



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

CAPITAL COMPLEX EAST
1025 CAPITAL CENTER DRIVE, SUITE #104
FRANKFORT, KY 40601
(502) 564-7954
FAX: (502)-695-5939
[HTTPS://ETHICS.KY.GOV/](https://ethics.ky.gov/)

KATHRYN H. GABHART
EXECUTIVE DIRECTOR

MICHAEL W. BOARD
GENERAL COUNSEL

SUCHETA MEENA MOHANTY
ASSISTANT GENERAL COUNSEL

CHRISTOPHER L. THACKER
CHAIR

CHRISTOPHER W. BROOKER
VICE CHAIR

APRIL A. WIMBERG
HOLLY R. IACCARINO
KYLE M. WINSLOW

Executive Branch Ethics Commission
ADVISORY OPINION 19-09
September 23, 2019

RE: May a Utility Inspector with the Public Service Commission work for privately owned water treatment facilities that are not subject to the jurisdiction of the Public Service Commission without violating the outside employment provisions of the Executive Branch Code of Ethics?

DECISION: Yes, if the appointing authority approves of the outside employment and conflicts of interest are mitigated.

This opinion is issued in response to your August 21, 2019 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the "Commission"). The Commission reviewed your request at the September 23, 2019 meeting and issued the following advisory opinion.

On behalf of the Public Service Commission (PSC) you have requested that the Commission assist the PSC in reviewing the outside employment request of a Utility Inspector II with the Division of Inspections. You state the relevant facts as follows:

The Utility Inspector would like to work on her own time for two wastewater treatment facilities that are privately owned. The first facility serves a subdivision, is owned by a homeowners' association, and serves only those who live in the subdivision. The other facility serves a mobile home park, is overseen by a board from the mobile home park, and serves only the residents of the mobile home park. Neither of the facilities provide service to residents that do not live in the subdivision or the mobile home park, respectively.

The Utility Inspector in question is assigned to the PSC's Division of Inspections. Her duties include inspection of water and sewer utilities for regulatory compliance, preparation of reports of inspections, and maintenance of inspection files. The Utility Inspector also conducts investigations of accidents and complaints involving the service of water utilities and testifies before the PSC and in court as needed.

The PSC's jurisdiction for sewer utilities only extends to utilities that provides services "for the public." See KRS 278.010(f). The PSC has long held that wastewater treatment plants that serve only customers that are limited by membership or residence in a defined geographical area are not utilities because the service is not provided to or for the public. The two wastewater facilities operated by the Utility Inspector as part of her outside employment are not regulated by the PSC.

You assert that the PSC management believes that no conflict of interest exists because the PSC does not regulate the outside employer nor do the Utility Inspector's duties have any impact on the wastewater treatment facilities that she would be operating. The Utility Inspector would conduct the outside employment after official hours, and this conduct would not conflict with her duties for the PSC.

The outside employment provisions of the Executive Branch Code of Ethics are contained in KRS 11A.040(10) and 9 KAR 1:050. KRS 11A.040(10) was revised in the year 2000 to change the authority for enforcing the outside employment provisions from the Executive Branch Ethics Commission to the Appointing Authority. The provisions on outside employment state, in pertinent part, the following:

KRS 11A.040(10) provides:

- (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.

(emphasis added). KRS 11A.010(16) defines appointing authority as "the agency head or any person whom he or she has authorized by law to act on behalf of the agency with respect to

employee appointments.” As such, the Appointing Authority for the Utility Inspector is the PSC.

Pursuant to 9 KAR 1:050, the Utility Inspector requesting permission to engage in outside employment must submit a request for approval by the appointing authority of the PSC. This request is then reviewed by the PSC for any conflicts of interest inherent in the proposed outside employment and whether it will materially interfere with the public servant’s ability to do his or her duties for the Commonwealth. The appointing authority must certify that the public servant is not involved in the agency’s decisions concerning the outside employer and that the off-duty employment will not create a real or perceived conflict of interest which would damage public confidence in government.

The Ethics Code addresses conflicts of interest by prohibiting certain conduct on the part of public servants in KRS 11A.020(1) and (3), 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;
- ***
- (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.

It is ultimately up to the PSC to grant or deny permission to the public servant to engage in outside employment. The PSC may decide to limit conflicts by setting up parameters under which the Utility Inspector should operate as she engages in the outside employment while continuing with her official duties for the PSC. However, the PSC may decide that it may be too difficult to minimize such conflicts.

Since KRS 11A.040(10) was amended in 2000, the Commission has a long standing practice of supporting the decisions of the appointing authority who has the ultimate authority to decide whether or not an employee may engage in outside employment. In Advisory Opinion 10-07, the Commission stated:

[P]lease be advised that nothing in the Executive Branch Code of Ethics prohibits CHFS from implementing policies regarding outside or self-employment that may be more restrictive than the Executive Branch Code of Ethics or that might require all employees with outside or self-employment to obtain approval from their agencies for such employment. The Commission is aware that CHFS has such a policy, and cautions you that even though it does not believe your proposed work for the Third Party Certification firm presents a conflict of interest, your agency has the authority to continue to deny your request.

The Executive Branch Ethics Commission has no authority under KRS 11A.040(10) to undermine the decision of the appointing authority of the PSC in the present matter.

The appointing authority of the PSC has the final decision-making authority to determine whether this Utility Inspector may engage in outside employment while also mitigating conflicts of interest for the agency. The proposed outside employment should not create any conflicts of interest for the PSC because the outside employers are not regulated by the PSC. As such, the Commission encourages the PSC to grant the permission for the Utility Inspector to engage in the outside employment. However, if the PSC regulatory authority should change to expand to the Utility Inspectors outside employers, then the PSC should reevaluate its determination in the matter.

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: Christopher L. Thacker