

ADVISORY OPINION 98-26

May 19, 1998

RE: May employee serve as member of Brain Injury Trust Fund Board?

DECISION: Yes.

This opinion is in response to your May 6, 1998, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 19, 1998, meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. A newly created Brain Injury Trust Fund Board (the "Board") was created pursuant to HB 299, passed by the 1998 General Assembly, for the purpose of administering the Brain Injury Trust Fund to provide certain services for brain-injured individuals. A hearing officer within the Administrative Hearings Branch of the Office of Program Support of the Cabinet for Health Services desires to serve on the Board. The hearing officer is the father of a brain-injured child and would be an asset to the Board in light of his professional and personal experiences. As General Counsel for the Cabinet for Health Services, you ask whether a conflict of interest will exist if the hearing officer serves as a member of the Board.

You believe that the hearing officer could serve on the Board provided he recuses himself, in writing, from any action of the Board which may directly impact his family and, as a hearing officer also recuses himself, in writing, from any matter involving the Board or its actions which may be subject to appeal or hearings before the Administrative Hearings Branch. (Appeals from adverse decisions relative to brain injury fund eligibility and coverage may be taken to the Cabinet's Administrative Hearings Branch.) You also believe that the hearing officer should not serve as the director of the Board in order to ensure no conflicts arise and to ensure public trust and confidence in the operation and administration of the Fund.

KRS 11A.020 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;

(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.

(2) If a public servant appears before a state agency, he

shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

The Commission believes that the hearing officer may serve on the Board since the Board does not have governing authority over the agency by which the hearing officer is employed. Previous Advisory Opinions issued by the Commission prohibit an employee from serving on a board or commission if the employee works for the agency that is governed by the board or commission. Unlike the Board which does not have authority over the Cabinet for Health Services, the Office of Program Support or even for the Administrative Hearings Branch, the commissions cited in these previous opinions have governing authority over the state agencies to which they are attached.

However, the Commission envisions, as you have pointed out, situations that may present potential conflicts for the hearing officer. In order to avoid a conflict of interest in these matters, the Commission believes that the hearing officer should recuse himself pursuant to KRS11A.020(3) as you have proposed. He should take great care to avoid any conduct that would lead members of the general public to conclude that he is using his official position to further his professional or private interest.