



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 19-01
February 5, 2019

RE: May Property Valuation Administrators engage in practice as a certified public accountant in their home counties?

DECISION: Yes, as long as they are granted permission by their appointing authority to engage in outside employment pursuant to KRS 11A.040(10) and 9 KAR 1:050 as well as ensure that they abide by the conflict of interest provisions of KRS 11A.020 and KRS 11A.030.

This opinion is issued in response to your December 14, 2018, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 5, 2019 meeting of the Commission, and the following opinion is issued pursuant to KRS 11A.110(1) and KRS 11A.030(5).

Your agency regulates and oversees the locally elected Property Valuation Administrators. You ask whether a Property Valuation Administrator (PVA) may engage in outside employment as a certified public accountant (CPA) and engage in such practice in his or her home county in which he or she also serves as the PVA.

Since 1992, upon the enactment of the Executive Branch Code of Ethics (the Ethics Code), the Commission determined that PVAs and their employees are public servants and covered by the Ethics Code. In *Kentucky Executive Branch Ethics Commission v. Atkinson*, 339 S.W.3d 472 (Ky. App. 2010), the Court of Appeals determined

PVAs are indeed "major management personnel in the executive branch of state government" and thus are "officers" subject to the Executive Branch Code of

Ethics. Under KRS 132.370(1), PVAs are classified as “state officials” and “all deputies and assistants of their offices shall be unclassified state employees.”

While PVAs are elected state officials, they are aided by and answerable to the Department of Revenue and obliged to comply with the Department's rules, regulation, direction, instruction, and supervision.

Id. at 475. (citations omitted). Indeed, a PVA may be removed from office by the Commissioner of the Department of Revenue pursuant to KRS 132.370(4) for cause including “willful disobedience of any just or legal order of the department, or for misfeasance or malfeasance in office or willful neglect in the discharge of his or her official duties.”

The general provisions of the Ethics Code provide in KRS 11A.005 as follows:

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
 - (a) A public servant be independent and impartial;
 - (b) Government policy and decisions be made through the established processes of government;
 - (c) A public servant not use public office to obtain private benefits; and
 - (d) The public has confidence in the integrity of its government and public servants.
- (2) The principles of ethical behavior for public servants shall recognize that:
 - (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
 - (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
 - (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.020 provides certain prohibited conduct as well:

- (1) No public servant, by himself or through others, shall knowingly:

ADVISORY OPINION 19-01

February 5, 2019

3 | Page

- (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.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

The outside employment provisions of the Executive Branch Code of Ethics are contained in KRS 11A.040(10) and 9 KAR 1:050. KRS 11A.040(10) was revised in the year 2000 to change the authority for enforcing the outside employment provisions from the Executive Branch Ethics Commission to the Appointing Authority. Any advisory opinions that were issued by the Commission prior to 2000 are inapplicable for the purposes of reviewing outside employment. The provisions on outside employment state, in pertinent part, the following:

KRS 11A.040(10) 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.

(emphasis added). KRS 11A.010(16) defines appointing authority as “the agency head or any person whom he or she has authorized by law to act on behalf of the agency with respect to employee appointments.” As such, the Appointing Authority for the PVAs for the purposes of making decisions concerning outside employment is the Commissioner of the Department of Revenue or his or her designee.

Pursuant to 9 KAR 1:050, the public servant requesting permission to engage in outside employment must submit a request for approval by the appointing authority. This request is then reviewed by the Appointing Authority for any conflicts of interest inherent in the proposed outside employment and whether it will materially interfere with the public servant’s ability to do his or her duties for the Commonwealth. The appointing authority must certify that the public servant is not involved in the agency's decisions concerning the outside employer and that the off-duty employment will not create a real or perceived conflict of interest which would damage public confidence in government.

It is ultimately up to the Appointing Authority to grant or deny permission to the public servant to engage in outside employment. The Commissioner may decide to limit conflicts by setting up parameters for PVAs and PVA employees to operate under as they engage in the outside employment while continuing with their official duties. However, the Commissioner may decide that it may be too difficult to minimize such conflicts.

Since KRS 11A.040(10) was amended in 2000, the Commission has a long standing practice of supporting the decisions of the appointing authority who has the ultimate authority to decide whether or not an employee may engage in outside employment. In Advisory Opinion 10-07, the Commission stated:

[P]lease 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.

The Executive Branch Ethics Commission has no authority under KRS 11A.040(10) to undermine the decision of the appointing authority.

