

Executive Branch Ethics Commission
ADVISORY OPINION 08-2
February 29, 2008

RE: May mine inspector accept short-term employment with a coal company in order to gain retirement and health care benefits?

DECISION: Yes, within limitations.

This opinion is issued in response to your January 7 and February 8, 2008 requests for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 29, 2008 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You are a mine inspector with the Environmental and Public Protection Cabinet's Office of Mine Safety and Licensing, which regulates any coal mine inside the boundaries of the Commonwealth of Kentucky. You are asking for advice regarding what you see as a potential conflict of interest. You indicate that before you came to work for the Office of Mine Safety and Licensing, you were employed by a coal company for over 14 years before being laid off due to the mine closing. You state that you need to return to work for this coal company, if a job becomes available, for a period of no more than 60 days in order to "lock in" your retirement and health care benefits with them.

You provide a summary of what you regard as the relevant facts, as follows: 1) If you return to work from the laid off panel, it will be at a UMWA represented mine, of which the coal company in question has none in Kentucky, meaning that your agency would not have jurisdiction over the mine; 2) The panel recall rights you have with the coal company were earned prior to your employment with the Commonwealth of Kentucky, and were available to each individual who worked at the mine at the time of its closing, indicating that this benefit has no relation to your current position with the state; and 3) During your 16 years with the state, the coal company has never done business with the state, nor owned any coal lands in your inspection district, and should it ever purchase any, you would not be assigned to inspect them. You reiterate that should you be recalled by the coal company to work, that you would work in another state wherein you have no jurisdiction.

It is your intention, if you are recalled by the coal company, to request leave time from your agency, not to exceed 60 days, in the form of earned leave, either compensatory or annual.

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If this is not possible, you intend to use a combination of earned leave, not to exceed 100 hours in any calendar month, in order to maintain continuity of insurances, pension service credit, etc., with the remainder being unpaid leave. Your third option, if you cannot use accumulated leave time, would be to ask for an unpaid leave of absence, not to exceed 60 days.

KRS 11A.040(10) provides, in part:

(10) Without the approval of his appointing authority, no public servant shall 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.

You are subject to the provisions in KRS 11A.040(10) above because you seek to be employed by a coal company, even if for no more than 60 days. While you may not plan to work for the coal company within the state of Kentucky, and the coal company may not do business with your agency, it is still a corporation licensed to do business in Kentucky and thus subject to regulation by your agency. Thus, you should seek approval for such outside employment from your appointing authority, who must review the provisions in administrative regulations 9 KAR 1:050 below in considering whether to approve such outside employment.

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

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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.

In Advisory Opinion 00-38 (a copy of which is provided) the Commission stated that if an outside entity was scheduled to be monitored (i.e. inspected) by an agency, that an inspector of that agency should not hold outside employment with the outside entity regardless of whether the employee was involved in the inspection. Typically, therefore, even if you are not directly involved with inspecting the coal company, if it has any operation in Kentucky and is inspected by your agency, a conflict could still exist due to the fact that a fellow inspector could be involved in inspecting an operation owned by this coal company. However, in Advisory Opinion 01-07 (a copy of which is provided), which involved a mine inspector in a situation similar to yours, the duration of the proposed employment therein was limited (just one day), and thus the Commission believed that such employment would not create an appearance of a conflict provided the inspector in question was not involved in the inspection of the coal company for a reasonable period of time, and provided he did not discuss with his fellow inspectors any matters involving inspections of the coal company.

It is the Commission's opinion that your situation is similar enough to the situation described in Advisory Opinion 01-07 that you could accept employment with the coal company

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for the limited duration you described in order to secure your retirement and health care benefits as long as you continue to be uninvolved with the coal company in your state position, you do not perform any work for the coal company on state time, nor let it interfere in any other way with your job duties, and the duration of the employment is in fact limited as described. The Commission further feels that the fact that you would not work within Kentucky for a mine owned by the coal company significantly reduces any appearance of a conflict that might exist should you gain employment with that company.

Please keep in mind, however, that you must still get the approval of your appointing authority prior to accepting employment from the coal company. Likewise, in regard to the use of your leave time for this purpose, it is within the authority of your appointing authority to approve leave requests, not the Commission. Under no circumstances, however, should sick leave be misused for this purpose.

Furthermore, as stated in Advisory Opinion 01-07, if you will receive future retirement benefits from the coal company, you should have no further responsibility regarding the inspection of this coal company.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb

Enclosures: Advisory Opinion 00-38
Advisory Opinion 01-07