

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-24

May 29, 2003

RE: May Deputy Commissioner of Medicaid Services work on matters that impact the comprehensive care system universally, including the one where he is an employee?

DECISION: Yes, provided the Deputy Commissioner does not use his position to give any comprehensive care center an advantage over other providers.

This opinion is in response to your May 19, 2003, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 29, 2003, meeting of the Commission and the following opinion is issued.

The relevant facts are as follows. The Commission, in Advisory Opinion 02-57, held that an employee of a comprehensive care center could be retained by the Cabinet for Health Services (the "Cabinet") as a Deputy Commissioner for the Department of Medicaid Services (the "Department"). The Commission allowed this arrangement "...[p]rovided the employee has no involvement in matters relating to Bluegrass Comprehensive Care Center." This language was clarified in a letter sent to the Cabinet by the Commission's Executive Director, stating that the Deputy Commissioner "... [s]hould have no involvement in any matters relating to, or that will have any effect on, the Bluegrass Comprehensive Care Center (or Bluegrass Mental Health/Mental Retardation Board, as it appears it is now so entitled)."

In the present request, you state that it was not the Cabinet's understanding that as a result of the Commission's issuance of Advisory Opinion 02-57 the Deputy Commissioner "... [w]ould have to recuse herself from any and all matters involving the entire, statutorily created, mental health/mental retardation comprehensive care system." You go on to state that there are fourteen (14) such comprehensive care centers that operate under a universal services and reimbursement system, thus no one center can have something more or less than another under such a system.

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In formulating its advice in Advisory Opinion 02-57, the Commission cited and relied on advice it had rendered in Advisory Opinion 98-19. In that scenario, a former Department Commissioner who was employed by the Cabinet under a contract with the University of Louisville was allowed to serve as Department Commissioner so long as he recused himself from "...[a]ll matters within the Department involving the University..." You note that apparently this prohibition never specifically extended to foreclose that Commissioner from involvement in matters which impact any and every university hospital in the same way.

Finally, you note that if the Commission interprets Advisory Opinion 02-57 so as to keep the Deputy Commissioner from involvement in any matter affecting Bluegrass Comprehensive Care Center ("Bluegrass"), such a prohibition would have a deleterious effect upon the ability of the Cabinet to fill several key management posts and may affect other cabinets as well.

Based on the Commission's review of the agreement between the Cabinet and Bluegrass for the services of the Deputy Commissioner, it appears that the Deputy Commissioner's primary area of responsibility is for matters involving the Kentucky Medicaid program. The Deputy Commissioner will continue to be paid by Bluegrass, with Bluegrass being reimbursed by the Cabinet for the Deputy Commissioner's services.

KRS 11A.020(1)-(3) states:

(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.

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(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 Commission feels strongly that the public interest is served by having the most highly qualified individuals serving at the highest levels of state government. The Commission also believes that such individuals must scrupulously avoid conflicts of interest that lead to loss of public confidence in the independence and impartiality of government. The Cabinet clearly is interested in retaining the services of the Deputy Commissioner, believing him to be highly qualified and possessing a skill set not easily replaced in state government, and to demonstrate this belief, the Cabinet commits that it will not allow the Deputy Commissioner to work on any matters that would specifically and solely impact Bluegrass.

Policy decisions made or recommended that would impact the entire system must necessarily impact Bluegrass. However, it can be argued that such decisions, provided that Bluegrass would not be affected any more or less than any other similarly situated comprehensive care center, do not specifically cause an inescapable conflict of interest for the Deputy Commissioner, it can also be argued that such policy matters may pose a conflict if the Deputy Commissioner uses his position to give Bluegrass or comprehensive care centers, in general, an advantage over other providers of Medicaid services.

Thus, the Deputy Commissioner may have involvement in matters that are no more than ministerial functions of his position that may affect Bluegrass, as such ministerial matters do not give rise to a conflict of interest. The Deputy Commissioner may also be involved in policy matters that affect the entire comprehensive care center system, including Bluegrass, provided the Deputy Commissioner does not use his position to give an advantage to Bluegrass, or the entire comprehensive care system, over other Medicaid providers. Because of the Deputy Commissioner's ongoing employment relationship with Bluegrass, the Commission believes that the Deputy Commissioner should not be involved in discretionary matters that give Bluegrass,

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whether solely or as being one of the fourteen comprehensive care centers in Kentucky, an advantage over other providers.

The Commission cautions the Cabinet that it should also take precautions to avoid even the appearance of a conflict of interest, although it may be unavoidable.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.