

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-53

November 22, 2002

RE: May Administrator for the Board of Barbering be employed by a barbershop or a barber school?

DECISION: No.

This opinion is in response to your October 21, 2002, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the November 22, 2002, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You are employed as the Administrator of the Kentucky Board of Barbering (the "Board"). In addition, you would like to work part-time for a barbershop and/or as a barber instructor for a barber school. The Board is responsible for licensing and regulating all barbers, barber shops, and barber schools in the Commonwealth of Kentucky. As the Administrator for the Board you are employed to administer the statutory provisions of the law as directed by the Board, and you have authority to inspect any shop or establishment licensed by the Board

At its October 14, 2002, meeting, you requested approval for such outside employment from the Board; however, the Board voted to table the discussion and delay a vote on your request pending an opinion from the Commission. You propose to abstain from any involvement with 1) any barber shop with which you have employment or any barbershop within a five mile radius, 2) any barber school with which you have employment, and 3) the testing of any apprentices with whom you are working, or with whom you have worked, or whom you have taught.

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.

Kentucky Administrative Regulation, 9 KAR 1:050, provides:

9 KAR 1:050. Approval of outside employment of a public servant.

RELATES TO: KRS 11A.040(9)

STATUTORY AUTHORITY: KRS 11A.040(9)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 11A.040(9) requires the appointing authority to review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

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.

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(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."

Section 4. On January 15, April 15, July 15, and October 15 of each year, the appointing authority shall file with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment during the preceding quarter, along with the name of the outside employer of each. (21 Ky.R. 1397; Am. 1719; eff. 12-14-94; 25 Ky.R. 887; 1580; eff. 1-19-99.)

Additionally, KRS 11A.020(1)(a) provides:

(1) No public servant, by himself or through others, shall knowingly:

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(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;

Based on the provisions above, the Board must review administrative regulations established by the Commission before deciding whether to approve your outside employment. The Board may not approve your outside employment if you will be involved in decision making or recommendations concerning the barbershop or school with which you seek employment.

Additionally, in Advisory Opinion 00-72 (a copy of which is enclosed), the Commission advised that an inspector employed by the Board of Pharmacy should not hold outside employment with a pharmacy, even if the inspector is not involved in the inspection of the pharmacy. Similarly, because you are the Administrator, the Commission does not believe that you should have any outside employment with either a barbershop or a school of barbering. Even if you were to abstain from inspections and other matters involving a shop or school regulated by the board, the Commission believes that inspectors under your supervision could not inspect those entities by which you are employed without a conflict of interest. It would be hard for an inspector to remain independent in his review of a barbershop or school if he were aware that the shop or school employed his supervisor.

Furthermore, you would also have to recuse yourself from all matters involving any shop or school that might be in competition with any shop or school employing you. Even if a Board member agreed to handle your responsibilities pertaining to any shop or school employing you and any shops or schools in competition with the shop or school employing you, the Commission believes a definite appearance of a conflict of interest would still exist for you and the Board. Thus, the Commission recommends the Board not approve your request for approval of outside employment with a barbershop or school of barbering.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Cynthia C. Stone, Esq.

Enclosures: Advisory Opinion 00-72