



COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission

ADVISORY OPINION 17-06

May 15, 2017

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RE:

(1) May a public servant in a non-officer position accept employment as a manager of a property owned by a company that has a contract with his former agency immediately after retiring from the executive branch of state government without violating the post-employment provisions contained in KRS 11A.040(6)-(9)?

DECISION:

(1) Yes, within limitations.

This opinion is issued in response to your April 22, 2017, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 15, 2017 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

You originally sought a staff opinion from the Commission's staff on March 14, 2017. Commission staff issued an informal opinion to you on March 15, 2017. You request a formal Advisory Opinion from the Commission as an assurance that you are following the correct course of action in your post-employment conduct. You advised Commission staff that you intended to retire from state government on April 1, 2017; however, you indicate in your advisory opinion request that you are now intending to retire on July 1, 2017. You would like to accept a position as manager of a marina that is owned by a business ("Company") that currently holds contracts with the Finance and Administration Cabinet and the Kentucky Department of Parks. You seek advice as to the application of the post-employment provisions contained in KRS 11A.040(6) through (9) to your intended post-employment conduct.

You served as Resort Park Manager II at a State Resort Park from 2004 until April 15, 2016. You then transferred to your current Recreation Park Manager position at a State Recreational Park. While at the Resort Park, you were considered as an "officer" pursuant to KRS 11A.010(7) and required to file a Statement of Financial Disclosure (SFD) with the Commission every year. As a Recreation Park Manager, you are not considered an officer who is required to file an SFD.

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While you were at the State Resort Park, the marina on the property was initially operated by the Department of Parks. The management of the marina was later leased to a private entity in 2015. In January 2016, four months prior to your departure from the State Resort Park, the marina came to be leased by the Company. The State Recreational Park for which you currently work does not have a marina on its property. When you transferred to the State Recreational Park in April of 2016, you ceased communications or working directly on matters with the Company in your official capacity as a public servant.

The Company handles all aspects of daily operation of the marina through its contract with the Department of Parks and Finance and Administration Cabinet. While serving as the Resort Park Manager, you often served as a communication liaison between the marina and the Department of Parks Central office. Commission staff has reviewed your last Resort Park II Manager Employee Performance Planning and Evaluation form in your personnel file, which confirmed that you had no official duties at all related to the marina or the Company. Commission staff has also spoken with your direct supervisor and with the Cabinet's General Counsel, who confirmed that you had no direct involvement in the contract negotiations between the Department of Parks and the Company.

The provisions of KRS 11A.040 (6) and (7) only apply to employees who are also identified as "officers" per KRS 11A.010(7). While the provisions of KRS 11A.040 (8) and (9) apply to all public servants for a period of one year after leaving state government. Based upon the facts you have presented, the Commission only needs to examine the texts and application of KRS 11A.040 (7), (8), and (9). KRS 11A.040(7) applies to "officers" and reads as follows:

(7) A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, 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, or is regulated by, 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, or for which he received, prior to his state employment, a professional degree or license, 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.

The term "matter" is defined in 9 KAR 1:024 Section 1, (4) to mean "any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation

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charge, or legislative bill.” The term “directly involved” is defined by KRS 11A.010(18) to mean “to work on personally or to supervise someone who works on personally.”

The Commission has previously determined that your previous position as a Resort Park Manager II is considered as a major management position and qualifies as an “officer” position under KRS 11A.010(7). Therefore, you were prohibited for a period of six (6) months following transferring into a non-officer position from accepting employment, compensation, or other economic benefit from any person or business that contracts or does business with, or is regulated by, the state in matters in which he was directly involved during the last thirty-six (36) months of your tenure as an officer. Since you vacated your officer position as Resort Park Manager II on April 15, 2016, this prohibition applied to you until October 15, 2016, after which you were no longer subject to KRS 11A.040(7) based on precedent set forth in Advisory Opinion 15-03.

More importantly however, based upon the facts presented, it appears you were not directly involved in “any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation charge, or legislative bill” related to the Company’s negotiated lease with the Department of Parks. Therefore, you are not prohibited from accepting employment with the Company under KRS 11A.040(7).

As to your present scenario, although you are not considered an “officer” for purposes of KRS 11A.010(7), a Recreational Park Manager is still a public servant and must abide by the post-employment provisions applying to all public servants contained in KRS 11A.040(8) and (9), which provide as follows:

(8) A former public servant shall not act as a lobbyist or lobbyist's principal in matters in which he was directly involved during the last thirty-six (36) months of his tenure 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.

(9) A former public servant shall not represent a person or business before a state agency in a matter in which the former public servant was directly involved during the last thirty-six (36) months of his tenure, 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.

“Represent” is defined in KRS 11A.010(17) to mean “attend a proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else.” As stated in Advisory Opinion 09-06 and 15-03, you may not represent your new employer before the state in any matter with which you had direct involvement during the last three years of your tenure with the Kentucky State Parks.

As such, you may immediately begin working for the Company following your retirement, as long as, for a period of one (1) year after your retirement date, you do not act as a lobbyist or

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lobbyist's principal or represent the Company before the Cabinet in a matter in which you were directly involved during the last thirty-six (36) months of your state tenure.

Finally, you should also seek the advice of the Kentucky Retirement Systems concerning the break in service provisions applying to retirees.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton

Attachment: Advisory Opinion 15-03