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EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 24-04

July 17, 2024

RE: Does KRS 11A.040 prohibit the former Division Director of the Division of Water for the Commonwealth of Kentucky from taking a job with a consulting firm with which he approved ongoing state contracts and projects.

DECISION: QUALIFIED YES. For one year from the termination of state service, KRS 11A.040(6) prohibits officers, or public servants listed in KRS 11A.010(9)(a) to (g), from “enjoying” the benefits of any contract awarded by their agency to a consulting firm with which they are seeking employment. Further, KRS 11A.040(7) prohibits officers, or public servants listed in KRS 11A.010(9)(a) to (g), 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 the officer was directly involved in the last 36 months of their state service. However, KRS 11A.040(7) also contains a limited exception for an individual to return to the same business, firm, occupation, or profession they held prior to state service, or for which they had received a professional degree or license prior to state service.

This opinion is issued in response to a request from the former Director of the Division of Water for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”) regarding the post-employment provisions of KRS 11A.040. This matter was reviewed at the July 17, 2024, meeting of the Commission and the following opinion is issued.

The following relevant facts were provided: The employee served from May 16, 2021, to January 15, 2024, as the Division Director of the Division of Water for the Commonwealth of Kentucky. In that position he was solely responsible for the overall general direction of all branches and programs within the Division of Water. He was responsible for developing plans, programs, and regulations to manage, protect, and enhance the quality and quantity of the waters of the Commonwealth of Kentucky. He administered the National Pollution Discharge Elimination System Permit Program, the Water Quality Standards programs mandated by the Safe Drinking Water Act, the Public Water Supply System program mandated by the Safe Drinking Water Act,

the Water Resources programs mandated by state statutes, the Stream Construction permitting program, the Dam Safety program, and the National Flood Insurance and the Risk MAP program, in cooperation with FEMA. The employee now wants to join a consulting company that deals directly with water related issues, including water infrastructure and floodplains. During his state service the employee served as the Commonwealth Division of Water's project manager for several multimillion-dollar water projects contracted to this consulting firm. He served as the direct supervisor over those projects. The consulting firm has current ongoing contracts with the Commonwealth Division of Water that he negotiated. The employee is an "officer," as defined in KRS 11A.010(7) and is subject to all the post-employment provisions in KRS 11A.040(6), (7), (8), and (9).

First, we must analyze the question under KRS 11A.040(6) which states in relevant part:

"A former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year of termination of his or her employment, knowingly by himself or herself or through any business in which he or she owns or controls an interest of at least five percent (5%), or by any other person for his or her use or benefit or on his or her account, undertake, execute, hold, bid on, negotiate, 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 or she was employed..."

The concerning language in this statute is the prohibition against "enjoying" the benefits of any contract granted by his agency to the consulting firm. This language has been interpreted by the Commission to prohibit a public servant from fulfilling any part of a contract the new employer has with the Commonwealth for a period of one year from the termination of service to the Commonwealth. Advisory Opinion 07-29.

Secondly, we must analyze the question under KRS 11A.040(7) which provides, in relevant part, that an officer shall not, within one (1) year of the termination of service 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 the officer was directly involved during the last thirty-six (36) months of their tenure. KRS 11A.010(18) defines "Directly involved" as meaning "to work on personally or to supervise someone who works on personally."

As established above, the consulting firm has ongoing contracts and business with the Commonwealth of Kentucky and therefore, is doing business with the Commonwealth. The question then becomes whether the employee was directly involved in matters between that firm and the Commonwealth in the last 3 years of his employment. The Ethics Commission has defined "matter" to mean any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill." 9 KAR 1:025, Section 1(4). In Advisory Opinion 20-02 the Commission held that "measurable" means "the matter must have a beginning and end". Clearly, the employee was directly involved with this consulting company in the last three years of his tenure as a state government officer.

However, the language of KRS 11A.040(7) continues and offers an exception:

"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 taking office or

beginning his term of employment, a professional degree or license, provided that, for the period of one (1) year, 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.”

The employee has advised the Commission that he had completed both a Bachelor’s degree and a Master’s of Science degree in Plant and Soil Environmental Science prior to his state employment. The employee also worked as a paid research assistant in the environmental profession at the University of Kentucky, prior to his state employment. As the position he now seeks requires a Master’s of Science degree in an environmental field, he maintains that he would be returning to the only occupation and profession in which he had been involved. Executive Branch Ethics Commission Advisory Opinions 95-25 and 97-19 recognized that the exception contained in KRS 11A.040(7) was applicable to a licensed engineer with no experience prior to his state employment. The Commission reasoned that when an employee who was a licensed engineer prior to state service again performed as an engineer with a private firm after leaving state government, he had returned to his same profession. Here, the employee secured two professional degrees and worked in the environmental profession before accepting state employment. For purposes of the exception contained in KRS 11A.040(7), such suffices as a return to his former occupation and profession in which he was involved prior to state employment. While his employment with the consulting firm is not barred, for a period of one year he may not work on matters before the agency in which he was directly involved during the last 36 months of his tenure in state government.

Furthermore, after going to work for the consulting firm the employee must be sure to follow the next two post-employment provisions that apply to all former employees. These paragraphs state:

(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.

KRS 11A.010 (17) defines “represent” to mean “attend an agency proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else.” “Directly involved” is defined in KRS 11A.010(18) to mean “to work on personally or to supervise someone who works on personally.” The Commission has defined the term “matter” to mean “any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill.” 9 KAR 1:025, Section 1(4).

As such, for one year after departure from state service, an employee cannot lobby on behalf of or represent the new employer by direct communications with his former agency, attend proceedings of that agency, or send correspondence to the agency related to any ongoing matters in which the employee, or any of their former subordinate staff, were directly involved during the last three years of state service, pursuant to 11A.040(8) and (9).

EXECUTIVE BRANCH ETHICS COMMISSION

A handwritten signature in blue ink, appearing to read "David Karem", is written over a horizontal line.

By David Karem, Chair