

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-2

February 20, 2004

RE: May a state employee pharmacist consultant obtain outside employment as retail pharmacist?

DECISION: Yes, if approved for such outside employment by his appointing authority.

This opinion is in response to your December 18, 2003, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 20, 2004, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are employed by the Health and Family Services Cabinet (the "Cabinet") as a pharmacist consultant in the Drug Enforcement and Professional Services Branch (the "Branch"). The Branch is responsible for:

- 1) Licensing of manufacturers of controlled substances;
- 2) Investigations involving violations of KRS 218A; and
- 3) Administration of KASPER (Kentucky All Schedule Prescription Electronic Reporting)

Your primary job responsibility, as stated on your position description, is to "utilize pharmaceutical knowledge to analyze requests for KASPER reports and prepare KASPER reports." Other job duties require you to "use pharmacist education and experience to accept complaints for investigation by staff investigators" and "oversee the operation of the KASPER controlled substance monitoring program." You stress that you are not an investigator in this position, and have no decision-making authority regarding investigations. Because of system and staffing issues, you state that the majority of your time is receiving raw KASPER data and entering it into the database. As to the "accepting complaints for investigation by staff investigators," you say that this essentially means passing messages or complaints to the investigators, and that you have no responsibility for decisions relative to investigations. You say you were "...specifically hired as a non-investigator to learn how the system worked in regards to data loads and data retrieval," and that you are not involved "in any way" in investigative functions or duties, or in assigning them.

Previously, you sought approval from your appointing authority for outside employment as a retail pharmacist, but your request was denied. This employment would be outside normal state business hours, for about 8-12 hours every 2-3 weeks, and you would work outside the city of Frankfort for a retail pharmacy. You state that previously, when you worked in the Department of Public Health (the "Department") as the Strategic National Stockpile ("SNS") Coordinator before you assumed your current duties, you were allowed to work at a retail pharmacy as a secondary employment, and that so doing kept you in tune with updates in technologies and medications, and was generally beneficial to your state employment. You

believe this current situation is similar, in that outside retail pharmacy employment would benefit your state employment.

KRS 11A.040(10), the outside employment statute, states in pertinent part:

(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.

(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.

The administrative regulations established that govern the approval of outside employment are, in pertinent part, as follows:

9 KAR 1:050. Approval of outside employment of a public servant.

KRS 11A.040(9) requires the appointing authority to review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

...

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.

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.

Section 3. The appointing authority shall consider the factors set forth in Section 2 of this administrative regulation and, if the appointing authority approves the outside employment request, certify in writing the following:

"As appointing authority for the (agency), I certify that as a (public servant's job title), (public servant's name) is not involved in this agency's decisions concerning (outside employer); that his off-duty employment by (outside employer), in my opinion, will not create a real or perceived conflict of interest which would damage public confidence in government; and that I approve such off-duty employment."

Retail pharmacies are regulated by your employing state agency. Thus, in order to be approved by your appointing authority for outside employment with a retail pharmacy, you must not be involved in decision making or recommendations concerning the retail pharmacy. You state that you have submitted a sworn statement verifying that you are not involved in your state employment with decisions affecting the retail pharmacy for which you wish to work. In addition, a review of your job duties and your statements regarding your job duties seems to indicate that you would not be involved in investigation or decision making of pharmacies or pharmacists that submit the data you work with in the KASPER system. Based on this information that you have provided to the Commission regarding your job duties, it does not appear that your working as a retail pharmacist would create a conflict of interest for you with respect to your state employment job duties.

However, the Commission believes there are other factors, as listed in the regulations above, that an agency appointing authority must consider when determining whether to approve your outside employment request. Thus, after a review of those additional factors, if the Cabinet appointing authority believes that your outside employment with a retail pharmacy will create a real or perceived conflict of interest and should not be approved, the Commission supports this decision.

BY CHAIR: Joseph B. Helm, Jr.