

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 99-40

October 22, 1999

RE: May commission member vote on budget of state agency with which he holds a private contract?

DECISION: Yes, however such action may damage public confidence.

This opinion is in response to your August 30, 1999, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 22, 1999, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You serve as a member of the Public Advocacy Commission. In addition, you are in private law practice as a criminal defense attorney and have held a private contract with the Department of Public Advocacy (the "Department") to provide services for criminal cases for the past seven years. However, you have no guarantee that the contract will be offered to you next year and you state that there is a 60-day cancellation clause without reason for either party to the contract.

When you vote on the budget for the Department, you are voting on a proposed allocation of budget funds well before either legislative appropriation or agreement by the Department to offer you a contract. Additionally, you do not "lobby" the Department for the contract, but are asked by the Department in the previous year's contract to advise the Department as to whether you are willing to consider a contract for the next year.

Annual contract offers are based upon Department need, past contract performance measured under the terms of the contract itself, and professional competence in the context of Department plans, policies and regulations administered by the Department Director. You have no personal or professional hesitation in casting a vote on the Department budget; however, you ask for advice as to whether you should abstain from voting on the budget for the Department.

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In Advisory Opinion 93-53 (a copy of which is enclosed), the Commission concluded that members of state boards and commissions are not subject to the Executive Branch Code of Ethics unless the board or commission is specifically listed in the "officer" definition in KRS 11A.010(7). Because the Public Advocacy Commission is not a commission specifically listed, you are not subject to the Executive Branch Code of Ethics in KRS Chapter 11A. Thus, you are not prohibited from voting on matters of the budget; however, the Commission believes that your involvement in such matters could damage public confidence in the integrity of the Department.

Furthermore, in order to uphold the public trust in members of state boards and commissions, the Commission has proposed some legislation to be introduced during the 2000 legislative session that will prohibit board and commission members from contracting with the board or commission on which they serve. The Commission believes that a conflict of interest exists when a board or commission member contracts or has an agreement with the board or commission on which he serves.

Similarly, employees of the Department are prohibited from contracting or having an agreement with the Department pursuant to KRS 11A.040(4), which provides:

(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, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

(a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or

(b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or

(c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises; or

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(d) Purchases from a state agency that are available on the same terms to the general public or that are made at public auction.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Bertie Oldham Salyer, M.A., A.M.E.

Enclosure: Advisory Opinion 93-53

October 25, 1999

Hon. Randall T. Bentley
Bentley's Law Office
The Times Building
133 West Public Square
Glasgow, Kentucky 42141

Reference: 102299.1

Dear Mr. Bentley:

At its October 22, 1999, meeting, the Executive Branch Ethics Commission took up your request, dated August 30, 1999, in which you ask whether a commission member may vote on the budget of a state agency with which he holds a private contract.

The enclosed Advisory Opinion 99–40 is issued in response to your inquiry.

Sincerely,

Jill LeMaster, Executive Director

Enclosure: AO 99--40

Visit our website: www.state.ky.us/agencies/ethics/ETHICS/HTM

