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EXECUTIVE BRANCH ETHICS COMMISSION  
FOUNTAIN PLACE SHOPS #3 FOUNTAIN PLACE  
FRANKFORT, KY 40601  
502-564-7954 FAX 502-564-2686

JOHN R. STEFFEN  
EXECUTIVE DIRECTOR

KATHRYN H. GABHART  
GENERAL COUNSEL

Executive Branch Ethics Commission  
**ADVISORY OPINION 12-05**  
July 2, 2012

**RECONSIDERATION OF ADVISORY OPINION 03-13**

**RE:** May regulatory board inspectors who are employed in the profession they regulate conduct inspections in the county in which they own or work in a business they regulate?

**DECISION:** No, except under specific circumstances addressed herein. The Commission declines to amend Advisory Opinion 03-13.

This opinion is issued in response to your March 15, 2012, request for reconsideration of Advisory Opinion 03-13 (attached) by the Executive Branch Ethics Commission (the "Commission"). Your request was reviewed at the May 14, 2012, and July 2, 2012, meetings of the Commission and the following opinion is issued.

In Advisory Opinion 03-13, the Commission stated that regulatory boards could hire inspectors employed in the profession they regulate, provided that the Executive Director (or Administrator) of the board inspects the businesses owned by or employing the inspectors, and provided that the inspectors work privately only in non-competing areas. In regard to this point, the Commission specifically indicated that the inspectors should not own or work in a business, privately, within a county of any business they inspect.

You are the Administrator of the Kentucky Board of Barbering (the "Board"). In this capacity you ask the Commission to reconsider and, if in agreement, amend Advisory Opinion 03-13 due to the fact that the restraints of this opinion have been very costly to the Board. You indicate that the Board is a small agency with seven part-time inspectors who cover all of Kentucky's 120 counties. To save on travel costs, inspectors are hired who live within the region of the state they inspect. However, in order to comply with Advisory Opinion 03-13, the inspectors are required to travel outside their region to inspect the counties in which the other inspectors own or work in a regulated business. Inspections of all barber shops are to be done no less than twice a year. You state that the logistics of travel to accomplish the inspection of all shops in the county in which another inspector works privately sometimes requires an overnight stay in addition to the cost of travel due to the distance and the number of shops licensed within that county. While you assure the Commission that the Board of Barbering has rigorously abided by Advisory Opinion 03-13, you ask for it to be amended so that inspectors are no longer prohibited from conducting inspections in counties in which they work or own a regulated business.

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In the alternative, if the Commission is unable to ease this restriction completely, you request that the Commission consider at least allowing the Board's inspectors to do the initial inspections of new shops within the counties in which the business they own or at which they work is located. According to your request, initial inspections of new shops are required by 201 KAR 14:045, Section 1, to be conducted within five working days of the Board receiving notification, and the Board receives between five and ten such requests to open new shops each month. It is very costly in both time and revenue to send an inspector from another region to conduct an initial shop inspection. The requirement that the initial inspection be done within five working days puts additional strain on the Board. As an example, at the time you made this request, you indicated that the Board was in receipt of a new shop request in Louisville and, due to schedule conflicts, you faced the possibility of needing to have the inspector from Floyd County travel to Jefferson County to conduct the initial inspection.

You state that the Board does not feel the initial inspection of a new barber shop would present a conflict of interest for inspectors who work privately in the same county.

While the Commission is sympathetic to the logistical difficulties faced by the Board because of the guidelines established in Advisory Opinion 03-13, as well as the impact the additional travel doubtlessly has on the Board's budget, after reconsidering Advisory Opinion 03-13 the Commission declines to amend it. While the limitations set out in Advisory Opinion 03-13 may be burdensome to regulatory boards affected thereby, they remain necessary in order for the regulatory boards to be able to hire inspectors employed in the profession they regulate. Absent these guidelines, conflicts of interest would inherently exist in such situations.

In reaching this conclusion the Commission reconsidered its original guidance, which established a 25 mile range restriction rather than a county restriction, but concluded that the county restriction, while not perfect, established a well-defined boundary that everyone could easily verify.

However, in regard to your request to allow the Board's inspectors to inspect new shops in their own counties, the Commission agrees to allow this narrow exception to the general guidelines established in Advisory Opinion 03-13, under the conditions established below. Since each new shop that opens in a county could be seen as a potential competitor of the local inspector's business, the same reasoning that is behind not allowing an inspector to conduct inspections in the county in which he owns a shop or is employed at a shop would seem to apply in regard to new shops as well. Even so, the Commission recognizes the time and budget constraints the Board is operating under in regard to initial inspections, as well as the intrinsic flaws in its county-based restriction, so proposes that these situations be handled by the Board on a case-by-case basis through the application of KRS 11A.030, which provides as follows:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

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- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

If, after applying these provisions of the Executive Branch Code of Ethics to the specific circumstances of an upcoming initial inspection, the Board believes no substantial conflict of interest exists, then it may allow an inspector to conduct an initial inspection in the county in which he owns a shop or is employed at a shop. An example of this could be the Jefferson County situation described above, where the large population and large number of shops in diverse geographical locations could serve to eliminate any potential conflict, as compared to a sparsely populated county with only a few shops clustered in the population center. If, for example, the new shop is opening up across the street from the shop the inspector owns or in which he works, it is hard to envision how a conflict could not exist.

Advisory Opinion 03-13, originally issued March 25, 2003, remains as previously reconsidered and amended on June 18, 2003. The above described exception is limited to the specific circumstances addressed herein.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

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By Chair: Angela Logan Edwards

Attachment: Advisory Opinion 03-13

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