

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-40

October 16, 2003

RE: Would a violation of KRS 11A exist for an employee, if a law firm owned in part by the employee's spouse, contracted with the employee's agency?

DECISION: Yes.

This opinion is issued in response to your October 8, 2003 request for an advisory opinion 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.

You state the relevant facts as follows. The Cabinet for Health Services (the "Cabinet") currently has a contract with a law firm, which it has held since August 15, 2001. The firm is engaged to represent the Cabinet and the Department for Mental Health and Mental Retardation Services (the "Department") in a federal Department of Justice ("DOJ") investigation of alleged violations of the Civil Rights for Institutionalized Persons Act at Oakwood, an intermediate care facility for persons with mental retardation. The law firm was engaged to not only assist the Cabinet during the investigation but also in any subsequent negotiations with the DOJ or litigation wherein the Cabinet has to defend itself in federal court.

The lead counsel in this matter is a partner with the law firm, a professional service corporation. The law firm is composed of nineteen lawyers, sixteen whom are shareholders. All are employees of the corporation. The lead counsel's share represents at or over five percent of the equity in the firm. Since the time the lead counsel began services for the Cabinet, he met and married the Deputy Commissioner of the Department. The Deputy Commissioner does not have any direct responsibility at Oakwood, nor is the Deputy Commissioner involved in the award or monitoring of any legal services for the Cabinet or the Department.

The contract for legal services is up for renewal in November. The Cabinet and the Deputy Commissioner for the Department seek an opinion as to whether it would be violation of KRS 11A for the law firm to continue to represent the Cabinet and the Department in light of the marriage of the lead counsel and the Deputy Commissioner.

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In support of continuing the contract with current law firm, you note that the Deputy Commissioner does not have an ownership interest in the law firm, and although the Deputy Commissioner's spouse, the lead counsel, does have an ownership interest of greater than 5% in the firm, he cannot transfer or sell his share in a legal practice as one could with stock in a corporation. You believe that, at most, the Deputy Commissioner may indirectly benefit from the lead counsel's compensation as an employee and shareholder of the firm. Furthermore, the Deputy Commissioner is neither employed at Oakwood, nor supervises any aspect of Oakwood, nor awards or monitors any legal services contracts.

You believe that the Cabinet will be greatly disadvantaged if the current law firm cannot continue its representation for the Department. The lead counsel has personally participated on behalf of the Cabinet in two different lengthy, on-site investigations by DOJ experts and in initial negotiations with DOJ counsel. You do not believe that the intent of KRS 11A was to preclude the executive branch from continuing under a contract with an employee's spouse in such a situation. If so, you ask if the Deputy Commissioner's transfer from the Department to another department within the Cabinet would change the situation.

KRS 11A.040(4) provides the following:

(4) A public servant shall not 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

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

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In Advisory Opinion 92-4 (a copy of which is enclosed), the Commission addressed a situation similar to your request regarding the transaction of business with the state by a company that is partly owned by the spouse of a state employee. That opinion states “the company would be prohibited from transacting business with the Commonwealth of Kentucky. The phrase “or by other person for his use or benefit” would apply to the merit employee although he or she may technically own none of the company’s stock. Because such employee’s spouse owns seven percent (7%) of the company’s stock, it can be said that seven percent (7%) of the company’s benefits gained from transacting business with the state accrues in part to the merit employee in his/her capacity as the owner/operator’s spouse.”

Although the law in KRS 11A.040(4) has been narrowed to prohibit an employee from contracting only with the state agency by which he is employed, and not all state agencies, the same restrictions regarding contracting with a company owned, in part, by a spouse of an employee still exist within an agency. Thus, the Commission believes that if the law firm were to continue its contract with the Cabinet that a violation of the ethics code may exist for the Deputy Commissioner due to any “benefit” that would arise from the Cabinet’s compensation to the firm.

Even if the Deputy Commissioner were transferred to a different department within the Cabinet, and thus remove any actual or potential conflicts of interest, the provisions in KRS 11A.040(4) would not allow the law firm to hold the contract if the Deputy Commissioner would benefit from the contract, without a potential violation existing.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.

Enclosure: Advisory Opinion 92-4