

ADVISORY OPINION 98-24

May 19, 1998

RE: May Fish and Wildlife employee provide consulting services for environmental consulting firm?

DECISION: Yes, provided services do not fulfill part of contract with employee's state agency.

This opinion is in response to your April 17, 1998, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 19, 1998, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. You are an employee of the Kentucky Department of Fish & Wildlife Resources (the "Department"). You recently transferred positions within the Department. Formerly you worked as a wildlife management area supervisor for the West Kentucky Wildlife Management Area ("WKWMA"). Currently, you are employed as a wildlife biologist senior working with the elk restoration project in Kentucky. While you were a supervisor for the WKWMA, an environmental cleanup project was begun on a facility located in the area. Maxim Technologies, Inc. ("Maxim"), an environmental consulting firm, was chosen to work on the cleanup. After your transfer from your supervisory position for the WKWMA, Maxim requested you to provide services on a part-time basis to review and provide ecological expertise on the cleanup project. You state that you are not involved in a regulatory capacity as part of your official duties for the Department. You ask whether it is a conflict for you to accept this position.

KRS 11A.020(1)(a), (c) and (d) provide:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(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.

Additionally, KRS 11A.040(4) provides:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase

made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

- (a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or
- (b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or
- (c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises.

Since it does not appear that, as part of your official duties as a wildlife biologist senior, you currently are involved in matters relating to Maxim or the regulation of any companies that may be in competition with that company, it does not appear that a conflict will exist if you are hired by Maxim, provided the services you will provide for Maxim are not part of a contract or an agreement which Maxim holds with the Department. As provided by Advisory Opinions 96-38 and 96-39 (copies of which are enclosed), an employee is prohibited from contracting with an entity to provide a service that is part of a contract the entity holds with the state agency for which the employee works. Thus, if Maxim holds a contract or an agreement with the Department, and the work which you will provide for Maxim fulfills a part of the contract, you will be "enjoying" part of a contract with your state agency which is prohibited by KRS 11A.040(4). Because you do not state in your request whether the environmental cleanup project awarded to Maxim was awarded by the Department or not, the Commission cannot advise you as to whether you may provide such consulting services for Maxim.

Additionally, if you had any involvement in matters concerning the environmental cleanup project or Maxim as a part of your official duty for the Department, the Commission believes that an appearance of, if not an actual, conflict of interest may exist if you were to accept compensation from Maxim.

Furthermore, if Maxim has a business or regulatory relationship with the Department, and you will be hired by Maxim as an employee, rather than an independent contractor, you must obtain approval from the Commission for any outside employment as required by KRS 11A.040(9) which states:

- (9) Without the approval of the commission, no public servant shall accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds. The commission shall promulgate administrative regulations to establish a procedure for the approval of outside employment of a public servant, including

a requirement that the public servant and his appointing authority state in writing that the public servant is not in a position to influence any agency decision relating to the outside employer.

I have included Kentucky Administrative Regulation 9 KAR 1:050 which provides guidance on how to obtain approval of your outside employment if you will be an employee of Maxim.

Enclosures AO 96-38
 AO 96-39
 9 KAR 1:050