

Executive Branch Ethics Commission
ADVISORY OPINION 10-07
September 27, 2010

RE: May a state regulator perform work as an independent contractor for a Third Party Certification firm under the Interstate Milk Shippers International Certification Pilot Program?

DECISION: Yes, so long as he does not use state time, personnel, or property to perform the work.

This advisory opinion is issued in response to your September 14, 2010 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 27, 2010 meeting of the Commission and the following opinion is issued.

You are employed as an Environmental Health Supervisor in the Milk Safety Branch, Division of Public Health Protection and Safety (the "Division"), Department for Public Health (the "Department"), Cabinet for Health and Family Services ("CHFS"). According to the Division's webpage, its mission is to protect the health and welfare of Kentucky's citizens and to provide a well trained workforce. The Division accomplishes this through programs related to the enforcement of public health regulations for environmental health and community safety. One such program is managed by the Milk Safety Branch, which, according to its webpage, protects consumers by preventing the sale of adulterated, misbranded or falsely advertised milk and milk products. It accomplishes this through several mandated inspection programs. Milk Safety Branch staff regularly inspect dairy farms in Kentucky, all milk trucks and all dairy processing facilities, and certifies all persons in Kentucky responsible for collecting, sampling, and handling raw milk. Milk Safety Branch staff maintains records for enforcement of laboratory analysis of raw milk and finished dairy products. The Milk Safety Branch also conducts regular milk sanitation ratings to allow interstate shipment of milk and dairy products.

According to your request for an advisory opinion, you submitted an outside employment request to CHFS in order to work part-time for a private firm in the Interstate Milk Shippers (“IMS”) International Certification Pilot Program (“ICPP”). According to your request, the IMS is the regulatory authority, as overseen by the U.S. Food and Drug Administration (the “FDA”), over all milk and milk products that move interstate in the United States. The ICPP was prompted by free trade agreements with foreign countries and was established as a pilot program in order to determine if a milk company from a foreign country was able to upgrade their facilities and practices to meet the standards of the Pasteurized Milk Ordinance (“PMO”), the governing document of all milk operations and dairy farms in the U.S. The ICPP will employ Third Party Certification firms to inspect the foreign facilities.

Three firms applied and were approved to be Third Party Certifiers for the ICPP, one of which is the firm for which you seek approval to perform work. You state that each firm was allowed to work with two milk companies to give them guidance in meeting the requirements of the PMO. Your potential employer has been working with a milk company in Columbia and another in Costa Rica for about two years, and believes that these two companies have improved their facilities to the point where they can be rated for certification. You state that under the ICPP, the Third Party Certifiers in essence become the regulatory authority for the milk companies, much as the Department for Public Health is the regulatory authority for all milk operations (plants, farms, distributors, etc.) in Kentucky.

In order to gain certification, the foreign milk companies must pass a Milk Sanitation Rating. This exercise must be conducted by a Milk Sanitation Rating Officer (“MSRO”) who is certified by the FDA. Your letter states that there are only one hundred and twenty three MSROs in the United States with Kentucky having two, yourself and one other employee of the Milk Safety Branch. It is your opinion that one of these one hundred and twenty three MSROs will make the final decision on whether the two individual milk companies in Columbia and Costa Rica will be approved to sell milk products in the United States. The company in Columbia is interested in producing a drinkable yogurt product, and the company in Costa Rica is interested in producing a sour cream product.

The ICPP was designed to use experienced individuals as inspectors to do the routine inspections. It appears that these will tend to be either active or retired state employees. However, in order to perform the Milk Sanitation Rating, the Third Party Certifiers must be MSROs certified by the FDA. While it is your understanding that there is discussion about a new program that will allow the FDA to certify private individuals to be MSROs, to your knowledge the FDA will only certify active state employees at the present time. Your potential employer currently employs two retired milk inspectors from the state of Maryland to do the routine work, and an active state employee from Utah to perform the Lab Evaluation work. You also know that state employees from Vermont are currently doing the work on one of the Third Party facilities in Canada.

