

EXECUTIVE BRANCH ETHICS COMMISSION  
**ADVISORY OPINION 00-26**  
April 28, 2000

RE: May employee provide consulting services for company that provides dental services for agency by which he is employed?

DECISION: Yes, but an appearance of a conflict may still remain.

This opinion is in response to your March 21, 2000, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the April 28, 2000, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Dental Program Administrator ("Administrator") for the Division of Medical Services, Department of Corrections, has been asked to serve as a consultant for Mid-America Dental Inc. ("Mid-America"). Mid-America, is a private company that provides dental services for military and correctional facilities. Mid-America currently has a contract to provide dental services for the Kentucky State Penitentiary, an institution of the Department of Corrections. However, this contract is written, bid, and procured through the Kentucky State Penitentiary. The vendor is selected exclusively by the Kentucky State Penitentiary, and the Administrator has no responsibility whatsoever in the selection, approval, or issuance of the contract. The Medical Director and the Deputy Warden of Health Services at the Kentucky State Penitentiary have oversight responsibilities for the contract.

The Administrator mainly serves as a consultant to the Department's staff dentist, but may also provide input to wardens in the securing of dental services. Mid-America has asked the Administrator to assist in developing a program for the state of Mississippi. You ask whether such assistance to Mid-America presents a conflict on interest for the Administrator.

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KRS 11A.040(10) provides, in part:

(10) Without the approval of his appointing authority, no public servant shall accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds.

(a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

(b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

Although it does not appear that the Administrator will be an employee of Mid-America by providing consulting services, because Mid-America does business with the Department of Corrections, the Commission believes a potential for conflict will exist if the Administrator serves as a consultant for Mid-America. Thus, in considering this request, the Commission looked to regulation 9 KAR 1:050, Section 2, which is required to be reviewed by the appointing authority in considering approval of outside employment and which provides:

Section 2. The appointing authority shall review the request and consider, including but no limited to, the following factors:

(a) The degree of separation between the public servant's state duties and decisions concerning the outside employer. Example: whether the public servant is involved with the awarding of contracts to or regulation of the outside employer;

(b) The public servant's level of supervisory or administrative authority, if any. Example: whether the public servant has ultimate responsibility for a decision concerning the outside employer, although he is not involved in the decision-making process;

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(c) Whether the outside employment will interfere or conflict with the public servant's state employment duties;

(1) A conflict shall exist if a public servant cannot carryout an appropriate course of action for his agency because of responsibilities his outside employment would require.

(2) A conflict shall exist if the outside employment will materially interfere with the public servant's independent judgment in considering alternatives or courses of action that reasonably should be pursued in his state employment.

(d) The duration of the outside employment ;

(e) Whether the outside employment would create an appearance of conflict of interest with state duties; and

(f) Whether the public servant is an auditor, inspector or other regulatory personnel of a division which is currently auditing, inspecting or reviewing or has scheduled an audit, inspection or review of the outside entity for which the public servant requests approval to work.

Although it appears that the Administrator has no involvement, as a part of his official duties, in securing dental services for the Department or any of the institutions within the Department, the Commission believes that the fact that he could contact wardens and make recommendations to them concerning the procurement of dental services presents a potential conflict for the Administrator. However, the Commission believes that if the Administrator abstains from any involvement whatsoever regarding the procuring of dental services for the Department and the institutions and discloses his abstention in writing as required by KRS 11A.020(3) (cited below), then he will remove any possible conflict of interest if he were to act as a consultant for Mid-America.

(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.

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Thus, the Commission believes that the Administrator is not prohibited from acting as a consultant for Mid-America; however, the Commission is concerned that an appearance of a conflict will exist for the Administrator and advises the Department to consider such an appearance in its decision regarding the propriety of such outside consulting.

If the Administrator accepts work as a consultant for Mid-America, and his official responsibilities change to include matters regarding the securing of dental services for institutions, he should terminate any consulting work in which he is engaged for Mid-America.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: Bertie Oldham Salyer, M.A., A.M.E.