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EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 21-02
January 27, 2021

RE: May the Board of Cosmetology (“the Board”) deny permission to engage in outside employment to a field inspector for the Board who wants to open a salon in their own home?

DECISION: The Board of Cosmetology may, within its discretion pursuant to KRS 11A.040(10), choose to deny permission for the field inspector to engage in outside employment by opening a salon in their own home. However, in the alternative, the Board may also, in its discretion, choose to allow the field inspector for the Board to engage in the proposed outside employment if the Board sets up parameters to ensure that the inspector does not perform inspections in a geographical region of the state as determined by the board to ensure that the field inspector is not inspecting the competitors of their own salon.

This opinion is issued in response to your October 14, 2020, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 27, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1) and KRS 11A.030(5).

You represent the Board of Cosmetology (“the Board”) in submitting this request to the Commission. The Board employs field inspectors that have the opportunity to use their cosmetology licenses to work independently in the industry as part of their qualifications to hold the role as field inspectors. The inspection staff for the Board is responsible for conducting field inspections of licensed sole practitioners, salons, and other businesses licensed by the Board and conduct investigations of these entities in assigned counties across the Commonwealth. Historically, the Board has allowed the field inspectors with an active cosmetology license to continue practice through outside employment with the condition that

the field inspectors are prohibited from inspecting licensees or facilities near the area in which the field inspectors engage in outside employment.

Previously, the Board has approved field inspectors to engage in outside employment as sole practitioners, salon owners, and managers. However, the Board would like to revisit this previous approval process in light of recent situations that have occurred at the Board. The Board now believes that it is a conflict for a field inspector to also be the owner or manager of a facility regulated by the Board that is in direct competition with the area of inspection. You indicate that the Board presently has a request from a field inspector who would like to establish a salon in their own home. You indicate that this salon would be in direct competition with the businesses they would inspect as a field inspector.

The question of whether to allow an employee to engage in outside employment is statutorily up to the appointing authority as provided in KRS 11A.040(10) and 9 KAR 1:050. These provisions guide state agencies on the process for reviewing a request for outside employment. The Ethics Code provides the following process for a public servant to request permission from their appointing authority to perform outside employment. KRS 11A.040 provides in pertinent part:

- (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 provided). 9 KAR 1:050 dictates the process for an appointing authority to determine whether to approve a request for outside 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.

The Ethics Code addresses conflicts of interest by prohibiting certain conduct on the part of public servants in KRS 11A.020(1), which states as follows:

- (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;
 - (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.

KRS 11A.030 provides considerations for public servants to follow when determining when to abstain from action on an official decision in which the public servant may have a conflict of interest:

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:

- (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.

This process has been established since 1994 with minimal amendments. As such, for the past several decades, state agencies should have only been granting permission for public servants to engage in outside employment in situations when the outside employment would not create a conflict of interest. Indeed, according to the information you have provided, this process is in line with the process already being followed by the Board.

The mission of the Board of Cosmetology is to regulate the practice of cosmetology, esthetic practices, and nail technology by creating regulatory standards for all aspects of the beauty industry. The duty of field inspectors is to monitor this industry for compliance with KRS Chapter 317A and the procedures developed by the Board in Title 201 of the Kentucky Administrative Regulations (KAR). The field inspectors inspect the facilities of beauty salons, esthetic salons, nail salons, cosmetology schools, and sole practitioners in these industries. Pursuant to KRS 317A.040, the Board may employ field inspectors. 201 KAR 12:060 establishes that licensees must acquiesce to inspections by any Board member, administrator for the board, or field inspector. Each establishment licensed by the Board shall be inspected a

minimum of two (2) times per year. The field inspectors have the ability to recommend the licensees and licensed establishments to the Board for enforcement actions including the suspension of licenses for the failure to comply with KRS Chapter 317A.

