

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 93 – 71

November 22, 1993

RE: Physicians holding both personal service contracts and provider agreements

This opinion is in response to your November 10, 1993, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the November 22, 1993, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. The Department of Medicaid Services within the Cabinet for Human Resources contracts with physicians to provide services for the department. The services provided by the physicians include, in part, reviewing medical necessity and appropriateness of treatment, reviewing providers with high billings, serving as expert witnesses, contacting providers in clarification of issues, assisting staff in the development of coverage criteria, serving as drug consultants, and answering questions of staff. In addition, these same physicians may have provider agreements with the department to participate in the Medicaid Program. A provider agreement is a signed agreement between the department and the physician which allows the physician to be paid for providing medical care to medicaid recipients.

It appears that physicians with both a provider agreement and a personal service contract with the department are in the position of judging the propriety of medical services provided by other physicians who have provider agreements while also providing medical services themselves.

You ask: 1) Does the Commission consider physicians with Personal Service Contracts and Provider Agreements with DMS as public servants as the term is used by the Executive Branch Code of Ethics?

2) If so, does this arrangement, as presented, cause a conflict of interest, thus violating the Executive Branch Code of Ethics?

KRS 11A.010(9) provides:

- (9) "Public servant" means:
- (a) The Governor;
 - (b) The Lieutenant Governor;
 - (c) The Secretary of State;
 - (d) The Attorney General;
 - (e) The Treasurer;
 - (f) The Commissioner of Agriculture;
 - (g) The Superintendent of Public Instruction;
 - (h) The Auditor of Public Accounts;
 - (i) Each Railroad Commissioner; and
 - (j) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

KRS 11A.010(7):

"Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Occupational Safety and Health Review Commission, the State Board for Elementary and Secondary Education, the State Board for Adult and Technical Education, and any other management personnel with procurement authority;

Physicians who contract with the state to provide services on a limited basis are not considered employees in the executive branch, and thus, are not public servants as defined in the KRS Chapter 11A, the Executive Branch Code of Ethics. As such, they are not subject to the conflict of interest provisions of the Code. However, the Commission suggests that the department, if it has not already done so, take steps to ensure that a physician holding a personal service contract does not review treatment provided by himself or other physicians with whom he is associated in practice.