

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 04-20**

May 27, 2004

- RE: Must program coordinator recuse himself and abstain on official action regarding:
- (1) An organization for which he formerly provided services, and
  - (2) An organization that claims he has a conflict of interest in reviewing the organization?
- DECISION
- (1) Yes, for a reasonable period of time.
  - (2) Yes, in order to avoid an appearance of a conflict.

This opinion is in response to your April 12, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 27, 2004 meeting of the Commission and the following opinion is issued.

You state the relevant facts are as follows. An employee of the Driving Under the Influence Program ("DUI Program") within the Division of Substance Abuse ("Division") of the Cabinet for Health and Family Services serves as the DUI program coordinator for the western region of the state, and is responsible for monitoring programs certified by the Division. As the DUI coordinator, he is paid via a contract with Eastern Kentucky University, but is, in substance, an employee of the Division.

The employee was originally employed by the Division as a program coordinator in the central region from July 2001 until October 2002. He returned to state employment as the DUI program coordinator for the western region in February 2004. During the time he was not employed by the Division, he provided outpatient treatment group facilitation for a private-certified DUI program, New Horizons. You state that due to his previous financial arrangement with New Horizons, the DUI Program coordinator is accompanied on site visits/program reviews performed at New Horizons in order to eliminate any appearance of a conflict of interest.

The DUI program coordinator recently conducted a monitoring visit to another certified DUI program, Behavioral Resources, Inc., and observed several program deficiencies related to violations of regulation. The program administrator for Behavioral Resources, Inc. has complained that the DUI program coordinator has a conflict of interest with her organization, and that the DUI program coordinator cannot act effectively as the coordinator for her organization. Specifically, she claims the DUI program coordinator harbors resentment and bitterness towards her because her agency did not purchase a business he had owned, and she also reports feeling uneasy around the DUI program coordinator because he had allegedly made an inappropriate sexual comment to her.

You state that you have reviewed the DUI program coordinator's findings, and the violations appear appropriate and indicative of deficiencies previously found at Behavioral Resources, Inc. In addition, the program administrator for Behavioral Resources, Inc. was asked for more information relating to the inappropriate sexual comment, but no such information has been provided.

You ask the Commission to review and provide advice on this matter.

KRS 11A.020 (1)(a) and (3) provides:

(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;

...

(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.

Also, KRS 11A.030 provides:

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.

In Advisory Opinion 98-31, the Commission encouraged the Department of Insurance to develop internal policies for employees to abstain from matters involving a previous employer for a reasonable period of time. Similarly, the Commission believes that, in order to avoid any real or perceived conflicts of interest, the DUI program coordinator should abstain for a reasonable period of time from any site visits/program reviews, or any other matters, involving New Horizons, the DUI program for which he formerly provided services. For such abstention, he should follow the guidance laid out in KRS 11A.030 and the requirements set forth in KRS 11A.020(3) above.

Furthermore, KRS 11A.030 should be reviewed by the DUI program coordinator and the Division when deciding whether he should abstain from matters involving Behavioral Resources, Inc. Based on the information provided, it appears that his involvement in site visits/ program reviews may affect public confidence in the integrity of his agency even if, in fact, there may be no threat to his independence of judgment. Thus, if the Division wishes to avoid even the appearance of a conflict, we advise the DUI program coordinator to abstain from future involvement with Behavioral Resources Inc., as a part of his official duty.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: Joseph B. Helm, Jr.