

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-9

March 30, 2005

RE: Do “public funds disbursed through entitlement programs” include administrative costs?

DECISION: No.

This opinion is issued in response to your February 1, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 18 and March 30, 2005 meetings of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Finance and Administration Cabinet, Office of Material and Procurement Services (“OMPS”) is currently reviewing bid responses to a solicitation seeking a contractor for the Cabinet for Health Services, Department for Medicaid Services, (“Medicaid”) to assume defined administrative and medical management responsibilities, including quality improvement, for the Department.

One vendor that has submitted a response to this solicitation includes documentation from the primary subcontractor that the primary subcontractor has retained the former Commissioner of Medicaid to assist in recruiting staff to comply with staffing requirements of this solicitation and potential contract award. It is your understanding that the former Commissioner of Medicaid was employed as Commissioner through October 2004. During his employment as Commissioner, he would have been involved in the discussion and development of this solicitation and any confidential discussions on this matter, to which other vendors who responded to this solicitation would not have access.

You believe that this prior relationship raises the strong appearance of impropriety. However, the former Commissioner requested and received from the Commission, Advisory Opinion 04-35, which allows him to seek employment with a vendor, if returning to his former

profession, or receiving direct reimbursement of entitlement funds. In your opinion, this advisory opinion does not authorize the former Commissioner to be involved for his current employer in this solicitation. You ask whether a clarification of Advisory Opinion 04-35 is needed, in light of the events transpiring since its issuance.

The Commission will attempt to clarify and expound on the advice given in previously issued advisory opinions, including Advisory Opinion 04-35.

KRS 11A.040(6) and (7) provide:

(6) A former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within six (6) months of termination of his employment, knowingly by himself or through any business in which he owns or controls an interest of at least 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 was employed. **This provision shall not apply to a contract, purchase, or good faith negotiation made under KRS Chapter 416 relating to eminent domain or to agreements that may directly or indirectly involve public funds disbursed through entitlement programs.** This provision shall not apply to purchases from a state agency that are available on the same terms to the general public or that are made at public auction. This provision shall not apply to former officers of the Department of Public Advocacy whose continued representation of clients is necessary in order to prevent an adverse effect on the client. **(Emphasis added)**

(7) A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within six (6) months following termination of his office or employment, accept employment, compensation, or other economic benefit from any

person or business that contracts or does business with, or is regulated by, the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of six (6) months, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to, filing tax returns, filing applications for permits or licenses, or filing incorporation papers, **nor shall it prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs. (Emphasis added)**

In Advisory Opinion 04-35, the Commission stated that the former Commissioner would not be prohibited from enjoying a part of a contract with Medicaid if the contract would be paid with public funds for the administrative costs of the operation of Medicaid, an entitlement program, provided the former Commissioner otherwise complied with applicable post-employment statutes in KRS 11A.040(7).

The Commission further stated in the opinion that the exception for entitlement funds in KRS 11A.040(6) and (7) that would allow the former Commissioner to work on matters related to Medicaid, or to enjoy a part of a contract with Medicaid, applies only if the public funds are disbursed directly from the entitlement program for the work of the former Commissioner.

This advice to the former Commissioner was based on Advisory Opinion 96-3, in which the Commission stated that it believed the exception in KRS 11A.040(4), provided below, of “public funds disbursed through entitlement programs” applies to funds disbursed as benefits to individuals who meet the qualifications which “entitle” them to such funds, as well as to public funds disbursed as administrative costs for the operation of the entitlement program.

KRS 11A.040(4) provides:

(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. **(Emphasis added)**

After further reviewing the statutes in KRS 11A.040(4), (6), and (7), and Advisory Opinion 96-3, the Commission reverses its interpretation of these statutes, specifically the language “funds disbursed through entitlement programs,” as an exception for administrative costs for the operation of the program. The Commission believes this exception applies only to public funds disbursed as benefits to individuals who automatically meet the qualifications that “entitle” them to such funds. For example, those individuals who meet certain medical conditions and are determined to be disabled are entitled to receive disability benefits. They would not be excluded from receiving a disability check by virtue of their current or former state employment, as this is a benefit that is “disbursed through an entitlement program.”

Public funds which are received for the administration of the disability determinations program and are used to pay consultants or contractors for the operation of the program are not considered entitlement funds because such funds are not a “right or benefit for which a person qualifies.” The purpose of the statutes KRS 11A.040(4), (6), and (7) is not to prohibit current and former employees from receiving benefits, such as food stamps, for which they would automatically qualify otherwise. However, just because the source of funds for a contract is a program which is considered to be an “entitlement program” does not mean that all contracts paid by the program are “entitlements” in the hands of persons who contract to provide services for that program.

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Thus, the Commission does not believe that contracts between Medicaid and a vendor to provide management services involve funds disbursed through entitlement programs. The former Commissioner, for the remainder of his six-month post-employment prohibition, should not have or enjoy a part of a contract with Medicaid, and he should have no further involvement in any matters relating to Medicaid.

If the new employer of the former Commissioner wishes to respond to any future bid solicitations involving Medicaid and wishes to list the former Commissioner as an employee available to work on the project, the employer should include a statement in the response that the former Commissioner's services are not available until six months after his resignation from state employment. Further, for one year the former Commissioner may not act as a lobbyist, or represent the new employer before the state, in Medicaid matters.

This advice differs from the advice given in several previously issued advisory opinions, and the Commission understands that the former Commissioner and other current and former employees may have relied on advice given in those opinions. However, the Commission advises that any future actions taken by current or former employees should be based on this advisory opinion. In the future, current and former employees will be granted an entitlement exception to KRS 11A.040(4), (6), or (7) only when they are recipients of benefits of entitlement funds.

The Commission will attempt to notify individuals who have been issued advisory opinions that were based on the former interpretation of the entitlement exception language in KRS 11A.040(4), (6), and (7).

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite