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EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 15-04
September 30, 2015

- RE:**
- 1) If an environmental scientist creates a research-focused company, which only receives revenue from federal grants applied for in collaboration with a Kentucky university, is a conflict of interest created if some of the research involves a process for treating a waste product of the environmental industry of which the environmental scientist is a regulator?
 - 2) If a conflict of interest is created, can the Commission offer guidance that would allow the inspector to continue the research with the Company in the environmental scientist's name?

- DECISION:**
- 1) Yes
 - 2) No

This opinion is issued in response to your September 16, 2015, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 30, 2015 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1) and KRS 11A.030(5).

You are employed by the Division of Oil and Gas, Department for Natural Resources (the "Department"), Energy and Environment Cabinet, as an Environmental Scientist I in the Madisonville office. As part of your job duties for the state, you review and analyze for avoidance, minimization, and mitigation of environmental impacts, collect and analyze scientific data, and oversee the remediation of contaminants. Furthermore, according to the class specifications for your position as an Environmental Scientist I, you perform the following duties:

Evaluates permits, projects, authorizations, and certification applications to determine compliance with existing regulations, promote pollution prevention, resource extraction, remediation, reclamation, mitigation, and energy efficiency. . .
. . Conducts remediation and reclamation investigations and reviews and monitors

cleanup plans. Develops and monitors agreed orders, demand letters, corrective action orders, and other correspondence to facilities regulated by state and federal regulations. Determines compliance with mining, reclamation, remediation, mitigation, resource extraction and environmental control laws and regulations.

As such, in the performance of your duties for the Department, you regulate remediation efforts of members of the oil and gas industry, inspect such efforts, and make recommendations to your Department for enforcement.

You have provided the following information. You sought permission to participate in outside employment by your appointing authority and were denied permission. You were seeking permission to be employed by PIP Industries, LLC, ("PIP Industries") a company which you formed to be able to accept federal grants to participate in a research study with Western Kentucky University ("WKU").

In the summer of 2013, you began research with a professor with WKU on the use of plants to dispose of petroleum wastewater as a viable bioremediation effort. Along with WKU personnel, you conducted a pilot study in 2014, which yielded promising results enough for the Kentucky Innovation Network to suggest you and your collaborators apply for a federal Small Business Innovation Research ("SBIR") grant for proof of concept to validate your pilot study. It was necessary for you to form a PIP Industries in October 2014 to accept the federal grant funding, which is intended for small for-profit businesses. The SBIR application to the National Science Foundation missed the deadline in December 2014 and you reapplied in June 2015.

According to the SBIR website, the federal program

is a highly competitive program that encourages domestic small businesses to engage in Federal Research/Research and Development (R/R&D) that has the potential for commercialization. Through a competitive awards-based program, SBIR enables small businesses to explore their technological potential and provides the incentive to profit from its commercialization. By including qualified small businesses in the nation's R&D arena, high-tech innovation is stimulated and the United States gains entrepreneurial spirit as it meets its specific research and development needs.

You state that an Environmental Control Supervisor with the Department for Environmental Protection, Division of Water, which is responsible for regulating water pollution from oil and gas facilities, provided you a letter of support encouraging the research. You state that neither you nor your Division has any authority over the National Science Foundation or WKU. WKU has already been awarded grants, of which you were listed as a collaborator, from which you received no compensation. You are named, and will be named in future grant applications, as an unpaid researcher collaborator and unpaid co-principal investigator in the grants. You report having received no income from the collaboration and your 2014 tax returns

indicate \$0 gross income as will your 2015 returns; however, you admit that the grant will not begin until January 2016. Your business is listed as “research and product development” on your tax return and business filings. You state that you signed a confidential invention disclosure document giving the patenting and commercialization rights to WKU. As such, you disclaim any plans or ability to earn a profit from the products developed from your research. You further indicate that the work you perform on the research was performed outside of state time and used no state resources. The Commissioner of the Division of Oil and Gas and your appointing authority determined by letter on August 10, 2015, that your business, PIP Industries, creates a conflict of interest with your duties for the Department as an environmental scientist.

On September 23, 2015, the Department provided information to the Commission to assist in the review of this issue. The Department indicates that you did not request permission of your appointing authority to participate in outside employment until July 23, 2015, even though you had formed PIP Industries in October 2014. You only requested permission to do outside employment after your Department learned that you had marketed PIP Industries at the annual Kentucky Oil and Gas Association (“KOGA”) meeting. Your supervisor had given you permission to attend the KOGA conference to present your research; however, the Department was not aware that you had formed a for-profit company to market the research and offer consulting services on bioremediation. At the KOGA meeting, you presented PIP Industries business cards, on which you were listed as the Chief Executive Officer and marketing your “bioremediation services,” to members of the oil and gas industry represented at the meeting. You displayed materials from PIP Industries’ website marketing “consulting services.”

After your agency learned this information, you were instructed to complete an agency form requesting permission to participate in outside employment. On August 10, 2015, the Department denied your request determining that you were engaging in a consulting business that was directly in conflict with your state duties. The Department further instructed you to resign from your position with the Department or divest yourself of your interest in PIP Industries. On August 24, 2015, you notified your Department, through your attorney, that you had assigned PIP Industries in its entirety to a family member.

