

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-24

May 27, 2005

RE: May Department of Criminal Justice Training firearms instructors accept compensation, privately, for “qualifying” a peace officer for firearms certification from an active peace officer or his employer?

DECISION: No.

This opinion is in response to your April 6, 2005, request for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”). This matter was reviewed at the May 27, 2005 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. Senate Bill 142, passed by the General Assembly in 2005, creates a new section of KRS Chapter 237 that supplements the annual certification requirements for active or retired peace officers with a firearms qualification standard.

This firearms qualification standard requires each peace officer to fire twenty (20) rounds at an adult size silhouette target at a range of twenty-one (21) feet, with a handgun, and hit the target not less than eleven (11) times to obtain or maintain certification as a peace officer. The rounds fired must be done under the supervision of either:

- 1) A firearms instructor of a retiree’s former employing agency;
- 2) A Department of Criminal Justice Training (“Department”) certified police firearms instructor or instructor trainer (Department employee); or
- 3) A Department certified concealed carry instructor or instructor trainer (civilian).

The new law provides that a firearms instructor hired to supervise the firing of rounds shall not charge more than \$20 for qualifying each “participant.” Further, the law states that the Department shall not prohibit any of its instructors from qualifying “active or retired” peace officers while that instructor is “off duty.”

Although the Department plans to allow instructors (employees and civilian) the use of the firing range on a quarterly basis in order for instructors to have a site to “qualify” active and retired peace officers, the Department, itself, is not required by the new law to qualify the peace officers or provide instructors for such “qualification.”

Under KRS 15.330(1)(e), each Department firearms instructor is certified by the Kentucky Law Enforcement Council (the “Council”), the same body that certifies active peace officers under KRS 15.330(1)(f). Although an independent body, the Council is attached to the Department for administrative purposes (Governor’s reorganization order). The instructors who qualify active and retired peace officers provide written certification of the peace officer’s firearms qualifications to the Council.

The current annual requirements for an active peace officer to remain certified include forty (40) hours of training provided, at no charge, by the Department. The Department instructors who provide such training include firearms instructors whose responsibilities include grading each training participant and certifying to the Council whether each participant passes the required course. All active peace officers including state, city, county, urban-county, certain deputy sheriffs, university safety and security officers, school security officers, airport safety and security officers, certain field representatives and investigators, and county detectives are required to be certified. Other officers, such as deputy coroners, deputy constables, deputy jailers, other deputy sheriffs, private security officers, certain correctional employees, and other investigators may be certified upon request of the employing agency.

You believe that if a law enforcement agency, such as a city, county, or university, or an officer of a law enforcement agency, were privately to compensate an instructor employed by the Department, for qualifying officers on the firearms standards, even while off-duty, a conflict of interest would exist for the instructor.

You ask:

In light of KRS 11A.040(10)(a) and Section 2(e) of 9 KAR 1:050, is a DOCJT-employed firearm instructor, certified by the Kentucky Law Enforcement Council, prohibited from accepting compensation from an active peace officer (even while off-duty), who must meet the firearm standard to maintain his peace officer certification by the Kentucky Law Enforcement Council?

OR

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Are the provisions in Senate Bill 142 later in time and more specific than the ethics statutes and regulations, thereby making it the controlling legal provision, i.e. Section 12(4)(e) of Senate Bill 142 effectively negates KRS 11A.040(10) and Section 2(e) of 9 KAR 1:050 for DOCJT relating to prohibiting its instructors from receiving financial compensation for active peace officers who now must meet the annual firearm qualification requirement as a condition of their peace officer certification?

KRS 11A.040(10) states:

(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.

Unless the Department instructor will be hired as an "employee" by an outside law-enforcement agency to provide such firearms qualification services, KRS 11A.040(10), provided above, will not apply. The Commission has determined in the past that this provision only requires an employee to obtain approval for his outside work when he is an "employee" for an outside entity. Although an employee is not required by KRS 11A.040(10) to obtain approval for self-employment or to act as an "independent contractor," he must ascertain that a conflict of interest does not exist with any clients he may have. See Advisory Opinions 00-8 and 00-68, attached.

Accordingly, KRS 11A.020 provides:

- (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.

Furthermore, pursuant to KRS 11A.040(5), “A public servant shall not knowingly accept compensation, other than that provided by law for public servants, for performance of his official duties without the prior approval of the commission.”

The Department is responsible for instructing and certifying instructors to provide training for applicants who wish to be licensed to carry concealed weapons. Further, the Department is responsible for providing, at no charge, forty (40) hours of annual certification training for all active peace officers in order to maintain their peace officer certification. It does not appear from the information you have provided that the Department is responsible for “qualifying” peace officers for their firearms certification, now required by KRS Chapter 237.

Thus, as it is not necessarily part of the Department’s mission or the instructors’ official duty to provide such firearms qualification, instructors would not necessarily be prohibited from accepting the additional compensation they would receive from qualifying active and retired peace officers in firearms, on their own time. On the other hand, the Commission believes that the acceptance of compensation by instructors, who also are Department employees, could present a conflict of interest for the instructor if the same peace officers whom he trains, grades and determines whether they pass the required course for certification are also peace officers whom he seeks to provide firearms qualification services privately for compensation. Such involvement by an instructor in discretionary decisions regarding the training and grading of an active peace officer would involve a substantial conflict between his duties in the public interest and his private interest of obtaining the active peace officer as a private client.

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Consequently, even though KRS 237 does not allow the Department's appointing authority to prohibit instructors from qualifying peace officers, the Commission believes that the Department instructors should not accept compensation for such firearms qualification services they provide privately for active peace officers that also attend training classes provided by the Department. Department instructors may accept compensation, however, from retired peace officers that do not attend training classes provided by the Department.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosures: Advisory Opinion 00-8
Advisory Opinion 00-68