The Commission has a long history of providing advice to PVAs and their employees on the dictates of the Ethics Code and conflicts of interest. In Advisory Opinion 98-11, the Commission concluded that it would be a conflict of interest for a PVA employee to market property as part of a private business and to receive a financial gain based on the value or selling price of the property if, as a part of the employee's official duty, he was involved in valuing the property. In later Advisory Opinions, the Commission further opined that a PVA is prohibited from performing real estate appraisals or marketing property, either personally or through sales associates, in the county in which he is a PVA. See Advisory Opinions 06-29 and 05-22. This premise was reiterated in Advisory Opinion 09-14, in which the Commission stated it still believed that the PVA and deputy PVAs should not be involved in the buying and selling of property as a business practice in the county in which they are employed.

In Advisory Opinion 07-26, the Commission determined that a PVA employee who was a licensed realtor could accept referral fees for referring individuals to other realtors with the employee's own county

if you will not have any involvement in the buying, selling, or any type of marketing or recommendation of property, other than to refer a client to another realtor and receive a fee based on that referral; the Commission does not believe that such action will present an actual conflict between your private interest and your duty in the public interest, even in your county of employment. Although the referral fee that you receive may be based on a percentage of the sale price of a property, by not having any involvement in the buying or selling of the property, an actual conflict is avoided.

In Advisory Opinion 07-36, the Commission determined that a PVA employee could work as a private real estate appraiser in the employee's own county as long as the homes for which the employee is appraising are not homes that the PVA employee was involved in evaluating as part of his or her official duties for the PVA office. Yet, this same advice cannot be imputed to the PVA because he or she is involved with the valuation of all properties in the county for which the PVA serves by the nature of the PVA's position.

The Commission has acknowledged that an employee of a PVA office whose official duties do not involve the valuation of property, who does not attempt to influence those individuals who are so responsible, and who does not use information in his private business that is not freely available to the general public, may act as a real estate sales associate. See Advisory Opinion 98-11. The Commission has also said that PVAs (or by inference a deputy

PVA) may perform appraisals or market real estate outside of their own jurisdiction (Advisory Opinion 05-22) and that the spouse of a PVA may market real estate so long as a clear distinction was made between the spouse's work and the office of the PVA (Advisory Opinion 06-29).

In all of these opinions, it is either assumed or specifically stated that any such outside work must be done on the public servant's own time and that the public servant may not use any state resources or other benefit gained by virtue of his position in the PVA office to further his private interests.

An additional opinion, Advisory Opinion 94-26, addressed whether a PVA could conduct auctions for his county's Master Commissioner. In that opinion the Commission concluded that there was no provision in the Code of Ethics which would prohibit a public servant from being employed by or accepting compensation from a court-appointed Master Commissioner. Therefore, the Commission concluded that the PVA could conduct auctions for the Master Commissioner so long as such activity does not interfere with his duties as PVA.

As for the practice as a certified public accountant, a CPA performs services in the preparation of tax forms and assists tax payers in ensuring that their tax returns are properly completed. In this service, the Commission does not envision that the CPA effects the value of the property by merely assisting a client in properly stating the value of the property on tax returns. However, CPAs may also be asked by their clients to assist in providing financial advice in planning, which can include a review of a property's revenue, cash flow, depreciation and tax implications. Such information could be used by a CPA's client in determining fair market value for real estate.

The PVA or PVA employee who is granted permission to engage in outside employment by the Appointing Authority should be careful to avoid providing recommendations that would influence the value of a property in his or her home county in which the public servant also serves the Commonwealth. If the CPA cannot properly serve his or her in-county clients without providing such advice, then the CPA should not accept the employment from such clients as this conduct could be in conflict with the PVA duties in the public interest. Each client may have a different set of circumstances, which will require the PVA to be vigilant in deciding which clients to take on to ensure compliance with the conflict of interest provisions of the Ethics Code.

With that said, the Commissioner of the Department of Revenue is the Appointing Authority and has the final decision-making authority to determine whether a PVA or a PVA employee may engage in outside employment while also mitigating conflicts of interest. This Advisory Opinion is issued to provide guidance to all PVAs as well as the Department of Revenue. However, the Ethics Code establishes minimum standards for all public servants and

Executive Branch Ethics Commission

ADVISORY OPINION 19-01

February 5, 2019

7 | Page

agencies to follow, but nothing in the Ethics Code prohibits the Department of Revenue from establishing more restrictive standards for those employees and officials under its authority. If the Commissioner determines that a PVA may not engage in outside employment whether or not the outside employment is restricted to inside or outside the county in which the PVA or PVA employee serves the Commonwealth, the Commissioner has that ultimate authority to do so. Nevertheless, these more restrictive policies do not expand the authority of the Ethics Commission to issue punishment under KRS Chapter 11A.

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: Christopher L. Thacker