

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-25

March 22, 2002

RE: May a state employee accept outside employment with a business that is registered to lobby the executive branch agency where he is employed?

DECISION: Yes, but an appearance of a conflict may exist.

This opinion is in response to your March 18, 2002, request for an opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 22, 2002, meeting of the Commission and the following opinion is issued.

You state the following relevant facts. You are employed by the Transportation Cabinet (the "Cabinet"), Department of Administrative Services (the "Department") as a Principal Assistant in the Commissioner's Office. The Commissioner's Office manages three divisions: Fleet Management, Service and Supply, and Toll Facilities. Your job as Principal Assistant to the Commissioner of the Department is to assist with special projects for these divisions. You further state that you have no decision-making responsibilities in the Cabinet.

Your prospective outside employer is The Flint Group, Inc. ("Flint"). Flint is a governmental services consulting firm, and your position with Flint would be as a utility consultant for local governments. Flint is registered with the Commission as an executive agency lobbyist, specifically to lobby the Department, among other agencies, on behalf of two employers. You affirmatively state you "... will not be involved with any Transportation issues..." You request approval from the Commission for such outside employment.

Requests for outside employment are governed by KRS 11A.040(10) and 9 KAR 1:050. KRS 11A.040(10) states:

(10) Without the approval of his appointing authority, a public servant shall not 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.

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(a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

(b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

(c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

Although, from the facts you have presented, it does not appear that Flint is regulated by or doing business with the Department, because Flint is registered to lobby the Department on behalf of two entities, the Commission believes a potential for conflict will exist if you are employed by Flint. Those entities are presumably attempting to influence decisions the Department will be making, as both are engineering firms. Thus, in considering this request, the Commission looked to regulation 9 KAR 1:050, Section 2, which is required to be reviewed by the appointing authority in considering approval of outside employment, and which provides:

Section 2. The appointing authority shall review the request and consider, including but not limited to, the following factors:

(a) The degree of separation between the public servant's state duties and decisions concerning the outside employer. Example: whether the public servant is involved with the awarding of contracts to or regulation of the outside employer.

(b) The public servant's level of supervisory or administrative authority, if any. Example: whether the public servant has ultimate responsibility for a decision concerning the outside employer, although he is not involved in the decision-making process.

(c) Whether the outside employment will interfere or conflict with the public servant's state employment duties.

1. A conflict shall exist if a public servant cannot carry out an appropriate course of action for his agency because of responsibilities his outside employment would require.

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2. A conflict shall exist if the outside employment will materially interfere with the public servant's independent judgment in considering alternatives or courses of action that reasonably should be pursued in his state employment.

(d) The duration of the outside employment;

(e) Whether the outside employment would create an appearance of conflict of interest with state duties; and

(f) Whether the public servant is an auditor, inspector or other regulatory personnel of a division which is currently auditing, inspecting or reviewing or has scheduled an audit, inspection or review of the outside entity for which the public servant requests approval to work.

Although you state that you have no involvement in decision-making responsibilities for the Department, the Commission believes the fact that you are a high-level official within the Department and could make recommendations to those who are involved in decision-making presents a potential conflict of interest for you as set forth in KRS 11A.020(1)(a) and (d) below:

(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;

...

(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.

However, the Commission believes that if you abstain, as part of your official duty, from any involvement whatsoever regarding matters involving the two engineering firms that Flint represents, and any engineering firms that might compete with such firms, and you disclose your abstention in writing as required by KRS 11A.020(3) (cited below), this will remove any actual conflict of interest. The Commission then believes you may accept employment with Flint;

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however, the Commission cautions that an appearance of a conflict may still exist, and it advises you to consider such an appearance in your decision regarding the propriety of such outside employment.

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

If you do accept work with Flint and your official responsibilities change to include matters regarding the firms Flint represent or firms that compete with such firms, you should immediately terminate your work with Flint. See Advisory Opinion 00-26, copy enclosed.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY VICE CHAIR: Joseph B. Helm, Jr.