You state that the SBIR grant for which PIP Industries [which you still refer to as “my company” in your September 16, 2015 request to the Commission] and WKU applied from the National Science Foundation begins January 1, 2016, and will last for six months. You are requesting time to put the company back in your name to avoid burdening the current owner with tax liability. You are seeking an Advisory Opinion from the Commission in an effort to continue to work for PIP Industries and participate in the research study while avoiding violating the Executive Branch Code of Ethics (the “Ethics Code”). Specifically, you ask whether it would be a conflict of interest for you as an environmental scientist with the Division of Oil and Gas to return the ownership of PIP Industries in your name so that you may accept the federal grants funds and participate in the research study. Within your request, you ask the Commission to offer you guidance how you may accomplish this and avoid any conflicts of interest. You ultimately are seeking the Commission to overturn your appointing authority’s denial of your request to participate in outside employment.

The Ethics Code contains the following provisions and process for a public servant to request permission from his or her appointing authority to perform outside employment. KRS 11A.040 provides 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.
 - (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.

9 KAR 1:050 dictates the process for an appointing authority to determine whether to approve a request for 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 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.

The Ethics Code addresses conflicts of interest by prohibiting certain conduct on the part of public servants in KRS 11A.020(1), which states as follows:

- (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.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (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.

KRS 11A.030 provides considerations for public servants to follow when determining when to abstain from action on an official decision in which the public servant may have a conflict of interest:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or

- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

The mission of the Division of Oil and Gas is to regulate the crude oil and natural gas industry in the Commonwealth; to protect the correlative rights of mineral owners, fresh water zones and minable coal seams; and to conserve and protect oil and gas reserves in Kentucky. Your duty as an environmental scientist is to monitor remediation efforts of this industry and determine the industries compliance with the programs you develop.

Notwithstanding the arguments you present regarding your request, it is the opinion of the Commission that your involvement with PIP Industries and the SBIR grant has already created a conflict of interest. Regardless of whether you have signed away your rights to any patent or any ownership interest in any of the products that may be developed through your research using the SBIR grant with WKU, it is apparent you intend to use the knowledge and experience you are gaining to offer bioremediation services to members of the oil and gas industry, the entities and processes you regulate as an environmental scientist. Indeed, at the KOGA conference, you marketed your bioremediation services to individuals you regulate to assist them with their remediation efforts, which you monitor and review as an environmental scientist. If you had followed the established processes of state government, and requested permission to perform outside employment prior to creating PIP Industries, perhaps this conflict of interest could have been avoided. Nevertheless, if you and WKU are successful, you will be creating a unique technology and process, which only you and WKU will have the expertise to assist the oil and gas industry to implement as part of their remediation efforts, which you regulate as a public servant.

The primary purpose of the SBIR grant is to encourage domestic small businesses to engage in research and development that has the potential for commercialization enabling them to profit from its commercialization. Thus, you created PIP Industries, a for-profit company, so that you could receive the grant funds. It is clear that your immediate goal and purpose is for PIP Industries to receive the federal grant funding so that you may continue to participate in the research with WKU. However, it is also apparent that your long-terms goals must be for PIP Industries to profit from the commercialization of the research and development in which you participate while receiving the grant funds to market products and services to the oil and gas industry, the only possible intended market and the industry which you regulate as a public servant. If this is not your ultimate intended purpose for PIP Industries, then PIP Industries should not be awarded the highly sought after federal SBIR grant funds because it is not fulfilling the purpose and mission of SBIR.

KRS 11A.040(10) specifically mandates that the appointing authority review and approve or deny a public servant's request for outside employment, not the Commission. The Commission may provide guidance to an agency pursuant to KRS 11A.110(1), upon request, while it is considering whether to approve or deny a request. The Commission is the ultimate source regarding questions of conflicts of interest with outside employment and may advise an employee to discontinue outside employment where a conflict of interest with his official duties exists, even when such employment has been approved by the employee's appointing authority. See Advisory Opinion 00-72.

Nevertheless, the Commission generally does not overrule an agency's determination to deny permission to perform outside employment when the agency determines that a conflict of interest exists. 9 KAR 1:050, Section 2(e), provides that the appointing authority must determine that a conflict of interest exists when "the outside employment would create an appearance of conflict of interest with state duties." Marketing PIP Industries bioremediation services to members of the industry you regulate in and of itself creates an appearance of a conflict of interest with the state duties you must perform as an environmental scientist. As such, you could be offering bioremediation services to an entity that you direct, investigate, regulate, and monitor their remediation efforts. As such, your agency's denial of your request to work for PIP Industries is sound.

Furthermore, you attested to your agency that you disavowed ownership of PIP Industries in order to continue your employment with the Department. Therefore, your question to the Commission whether you may reacquire ownership of PIP Industries so that you may accept the SBIR grant funds is moot. Your agency has determined your involvement with PIP Industries and, as a result, your participation in the SBIR grant to be a conflict of interest with your duties for your Department; therefore, by operation of KRS 11A.040(10) and 9 KAR 1:050, the Commission does not have a valid reason or desire to overrule the appointing authority's decision.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton