

ADVISORY OPINION 98-14

April 8, 1998

RE: Is approval of the Commission needed for self-employment?

DECISION: No.

This opinion is in response to your February 9, 1998, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the April 8, 1998, meeting of the Commission, and the following opinion is issued.

You ask the following questions relating to outside employment or "moonlighting" activities:

- *If an "outside employer" mentioned in 9 KAR 1:050, Sec. 1(1), is one's self, is an employee required to request approval for his outside employment as directed by 9 KAR 1:050? For example, is an auditor, employed by the Auditor of Public Accounts ("APA"), who also works on his own time as a self-employed tax preparer, required to request approval for such work from the Executive Branch Ethics Commission?*
- *If so, must the auditor request approval for each individual tax client for whom a tax return is prepared?*
- *What if the APA employee/tax preparer's individual tax client is a state employee who works for an agency the APA audits?*
- *What if the individual tax client is a state employee who works for an agency the APA audits but the APA employee/tax preparer is not involved in the APA audit of the agency?*
- *What if the individual tax client is a state employee who works for an agency the APA does not audit?*
- *What if the individual tax client is not a state employee and has no other connection with the state?*

KRS 11A.040(9) provides:

9) Without the approval of the commission, 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. The commission shall promulgate administrative regulations to establish a procedure for the approval of outside employment of a public servant, including a requirement that

the public servant and his appointing authority state in writing that the public servant is not in a position to influence any agency decision relating to the outside employer.

The provisions above only require an employee to obtain approval for his outside employment when such employment is with a person or business that does business with or is regulated by the state agency for which the employee works. Because employees of the APA are prohibited by KRS 11A.040(4) from doing business with the APA, and are not regulated by the APA, they are not required to obtain approval from the Commission for their self-employment.

In addition, KRS 11A.020(1) provides:

- (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;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (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.

Although an auditor may not need approval for such self-employment, he should ascertain that no conflict exists between his official duties and potential clients. For example, an auditor involved in the audit of a local government should not have as a client a local official of the government. Such activity would present a conflict of interest between the auditor's official duties and his private interest.

Additionally, even though there are no specific restrictions in the Executive Branch Code of Ethics regarding conflicts between an employee and an agency within state government (i.e. when one state agency regulates another), the Commission envisions circumstances that could occur that would cause a conflict of interest, or the appearance of a conflict, for an employee who is involved in an audit of a state agency and also seeks state employees of that agency as clients. Thus, the Commission recommends that the Auditor of Public Accounts develop specific in-house policies regarding this matter in order to avoid any real or perceived conflicts of interest and any loss of public confidence in the integrity of the Auditor of Public Accounts. The Commission will be happy to review such policies at your request.

As to your final question, the Commission believes that employees are not prohibited from having clients who are not state employees and have no relationship with the Commonwealth of Kentucky. However, the Commission cautions you not to allow employees to

use state time or materials for their private businesses.