

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 03-36**

October 16, 2003

RE:           1)     May state employee, as a member of a team, discuss the performance of contractors with whom he holds a private partnership?  
              2)     Does an appearance of impropriety exist even if the state employee abstains from any involvement regarding the contractors or discussion of their performance?

DECISION:   1)     No.  
              2)     Yes.

This opinion is in response to your request of September 4, 2003, for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 16, 2003 meeting of the Commission and the following opinion is issued.

You are employed by the Kentucky Agency for Substance Abuse Policy ("KY-ASAP") as Deputy Executive Director. Part of KY-ASAP's work is to help counties or groups of counties gather data in a manner that will help them develop a successful alcohol, tobacco or other drug prevention and treatment strategic plan. Since 2001 the Kentucky National Guard ("National Guard") has contracted with PCS Enterprises ("PCS") and SCG, Inc., ("SCG") to assist KY-ASAP in developing and training Kentucky counties on the "needs and resource scan" document. These two firms come to Kentucky during each round of county development for a total of 12-15 days. This time includes training for two days on how to use the data collection model and then reviewing the end result of both the model and strategic plan. As Deputy Executive Director, you have worked with both PCS and SCG when they are in Kentucky, but you have never been involved in negotiating compensation or providing formal feedback on their performance, as those actions have always been in the hands of your supervisor and the National Guard.

In 2002, your consulting firm, CSI-Kentucky ("CSI") and PCS and SCG formed a partnership to provide consulting work outside of Kentucky, and since that time the partnership has had several projects, all outside of Kentucky. Neither the partnership nor CSI receive any

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funds from the National Guard or any Kentucky state agency. Earlier this year, you called the Commission staff to discuss whether the contract with PCS & SCG should be broken due to a possible conflict of interest you might have as Deputy Executive Director of KY-ASAP. After receiving advice, you segregated yourself from any further discussion about the performance of PCS and SCG other than as a member of the team.

With the approach of the new federal fiscal year, you request guidance as to whether KY-ASAP may request the National Guard to enter into a new contract with PCS and SCG for the next phase of county development. It is your sense, from earlier conversations with Commission staff, that so long as you did not act as the decision maker for your agency in overseeing PCS' and SCG's work and in negotiating the contract, then there was no conflict. Now you ask if this arrangement, while not creating an actual conflict of interest, may, however, create the appearance of a conflict of interest?

KRS 11A.020(1)(a)-(d) provide:

- (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.

The issue here is whether the partnership of CSI with PCS and SCG creates a conflict of interest for you in your official position or could lead to the appearance of a conflict. You state that in your official position you are not involved in the decision to contract with PCS or SCG, and that you have had no part in formal performance reviews of these firms.

You state that your only involvement with PCS' and SCG's performance on these contracts was, upon receiving advice from the Commission, to discuss their performance as

“...a member of the team,” and that otherwise you segregated yourself from any further discussion about the firms’ performance. The Commission believes that your abstention from involvement in the decision to award the contract and in any formal performance reviews are good steps to take to avoid a conflict of interest in your situation. While it appears that your participation in performance feedback “...as a member of the team” does not impact on contracting or formal performance appraisal decisions, such also should be avoided in order to avoid a conflict of interest.

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In addition, the appearance of a conflict of interest in this case would arise merely from your involvement with these firms as part of your official duty as Deputy Executive Director of KY-ASAP (even if just as part of a “team” offering informal feedback) when viewed in conjunction with your partnership with these firms, albeit in ventures outside Kentucky and outside your official purview. In order to avoid even this minimal appearance of a conflict of interest, it would be better if you refrained from participation in these informal “team” reviews of the firms’ performance.

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Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: Joseph B. Helm, Jr.