You have told Commission staff that last year you, along with Kentucky's other MSRO, attended an FDA Training Course (required at least once every 3 years) in Columbus, Ohio. As part of the agenda for this course, an individual from one of the Third Party Certification firms conducted a presentation on the ICPP. He explained why and how the program was set up and how the program would be administered, including the specifics of how his company was set up. He stated that the routine work, including initial set-up, would be performed by retired milk program personnel that were associated with his firm, but that the Milk Sanitation Ratings would have to be performed by state MSRO personnel. He further stated that if anyone was interested, they should contact him. At that time he stated that it would probably be several months before he would have the proposed facilities upgraded to the point where he would need Milk Sanitation Ratings conducted.

Subsequently, earlier this year, five employees of the Milk Safety Branch, including you and the other MSRO, attended a joint meeting in Cincinnati with dairy officials from Indiana and Ohio. During a conversation with the other dairy officials, the Lab Evaluation Officer for one of the other states was discussing the Third Party Certification Program and indicated that she was doing the lab work for one of the Third Party Certifiers. She stated that one of the Third Party Certification firms still needed a MSRO to conduct ratings on the facilities that were almost ready. It was the same firm you had heard from when at the training in Columbus last year. Shortly after this discussion took place, you contacted this firm and discussed the position. The MSRO would not be an employee of the firm, but rather a contract employee used on an as-needed basis. Initial ratings would be conducted on both milk plants and dairy farms, and would be in effect for no more than 24 months, at which time a new rating would be required.

You indicate that you discussed the position with your supervisor, who is the manager of the Milk Safety Branch, as well as with the Director and Assistant Director of the Division. You state that all agreed that it should not be a problem with your current position, and your supervisor provided you with a form to request approval of outside employment.

Your request to work as a Third Party Certifier was denied by CHFS. You believe the denial was due to the fact that CHFS did not have all of the relevant information. You emphasize that you did not use your position in state government to gain this employment due to the fact that you are certified by the FDA as a Milk Sanitation Rating Officer, not by the state of Kentucky. You believe that you are not gaining an unfair advantage over members of the general public, as there are no members of the general public that have the qualifications nor certification to perform this duty. Milk Sanitation Ratings is the only work that you will do for the Third Party Certification firm. You state that this firm will never perform work in Kentucky, as they are only authorized as a Third Party Certifier for foreign countries. You further state that the work will not impact your regular job duties in that it will only require two or three weeks of work a year and that you have abundant leave time available to use for such purposes.

KRS 11A.040(10) provides:

(10) Without the approval of his appointing authority, no public servant shall 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.

It appears from the information provided that you would not be employed by the Third Party Certification firm, but rather would be performing work for the firm as an independent contractor. Therefore, KRS 11A.040(10) does not technically require you to obtain approval for your proposed outside work. However, the Executive Branch Code of Ethics still requires you to determine whether your outside work presents a conflict of interest with your official position. Based on the facts presented above, there appears to be no conflict of interest involved with your proposal. Even though you learned about the position while attending work-related functions, it does not appear that you used your position in any way to gain an advantage in obtaining

the position. You were attending a training course when you first heard about the possible position, but took no action on it at that time. Only after someone mentioned that the position was still open, nearly a year later, did you call the firm. While it is true that if not for your experience and certification as a MSRO, you would not be qualified to perform the work, the ICPP appears to be set up in such a way that only state employees in positions similar to your own would be qualified to perform the work. You are therefore not gaining an unfair advantage over any member of the public at large because of your state position. While this may not be the case in the future as you have indicated, it is at the present time based on the fact that the FDA does not certify anyone as a MSRO other than public employees who are required to perform the ratings as part of their official job duties.

Regarding the work itself, there appears to be no conflict because the firm in question performs no work in Kentucky and all of the work you intend to perform for it will be dealing with companies located out of the country. No Kentucky businesses are involved. It is therefore highly unlikely that the work you are to perform overseas would ever impact your work for the Commonwealth. The Commission just cautions you to make a clear distinction between the work you perform for the Third Party Certifier and the work you perform for CHFS. You should never use state time, personnel, or property for performing your outside work.

Furthermore, please be advised that nothing in the Executive Branch Code of Ethics prohibits CHFS from implementing policies regarding outside or self-employment that may be more restrictive than the Executive Branch Code of Ethics or that might require all employees with outside or self-employment to obtain approval from their agencies for such employment. The Commission is aware that CHFS has such a policy, and cautions you that even though it does not believe your proposed work for the Third Party Certification firm presents a conflict of interest, your agency has the authority to continue to deny your request.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Acting Chair: Ron Green

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