

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 06-24
AUGUST 25, 2006

RE: May contract employee for Education Professional Standards Board also serve as faculty member at private college in Kentucky?

DECISION: Yes, if appointing authority approves such outside employment.

This opinion is issued in response to your August 18, 2006 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the August 25, 2006 meeting of the Commission and the following opinion is issued.

You provide the following relevant facts as follows. You currently work through an educational cooperative out of Northern Kentucky as the technology coordinator for a Title II grant that the Educational Professional Standards Board ("EPSB") received in 2002. The EPSB regulates all Kentucky teacher preparation institutions, including private colleges, although you are not involved in any regulatory work for the EPSB. In your current job, you create data reporting systems for all teacher preparation institutions in Kentucky.

In addition, you serve as an adjunct faculty member in the education department at a private college in Kentucky. Prior to your acceptance of the position with the private college you inquired of the EPSB legal counsel and were told that it would not be a conflict for you because you did not work directly for the EPSB.

The grant will conclude at the end of September 2006, but the EPSB would like to continue your services until June 2008. During the course of your job negotiations (ongoing since April 2006) with the EPSB, the former personnel officer determined that you could continue to work for the EPSB through a cooperative after the grant ended, avoiding any potential conflicts of interest if you continued your employment at the private college. Consequently, you had planned to teach two distance learning courses in the fall of 2006.

Recently, though, the EPSB decided to request proposals for the position. If you are selected to retain the position, you will be employed through a personal service contract and will

work directly for the EPSB. You do not believe that it is or will be a conflict because the majority of your job responsibilities will not change as you transition your employment, and also you state that you have never been involved in the regulatory nature of the EPSB. An added responsibility will include consulting with the Division of Educator Preparation to translate their current business practices into a more efficient, electronic system, but you will not have access to any sensitive or confidential information. You also will manage the Kentucky Information Technology in Educator Preparation group, whose mission is to promote information technology in Kentucky's teacher preparation institutions.

You have and will continue to work closely with all institutions in Kentucky who train teachers. Although you have been trained as an accreditation team member, who visits and monitors a teacher preparation institution in order to report to the EPSB on how well the institution has met state and national standards, you did so only to understand the process. You do not plan to ever be involved in any accreditation visit to any institution because your work requires you to work closely with the institutions to support the data needs of all the institutions.

While the division for which you will be working regulates all the institutions in Kentucky, including private colleges, the work that you will be doing for the division will not ever be directly related to regulation of the institutions. You ask for an opinion as to whether such dual employments would present a conflict of interest for you; specifically you ask if you may work for the EPSB, which regulates teacher preparation institutions, and also serve as an adjunct faculty for such an institution if you have no involvement in any regulatory decisions relating to the institutions.

KRS 11A.010(9) defines "public servant" below:

(9) "Public servant" means:

- (a) The Governor;
- (b) The Lieutenant Governor;
- (c) The Secretary of State;
- (d) The Attorney General;
- (e) The Treasurer;
- (f) The Commissioner of Agriculture;
- (g) The Auditor of Public Accounts; and
- (h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

(7) "Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet,

the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Occupational Safety and Health Review Commission, the Kentucky Board of Education, the State Board for Adult and Technical Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

In Advisory Opinion 03-18, the Commission concluded that employees hired through memorandum of agreements with local school districts to fulfill positions in the Department of Education on a full-time basis for a period of not less than six months, even if the position is not an officer, are in substance public servants and subject to the requirement of the Executive Branch Code of Ethics in KRS Chapter 11A. Accordingly, whether you are employed through an education cooperative or through a personal service contract, if you are or will be employed full-time, for a period of not less than six months, you are and will be subject to the Executive Branch Code of Ethics in KRS Chapter 11A.

KRS 11A.040(10)(a) and (b) provide:

(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.

As required by the provisions above, you are required to obtain approval for any outside employment, including employment with a private college, if the outside employer is regulated by the EPSB. Since the private college which employs you is regulated by the EPSB, the appointing authority may not approve your outside employment if you are involved in any decision-making or recommendations concerning the private college. Further, the appointing authority should review the regulations below in his determination of such approval.

Section 1. (1) A public servant who requests approval of his appointing authority for outside employment shall submit a statement under oath to the appointing authority of his agency as follows:

"I request approval of off-duty employment with (name of outside employer). As a (public servant's job title), I am not involved in the (name of state agency's) decisions concerning (name of outside employer). If the request is approved, I agree that if, in the future, I realize that I will be involved in such decisions, I will immediately notify (appointing authority) and take steps to avoid any conflict of interest."

(2) The public servant shall attach to this statement:

(a) The public servant's current P-1 personnel form or comparable form, if applicable, and job description, and the name, title and location of the public servant's immediate supervisor.

(b) The name and address of the outside employer; description of its type of business, ownership, and all its business and regulatory relationships with the appointing authority's agency; and a description of the public servant's off-duty job.

(c) An explanation of the specific factors which separate the public servant's state job from the agency's decisions concerning the outside employer.

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."

Sincerely,
EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb