

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-45

December 17, 2004

RE: Must employee seek approval from agency for outside employment with Airport contractor?

DECISION: Yes.

This opinion is issued in response to two separate requests, dated October 20, 2004 and November 4, 2004, for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 17, 2004 meeting of the Commission and the following opinion is issued.

The relevant facts are provided as follows. An employee of the Division of Air Transport, Department of Military Affairs (the "Department"), works as a Flightline Attendant II at the Capital City Airport (the "Airport"), which is owned and managed by the Commonwealth of Kentucky. In addition to his position with the Department, the employee has a part-time position with a private aircraft maintenance facility that holds a contract with the Airport for hangar storage space, just a few feet from where the employee's full-time state position is located. The employee's outside employment includes duties such as aircraft washing and detailing, and aircraft repair and maintenance at the hangar space that is leased from the Airport. You believe that the employee's outside employment poses potential works conflicts for the employee as provided below.

The employee's normal work schedule for the Department is from 6:00 a.m. to 3:00 p.m., Wednesday through Sunday. When the employee completes his work shift for the Department, he immediately begins work at his part-time job for the aircraft maintenance facility located at the airport in the building next to his where his state position is located. He also works at his part-time position on his days off. The employee will often enter his normal state workplace while in the employ of his part-time employer, the aircraft maintenance facility. He has keys and access to all the state hangars, the cash box and the oil room, and he has been observed on numerous occasions in various locations on the airport including the flight line attendants' cash counter while on non-duty status during his part-time employment.

While working part-time for the aircraft maintenance facility, the employee has called the Airport flight line crew and requested them to move and/or refuel the aircraft maintenance facility's aircraft, sometimes demanding such action from his peers, although he has been instructed by management not to do so.

The Airport periodically has the aircraft maintenance facility (his private employer) provide repairs to aircraft that may have minor damage due to moving within the confines of a crowded hangar. Questions about the source of such damage have led to conflicts for the employee. He also has moved customers' leased airplanes from a hangar or tie-down space to his private employer's hangar during his state work shift, knowing he was scheduled to work on the aircraft for his private employer. Without prior consent of the Airport management, he has knowingly switched aircraft and hangars to prevent his private employer or its customers from having to pay additional hangar rent. Furthermore, he continues to wear his state-issued Airport uniform shirts while on duty for his private employer, which can be misleading and confusing to Airport customers.

Although the employee has held his part-time outside employment position for as long as he has been employed in his full-time position for the Department, the employee has never requested approval for such outside employment. You ask for an advisory opinion on whether the employee's part-time outside employment conflicts with his full-time state employment.

KRS 11A.040(10) states that approval for outside employment is required in certain circumstances as provided below:

(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.

Because the aircraft maintenance facility holds a contract with the Airport, the employee may not hold such outside employment without the approval of the Department's appointing authority. The employee should immediately seek approval for such outside employment, pursuant to KRS 11A.040(10).

In determining whether to approve such outside employment, the appointing authority for the Department (or his designee) may not approve such employment if the employee is involved in matters, as part of his official position as a Flightline Attendant, that involve decision making or recommendations concerning the aircraft maintenance facility. Furthermore, the appointing authority must review the following regulations in 9 KAR 1:050, Section 2:

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.

After considering the factors above, the appointing authority then shall determine whether to approve the request for approval of outside employment by the employee. If the appointing authority believes that the outside employment will interfere or conflict with the employee's state employment duties, the appointing authority certainly has the authority to disapprove the employee's request for outside employment.

As provided by the Commission in many previously issued advisory opinions, employees who wish to hold outside or self-employment in addition to their state positions should make a clear distinction between their official duties and any private activities or employment. They should not use state time or resources for their outside employment. Based on the Commission's review of the information provided, it is readily apparent that the employee has not made a clear distinction between his private outside employment and his duties for the Department.

If the employee continues to hold his outside employment and does not seek approval for such employment, such action may be in violation of the Executive Branch Code of Ethics.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 99-44
Advisory Opinion 00-1
Advisory Opinion 00-68