

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-39

October 16, 2003

RECONSIDERATION OF ADVISORY OPINION 96-31

RE: May Governmental Services Center employees who have responsibilities in the Certified Public Manager Program be eligible for the Educational Achievement Award upon successful completion of the Certified Public Manager Program?

DECISION: Yes, because Governmental Services Center has taken steps to alleviate the inherent conflict of interest issues.

This opinion is in response to your September 15, 2003, request for reconsideration of Advisory Opinion 96-31 from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 16, 2003 meeting of the Commission and the following opinion is issued.

The Governmental Services Center ("GSC") is the designated entity to provide the Kentucky Certified Public Manager program ("CPM") to state employees. You describe the CPM program as "...a rigorous, comprehensive training program that takes at least 3 years to complete." GSC employees who participate in the CPM program must complete the same requirements as other CPM participants. State employees, except GSC employees, who complete the CPM program are eligible to receive an Educational Achievement Award ("EAA") from their agency. You mention that Personnel Cabinet employees who are involved in designing and administering the EAA policy are also eligible to receive an EAA for completion of the CPM program. GSC employees are prohibited from being eligible to receive an EAA completion of the CPM program because of a GSC policy based on the Commission's advice in Advisory Opinion 96-31. That opinion stated in pertinent part:

"The Commission advises GSC to implement an in-house policy to prohibit employees of GSC who are involved as part of their official duty in the Certified Public Manager program from receiving a monetary incentive for participation in the program. If such employees did receive the monetary incentive, the public

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may perceive the action as a substantial conflict between the employees' private interests and their duties in the public interest. In addition, the Commission believes employees who are responsible for reviewing tests or projects of coworkers may have difficulty being objective in their review."

You state that GSC has now addressed the concerns expressed by the Commission in 1996, and you request reconsideration of that opinion which operates to prohibit GSC employees from being eligible for an EAA upon completion of the CPM program.

You have identified the Commission's concern that GSC employees whose official duties include responsibilities in the CPM program may have difficulty in being impartial in reviewing the work of fellow GSC employees who are in the CPM program. You state that "The project review and evaluation system is now as objective as possible..." in that multiple reviewers use a scoring system that has been shown to be highly reliable. Specifically, GSC has reached agreement with the Kentucky Society of Certified Public Managers to review and evaluate GSC employees' CPM projects.

Another area of concern you have identified and state has now been addressed is the eight "tests of knowledge" required for successful completion of the CPM program. These tests are machine-scored, and both the tests and test keys are kept in a locked file cabinet. You observe that the purpose of the tests is to demonstrate that CPM participants have learned the basic principles, theories and models taught in the workshop. You go on to say that the learning and performance standards for the GSC employees involved in the CPM program are higher than for other participants. GSC consultants, it is argued, who teach the course must take the course three times before they can teach, and must also observe and team-teach before leading the course on their own. Finally, you note your belief that "...there is no apparent perception among CPM participants or others in state government that GSC employees in CPM workshops contribute less, work less, do less or have any advantage to the detriment of other participants."

You argue that current policy allows a benefit to all other state employees denied to GSC employees "...simply because of their (GSC employees) work assignment during the time in

which they completed the CPM program.” You feel this is inequitable and may be a potential obstacle for GSC to recruit the best employees. The current policy, you say, is an impediment to GSC’s mission.

You also take issue with the Commission’s reasoning that “... the public may perceive the action as a substantial conflict between the employees’ private interests and their duties in the public interest.” This, you say, is contradictory to the reasoning that led to the creation of programs such as the EAA and Educational Assistance Program, stating it is no less a desirable outcome of public policy for GSC employees to complete the CPM program and be eligible for the EAA than for other employees.

KRS 11A.020(1)(a)-(d) states:

- (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;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

The resolution offered concerning outside scoring of GSC employees’ CPM projects reasonable and appears to alleviate concerns in that regard. So long as the individual scoring the projects is not a person seeking something from GSC, such an approach would seem to address the concern on the issue of scoring or evaluating GSC employees’ CPM projects. Your arguments concerning the tests of knowledge and GSC employees’ participation in workshops are likewise reasonable and would appear to alleviate concerns of actual conflicts of interest. In fact, this may be true, especially if the GSC employee had no part in designing the tests of knowledge.

However, the appearance of a conflict of interest is more difficult to address. A GSC employee involved in curriculum design for the CPM program, even if not involved in drafting the tests or test keys, will still appear to have an advantage in this program because of his official

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position. This could be for mundane things such as scheduling matters, etc. These issues that give rise to an appearance of a conflict of interest are likely not resolvable so long as the GSC has responsibility for providing the CPM program. Your observations about the inequity of denying GSC employees the same opportunity to earn an EAA and the potential impediment to GSC to accomplish its mission, do resonate, but ultimately must be considered in light of the issues of public trust.

The Commission still believes, as it did in 1996, that the public may perceive GSC employees' eligibility to profit from a program with which they are involved, either in designing curriculum, designing tests they may later take, or in implementing the CPM program through teaching and feedback, as not in keeping with KRS 11A.005(1)(c), which states:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

...

(c) A public servant not use public office to obtain private benefits;...

Thus, although the Commission maintains the position it espoused in Advisory Opinion 96-31, it agrees that GSC has taken steps to remove any actual conflicts of interest for GSC employees participating in the CPM program, and believes that the decision to allow GSC employees to receive the EAA is one that should be made by GSC management.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.