

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 96-3**

March 19, 1996

RE: May spouse of state employee hold personal service contract with a state agency if the funds used to pay the spouse are received through an entitlement program?

DECISION: Yes.

This opinion is in response to your November 29, 1995, request and January 19, 1996, addendum to your request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 6 and March 19, 1996, meetings of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Division of Disability Determinations within the Cabinet for Health Services (the "Division") employs two individuals through personal service contracts as medical consultants. These consultants assist the Division in developing evidence for the purpose of documenting disability impairments, interpret and evaluate medical reports, advise staff regarding residual function and duration of impairment, and assist with public relations activities. They also review and sign completed disability claims for which they are paid on a per claim monthly basis.

The consultants' spouses both are state employees. One spouse is an administrative specialist principal within the Division. His duties relate to the data processing systems within the Division. You assert that he has no role in the selection of medical consultants for the Division. The other spouse is employed by the Workforce Development Cabinet, and thus has no involvement in decisions which would affect the contract with her spouse.

You believe that "*absent either some discernable connection between the state employee's position and the securing of the Medical Consultants' contracts, i.e., that the state employees were part of the decision-making process in awarding the contracts or evidence that these state employees used their influence in securing these contracts for their spouses, there is no rational basis for prohibiting the employment situations at issue in this case.*" You do not believe that these contracts can be said to be for the "use or benefit" of the state employees spouses.

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In addition, you believe that the medical consultants are paid with entitlement funds, and thus are excepted from the provisions of KRS 11A.040(4) below which prohibit state employees, or anyone else for their use or benefit, from contracting with a state agency:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by any state agency. This provision shall not apply to a contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain or to agreements which may directly or indirectly involve public funds disbursed through entitlement programs.

You cite the case of Estate of Cowart v. Nicklos Drilling Company, 112 S.Ct. 2589, 2595 (1992) as defining "entitlement" as a "right or benefit for which a person qualifies" which does not depend on whether the right has been acknowledged or adjudicated. Thus, disability benefits, which are provided to those individuals who meet certain conditions, are considered entitlements. The consultants are paid with funds provided by the Social Security Administration to the Division to perform disability determination functions. Because the funds paid to the consultants are federal funds received for the operation of the disability determinations program, you believe they are "public funds disbursed through an entitlement program." Accordingly, you believe the prohibition stated in KRS 11A.040(4) should not apply to the personal service contracts of the medical consultants involved in this matter.

You request an advisory opinion from the Commission as to whether the two state employees may continue their state employment while allowing their spouses to contract as medical consultants with the Division.

As provided in KRS 11A.040(4), a public servant, or any other person for the public servant's use or benefit, is prohibited from having any contract or agreement with any state agency. The Commission believes an employee is likely to benefit from a contract which his spouse holds with a state agency. Advisory Opinion 93-72. Thus, the spouse of a state employee is prohibited from contracting with a state agency.

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However, the provision in KRS 11A.040(4) does not apply to agreements which involve public funds disbursed through entitlement programs. The Commission believes this exception applies to public funds disbursed as benefits to individuals who meet the qualifications which "entitle" them to such funds, as well as to public funds disbursed as administrative costs for the operation of the entitlement program. Public funds which are received for the administration of the disability determinations program and are used to pay consultants for the operation of the program would be considered public funds disbursed through an entitlement program.

Thus, the Commission believes, because the contracts are paid from entitlement funds, that the two state employees may continue their state employment while allowing their spouses to contract as medical consultants with the Division as long as no other conflict exists.

EXECUTIVE BRANCH ETHICS COMMISSION

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BY: Ruth H. Baxter, Chair