

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 05-1**

February 18, 2005

RE: May Right of Way employees work as real estate appraisers?

DECISION: Yes, within limitations.

This opinion is issued in response to your September 20, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 30 and December 17, 2004, and February 18, 2005, meetings of the Commission and the following opinion is issued.

You state the relevant facts as follows. Two employees who work as Right of Way Agents for the Transportation Cabinet (the "Cabinet") have requested approval for outside employment. As Right of Way agents, the employees appraise complex residential, commercial, industrial, farms and special purpose property, negotiate complex acquisitions, and contact property owners and make offers, among other duties. The first employee, who began work with the Cabinet on August 16, 2004, requests approval as a real estate appraiser with an independent firm. According to the information provided by the Division of Right of Way, the Cabinet does not conduct any business with this independent firm. The second employee owns his own appraisal company, and wishes to buy property, renovate the property, and sell it for a profit. He states that he will not purchase any property that has been, in recent years, or will be in the immediate future, considered for purchase by the Cabinet.

The Office of Legal Services within the Cabinet requests an opinion from the Commission as to whether such outside work will present a conflict for either of the employees.

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.

Additionally, KRS 11A.020(1)(a), (c), and (d) provide:

(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;

...

(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.

Because it appears that neither of the employees is actually an “employee” of an outside “employer”, but rather are independent contractors either self-employed or associated with a firm, approval from the Cabinet’s appointing authority is not required unless the Cabinet has an

in-house policy that requires all types of outside or self-employment work to be approved. However, even though approval may not be required, the employees must ascertain that a conflict of interest does not exist between their outside work and their duties for the Cabinet.

Specifically, the employees should not provide services to persons or businesses, privately, with whom or which they are involved as part of their official duties for the Cabinet. A clear distinction should be made by the employees between their private businesses and their duties for the Cabinet. No contacts should be made for the benefit of a private business while on state time. The employees should not convey to any of their private clients that their employment with the Cabinet will give them an advantage in any way.

The employees also should not use any state time, materials, or equipment for their private businesses, and should not use their positions as Right of Way agents to give them an advantage in obtaining information as to property values or other information from citizens or businesses.

Further, they should not use information, not readily available to the public, obtained through their positions to give themselves an advantage in their private businesses pursuant to KRS 11A.040(1) below:

- (1) A public servant, in order to further his own economic interests, or those of any other person, shall not knowingly disclose or use confidential information acquired in the course of his official duties.

Although the employees are not prohibited from using general knowledge gained from their state positions, the employees should not be compensated privately for providing information or services to the public if it is a part of the employees' official duties to provide such information or services.

Furthermore, a potential conflict of interest may exist for the employees if they are involved, as part of their official duties, in matters concerning any persons or businesses with which they or their businesses may compete privately. See included advisory opinions that also provide guidance in this area.

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The Cabinet is not prohibited from further adopting in-house policies regarding outside or self-employment by employees that will serve to avoid any real or perceived conflicts of interest.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 97-4  
Advisory Opinion 98-32  
Advisory Opinion 99-37  
Advisory Opinion 00-27  
Advisory Opinion 00-68