

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-22

May 27, 2004

RE: May employee of Department of Education perform, for compensation, peer reviews of other states' programs?

DECISION: Yes, within limitations.

This opinion is issued in response to your May 24, 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 as follows. You are currently employed as the Director in an office within the Department of Education (the "Department"). The office is responsible for implementation of the Commonwealth Accountability Testing System, or CATS, and also oversees development of the Kentucky Core Content Tests and the state's school and district accountability systems (both the federal dimension (No Child Left Behind ACT, or "NCLB" and the CATS).

You also do occasional consulting for the United States Department of Education ("USDOE"), participating in a peer review process where you are part of a team that advises the USDOE on states' compliance (other than Kentucky) toward those states' meeting federal requirements, including the NCLB. You have done this on state time (without compensation from the USDOE), and you have done this for professional development to learn more about the federal laws and regulations related to assessment and accountability.

As a peer reviewer, you have no say on how the USDOE will treat Kentucky on issues of federal compliance. You note that in listing members of the peer review process, the USDOE may note that you work for the Department. The Department has no oversight over the USDOE, and the USDOE's peer review process is, you say, strict regarding conflicts of interest. An example you point to is that you are prohibited from participating in Kentucky's peer review of Title I of the Elementary and Secondary Education Act ("Title I") or NCLB.

You now ask whether you may be a peer reviewer and evaluate other states on your own time, using your own resources, with compensation from the USDOE.

The Commission believes that such compensated peer review service for the USDOE does not appear to present a conflict of interest with your state position. As you point out, the Department does not regulate or oversee the USDOE, and thus you are not in a position to use your official state position to give an advantage to your outside employer or client, the USDOE.

However, in Advisory Opinion 02-17, the Commission held that a Department of Mines and Minerals employee could not teach mine safety classes for coal companies off-site and other than normal working hours, because the employee was a mine safety instructor for the state and teaching mine safety classes was part of his official duties. See KRS 11A.040(5) provided below:

KRS 11A.040(5) provides:

(5) A public servant shall not knowingly accept compensation, other than that provided by law for public servants, for performance of his official duties without the prior approval of the commission.

Here, you have stated that in the past you have been a peer reviewer “on state time.” Thus, it appears that the performance of peer reviews was deemed to be part of your official duties for the Department. Your serving as a peer reviewer without additional compensation, complies with KRS 11A.040(5) above, which forbids employees from accepting compensation other than their state salary for performance of official duties.

Thus, the critical issue is whether your performance of peer reviews is determined by the Department to be part of your official duties. If the Department (not the employee) has now determined that conducting peer reviews of other states for the USDOE is not part of your

official duties for the Department, then you are not prohibited from accepting the compensation from the USDOE for your performance as a peer reviewer. Conversely, if the Department believes that part of your state duties includes such peer review service, you may not accept the additional compensation for performance of such service.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Joseph B. Helm, Jr.

Enclosures: Advisory Opinion 02-17