

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-41

December 16, 2005

RE: May employee accept part-time employment with Geotech?

DECISION: Only if approved by his appointing authority.

This opinion is issued in response to your November 28, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 16, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. Pursuant to KRS 11A.040(10), you recently requested approval from the Transportation Cabinet's ("Cabinet") appointing authority for part-time employment, in addition to your state employment, with Geotech Engineering & Testing, Inc., located in Paducah, Kentucky. Your employment duties will involve inspection of bridges located in Southern Illinois, on an as-needed basis, in fulfillment of a contract that Geotech is seeking with the Illinois Department of Transportation. You will provide a summary of all significant deficiencies noted during the inspections and general recommendations regarding the urgency for the manner of addressing the deficiencies. Such part-time employment will last approximately two years.

The Deputy Executive Director of the Office of Personnel Management notified you that an evaluation of your request had been conducted and it was determined that such part-time employment might be perceived as and potentially be a conflict of interest with your Cabinet position as a Transportation Engineering Technologist III. He stated the Geotech is a prequalified contractor with the State and could obtain a contract with the Cabinet. His belief was that simultaneous employment with the Cabinet and a contractor could prove to be a conflict. Therefore, your request for approval of part-time employment with Geotech was denied by the appointing authority.

The Deputy Executive Director advised that if you wished to pursue your request further, that you should request an advisory opinion from the Commission. He stated that if the Commission found no perceived or real conflict of interest between your Cabinet position and the part-time employment you seek that the Cabinet would accept the opinion.

Thus, you request an opinion as to whether the Commission believes that your part-time employment with Geotech will create a perceived or actual conflict of interest for you. You further state that although you are aware that Geotech is a prequalified contractor for the Cabinet, you would be hired by Geotech only for the fulfillment of the contract with Illinois, and thus, you did not think that would pose a conflict of interest for you.

KRS 11A.040(10) regarding outside employment in addition to your state employment 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.

Without additional information, the Commission can only advise you that if you are involved in decisions or recommendations concerning Geotech, as a part of your official duty for the Cabinet, the appointing authority for the Cabinet is prohibited from approving any outside employment for you with Geotech. If you are not involved in any decisions or recommendations regarding Geotech, then the appointing authority for the Cabinet is required to review the following regulations in 9 KAR 1:050, Section 2, before giving his approval for such part-time employment.

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 your request for approval of outside employment. If the appointing authority believes that such outside employment will interfere or conflict with your state employment duties, the appointing authority certainly has the authority to not approve your request for outside employment.

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Further, 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.

Sincerely

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosures: Advisory Opinion 04-45
Advisory opinion 99-44