department has no involvement in regulating the industries with which his private firm does business, no apparent potential for conflict exists.

The employee's interest in the private consulting business may be sold through an agreement allowing monthly installment payments provided such payments are not dependent on the success of the company.

Enclosure AO 94-18
 AO 97-4