

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-27

October 31, 2006

RE: May employee work during off-duty hours for regional mental health and mental retardation board?

DECISION: No, if such service fulfills part of agreement with his Department.

This opinion is issued in response to your October 6, 2006 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 31, 2006 meeting of the Commission and the following opinion is issued.

You provide the following relevant facts as follows. The Department for Mental Health and Mental Retardation Services (the "Department"), within the Cabinet for Health and Family Services, is currently implementing a program in western Kentucky designed to redirect potential admissions to Western State Hospital to other services offered in less restrictive settings. The program is known as Direct Intervention: Vital Early Responsive Treatment System ("DIVERTS").

Four regional mental health and mental retardation boards (quasi-governmental agencies), in cooperation with Western State Hospital, have developed specific plans designed to meet the admission objectives of this initiative. The Department has entered into Memorandums of Agreement with each of the boards to utilize various methods to reduce the number of admissions. Funds were distributed to each regional board based on a projected expenditure plan.

One of the regional boards has established an office on the grounds of Western State Hospital in order to implement a gatekeeping function that will require all voluntary admissions to the hospital to be screened first by a qualified mental health professional. The office is completely separate from hospital activities and only is located on the hospital grounds in order to facilitate the screenings and provide convenience for the patients. A separate lease for the regional board has been drafted and approved by the Finance and Administration Cabinet.

The regional board wishes to employ a current employee of Western State Hospital to provide clinical services during his off-duty hours from Western State Hospital. The employee has no involvement in the planning related to the DIVERTS program. The duties that he would perform for the regional board would not interfere with his duties for Western State Hospital. You ask whether the employee may provide such outside service for the regional board in addition to his state position with Western State Hospital.

Regarding your request, the Commission reviewed the following pertinent provisions in KRS Chapter 11A.020(1):

- (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.

KRS 11A.040(4) and (10) also provide:

- (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; or
 - (e) Sales of craft items to a state park by interim state employees designated as crafts persons under KRS 148.257.
- (10) Without the approval of his appointing authority, a public servant shall not 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.
 - (c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

According to Advisory Opinion 94-12, employment with comprehensive care centers is not considered to be outside employment. Thus, employment with the regional boards may or may not be considered outside employment. However, even if approval by the Department is not required pursuant to KRS 11A.040(10) above, the employee still must determine if a conflict of interest exists between the regional board and his official duty for the Department. The information that you have provided does not disclose whether the employee is involved, as part of his official duty, with the regional board.

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 06-27
October 31, 2006
Page Four

Further, if the services that the employee will be providing for the regional board will fulfill part of a contract or agreement with the Department, then such services provided by the employee would violate KRS 11A.040(4) quoted above. See Advisory Opinion 00-21 enclosed. If the services that the employee will be providing to the regional board are not services that will fulfill part of a contract or agreement between the Department and the regional board, then the employee would not be prohibited from accepting employment with the regional board in addition to his state employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosure: AO 00-21