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BOYCE A. CROCKER

ADVISORY OPINION 01-16

May 11, 2001

RE: May Oakwood facility employ the services of a psychologist who is employed full-time by another executive branch agency?

DECISION: Yes, however, the psychologist must recuse himself from approving behavior plans of Oakwood residents.

This opinion is in response to your May 3, 2001 request for an opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 11, 2001, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Oakwood facility ("Oakwood"), an agency within the Cabinet for Health Services, seeks to employ, through a personal service contract, a former Oakwood employee for staff psychologist services. This former Oakwood employee is now a full-time employee of the Division of Guardianship ("Guardianship") within the Cabinet for Families and Children (the "Cabinet"). He is interested in working part-time for Oakwood, and you inquire whether both Oakwood and the Cabinet may compensate him, though his work for Oakwood would be through a personal service contract. His last day of work for Oakwood was April 30, 2001.

In his present duties for the Cabinet, the psychologist has responsibility for approval of behavior programs for clients who have "Supports for Community Living" ("SCL") slots, most of whom live in the community, but several residents at Oakwood have these SCL slots as well. In any part-time work the psychologist would do for Oakwood, there may be occasion when he would be the only psychologist at work. As such, he may have occasion to develop a behavior program for an Oakwood resident with an SCL slot for which, in his Guardianship position, he would typically grant final approval. You ask for an opinion to help clarify this matter.

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KRS 11A.040(4) prohibits an employee from contracting with the state agency for which he is currently employed; however it does not prohibit an employee from contracting with another state agency provided the employee complies with the provisions of the Model Procurement Code in KRS 45A.340 provided below:

(5) No officer or employee of an agency or appointee shall knowingly himself or by his partners or through any corporation which he controls or in which he owns or controls more than ten percent (10%) of the stock, 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, sale, or purchase of the value of twenty-five dollars (\$25) or more, made, entered into, awarded, or granted by any agency, unless said contract, agreement, sale or purchase was made or let after public notice and competitive bidding.

Although the provisions above do not prohibit the psychologist from holding a personal service contract with Oakwood, the Commission believes that a conflict of interest may exist for the psychologist if he accepts a personal service contract for work at Oakwood, in that the psychologist directly regulates Oakwood activities by reviewing and approving behavior plans for Guardianship clients who are residents at Oakwood. Such activity may be in violation of KRS 11A.020(1)(a) which provides:

(1) No public servant, by himself or through others, shall knowingly:

...

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest.

Because the Guardianship psychologist may, in his personal contract work with Oakwood, be placed in the position of authoring behavior programs over which he has, in his official Guardianship position, regulatory control, there is a conflict between his private interest as a contract employee with Oakwood and his public interest as a state employee of Guardianship. KRS 11A.020(1)(a) prohibits the psychologist from using his influence in this manner.

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Furthermore, if, in his Guardianship employment, he is responsible for placement of clients at Oakwood, then such action may benefit him privately and create a further conflict.

If the psychologist recuses himself, as part of his official duty, from consideration of matters involving Guardianship clients at Oakwood and discloses such recusal, pursuant to KRS 11A.020(3), then the Commission believes this conflict may be cured, and he may provide services to Oakwood. However, if the psychologist is unable to recuse himself from approval of behavior programs, he should not provide such.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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