

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 96-44**

October 29, 1996

- RE: 1) May Revenue Cabinet employees be exempt from KRS 11A.040(9)?  
2) May Revenue Cabinet be exempt from the requirement to send a listing of entities to be audited to the Commission?

- DECISION: 1) No.  
2) Yes, if the Cabinet will assume the responsibility for determining whether the entity with which an employee seeks employment is scheduled for audit.

This opinion is in response to your June 28, 1996, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 5 and October 29, 1996, meetings of the Commission, and the following opinion is issued.

You state the relevant facts as follows. You are the Executive Director of the Office of Legal Counsel for the Revenue Cabinet ( the "Cabinet"). Recently, you received a copy of the Commission's "Approval Policy and Monitoring Procedure for Outside Employment of Auditors, Inspectors and Other Regulatory Personnel," dated March 19, 1996. The policy was reviewed by the Revenue Cabinet Secretary, the Commissioners, and the General Counsel, who are concerned about its effect on the outside employment of the Cabinet's employees. You believe that the practical effect of this policy will preclude any Revenue Cabinet employee from obtaining employment outside the Cabinet.

For financial reasons, many Cabinet employees must maintain a second job in order to avoid a financial hardship. Because the Cabinet has regulatory authority over virtually every person and entity in the state, you believe it will be impossible for Cabinet employees to obtain approval from the Commission for their outside employment.

On May 1, 1993, the Cabinet issued its own internal "Policy on Conflicts of Interest, Professional Standards and Ethics" which was distributed to every employee of the Cabinet. Each new employee of the Cabinet is provided a copy of this policy and must sign an acknowledgement stating he has received the policy and has attended a training session pertaining to the policy. This policy details an employee's obligation under the Executive Branch Code of Ethics, and it also provides examples of situations involving outside employment which are inappropriate for Cabinet employees. In addition, this internal policy requires an employee to advise his supervisor of any potential conflict associated with a work assignment. The employee's supervisor must then review the matter and determine if the work should be reassigned to another employee. Employees are also required to report any indication of violations of the internal policy or of the ethics code which may come to their attention.

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Any employee of the Cabinet who holds outside employment, in addition to his state employment, must advise the Cabinet of such employment through a memorandum form developed by the Cabinet. If an employee's supervisor believes the employee's outside employment could present a potential conflict of interest with his state employment, the matter is reviewed by the Commissioner of Administrative Services, the General Counsel, and the Branch Manager of the Human Resources Branch. You state that if management believes that a conflict or possible violation may exist, the matter is then referred to the Commission for a ruling.

Because the Revenue Cabinet regulates virtually every employer and individual in the state, you propose that Cabinet employees be excepted from the approval process required by KRS 11A.040(9). As an alternative, the Cabinet would continue to require its employees to advise the Cabinet of any outside employment. You believe if the employee's outside employment involves a non-management, ministerial or non-tax function, the employee should not be required to obtain permission for such outside employment with the Commission. However, if the employee's outside employment would create a potential conflict with his state position, the Cabinet would require the employee to obtain approval from the Commission. You propose that, unless a direct relationship exists between the duties and responsibilities of the employee and the nature of the outside employment, Commission approval not be required.

Additionally, you believe it may be impossible for the Cabinet to comply with the requirement of the Commission's "Approval Policy and Monitoring Procedure for Outside Employment of Auditors, Inspectors and Other Regulatory Personnel," which states:

*The Director of any Division which has such employees shall to send to the Commission, not less than on an annual basis (current fiscal year), a listing of the outside entities which are scheduled to be audited, inspected or reviewed during the year, as well as any entities which may be subject to a review during the year as a result of a complaint.*

You state the provisions of KRS 131.041, et seq., do not allow the Cabinet to provide to the Commission the names of those entities which are to be audited during the year. Thus, you believe the Cabinet is statutorily prohibited from providing the information required by the above policy.

You request the Commission to grant the Revenue Cabinet a waiver for employees who hold non-management, ministerial and non-tax related outside employment from the requirement that they obtain prior approval from the Commission for their outside employment. The Cabinet also requests a waiver from the requirement that a listing of the outside entities which are scheduled to be audited, inspected or reviewed during the year, as well as any entities which may be subject to a review during the year as a result of a complaint, be provided to the Commission.

KRS 11A.040(9) provides:

(9) Without the approval of the commission, 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. The commission shall promulgate administrative regulations to establish a procedure for the approval of outside employment of a public servant, including a requirement that the public servant and his appointing authority state in writing that the public servant is not in a position to influence any agency decision relating to the outside employer.

The Commission is aware that the Revenue Cabinet has regulatory authority over virtually every person and taxable entity in the state, and thus any Cabinet employee who holds outside employment is required to obtain approval for such employment with the Commission. Although this requirement may seem burdensome to your agency, the Commission does not have the authority to allow an exception to the law. Regardless of the position with the Cabinet, if an employee desires to hold outside employment with a person or entity which is under the regulatory authority of the Cabinet, then the employee must apply for approval of such outside employment as directed by 9 KAR 1:050 (a copy of which is included).

As part of the review process in determining whether to grant approval of an employee's outside employment, the Commission considers whether an employee in a regulatory position is involved in discussions, recommendations, or decisions concerning the outside entity for which

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he wishes to work. In addition, the Commission reviews whether or not any of the employee's co-inspectors or co-auditors could be in a position to review, audit or inspect the person or entity for which the employee seeks employment. To facilitate this process, the Commission issued the "Approval Policy and Monitoring Procedure for Outside Employment of Auditors, Inspectors and Other Regulatory Personnel," which requires the Cabinet to send to the Commission a list of entities which the Cabinet has scheduled for audit. The Commission does not believe that this requirement is statutorily prohibited by KRS 131.190 or 131.041, et seq., as the only confidentiality requirement within these provisions is that of the taxpayers' right to privacy with regard to the information provided on their returns and reports. The Commission's policy requests a listing of entities to be audited, not information from a taxpayer's return or report.

However, the Commission recognizes that the Cabinet wishes to keep the names of those persons or businesses it plans to audit confidential from the public. The Commission also acknowledges that discussion of requests for outside employment during its open meeting session may reveal the name of a person or entity which may be subject to audit by the Cabinet.

Thus, the Commission agrees not to require the Cabinet to send a confidential listing of entities to be audited to the Commission, if the Cabinet, prior to sending the employee's application for approval to the Commission, will assume the responsibility for determining whether or not the entity for which the employee wishes to work is scheduled for audit. If an employee seeks approval for outside employment with an entity he or a co-auditor may be reviewing, then the Cabinet should not approve or forward the employee's request to the Commission.

The Commission does require, however, that all requests submitted to the Commission from an employee in a regulatory position within the Cabinet include a statement for the Director of the Division for which the employee works stating that the outside entity is not scheduled for or currently being audited or reviewed.

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BY: Ruth H. Baxter, Chair