In the scenario presented, the field inspector does not want to work for a person or business that the field inspector would inspect, but rather the field inspector wants to compete actively against those that the field inspector inspects on behalf of the Board. Historically, the Commission has issued advisory opinions agreeing with agencies who limit or prohibit inspectors/investigators from directly competing with the industry they regulate:

Advisory Opinion 09-03: A case manager/nurse investigator for the Kentucky Board of Nursing may accept part-time employment with a nursing school in Kentucky if the employee's official job duties do not include regulation of nursing school programs. However, the employee must cease the part-time employment in the event that the employee's job duties change to include regulation of nursing school programs, or if a particular student who enrolls in a class taught by the employee is subject to disciplinary monitoring by the employee.

Advisory Opinion 15-04: A conflict of interest will exist if an Environmental Scientist I, employed by the Division of Oil and Gas, Department for Natural Resources, Energy and Environment Cabinet, is allowed to create a research-focused company involved in researching and developing a process for treating a waste product of the environmental industry of which the environmental scientist is a regulator. The Commission found that the appointing authority properly denied the same employee's request for outside employment to work for his research-focused company because the employee's involvement with the created company posed a direct conflict of interest with the employee's duties for the Cabinet by operation of KRS 11A.040(10) and 9 KAR 1:050. The Commission did not find a valid reason to overrule the appointing authority's decision.

Advisory Opinion 02-53:

The Administrator for the Board of Barbering may not be employed by a barbershop or a barber school.

Advisory Opinion 99-03:

An inspector employed by the Board of Barbering may not open a private barbing school.

On the other hand, the Commission did provide the following opinion in 2003:

Advisory Opinion 03-13:

Regulatory boards may hire inspectors who are employed in the profession they regulate, provided the Executive Director (or Administrator) of the board inspects the businesses owned by or employing the inspectors. Additionally, inspectors may be employed as instructors by a school that trains students in the profession only if the course instruction does not require specific approval by the board.

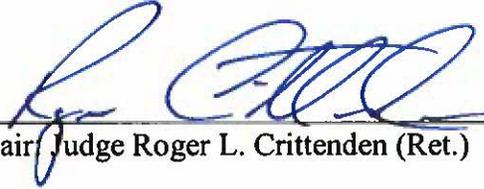
Nevertheless, the appointing authority is the ultimate decision-maker concerning denials of outside employment. If there is a way to mitigate the conflict of interest and change the field inspector's job duties so that the field inspector may engage in the outside employment with minimal conflicts, that is up to the Board. However, the public servant's primary employment is with the state and the responsibility of the appointing authority and the public servant is to ensure that the state duties are performed properly and that any private employment does not create a conflict of interest with those state duties.

KRS 11A.040(10) specifically mandates that the appointing authority review and approve or deny a public servant's request for outside employment, not the Commission. The Commission may provide guidance to an agency pursuant to KRS 11A.110(1), upon request, while it is considering whether to approve or deny a request. The Commission is the ultimate source regarding questions of conflicts of interest with outside employment and may advise an employee to discontinue outside employment where a conflict of interest with their official duties exists, even when the employee's appointing authority has approved such employment. See Advisory Opinion 00-72.

However, the Commission generally does not overrule an agency's determination to deny permission to perform outside employment when the agency determines that a conflict of interest exists. 9 KAR 1:050, Section 2(e), provides that the appointing authority must determine that a conflict of interest exists when "the outside employment would create an appearance of conflict of interest with state duties." In the opinion of the Commission, opening a salon in the field inspector's coverage area and competing directly with the Board's licensees creates in and of itself an appearance of a conflict of interest with the field inspector's state duties. As such, the Board is completely within its right to deny permission for the outside employment. However, if the Board decides that it can set up parameters for the field inspector to follow in the proposed outside employment to mitigate the conflict of interest, that is in the discretion of the Board, but is not required of the Board to do so. If the Board can change the field inspector's enforcement area to an area sufficiently distanced from the private salon of the field inspector so that the field inspector would not be inspecting the competitors of their private business, this could mitigate the conflicts of interest. However, if doing so would cause hardship for the Board, then the Board may, in its discretion, decide to not allow the outside employment.

Executive Branch Ethics Commission
ADVISORY OPINION 21-02
January 27, 2021
Page 7 of 7

EXECUTIVE BRANCH ETHICS COMMISSION

A handwritten signature in blue ink, appearing to read "R. Crittenden", is written over a horizontal line.

By Chair, Judge Roger L. Crittenden (Ret.)