

ADVISORY OPINION 98-46

December 17, 1998

RE: Will community mental health centers be in compliance with ethical standards if they comply with KRS 273.219, but not with KRS 210.110?

DECISION: No, the Commission does not have the authority to exempt individuals from statutory requirements.

This opinion is in response to your November 30, 1998, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 17, 1998, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. KRS 210.110 prohibits any employee or member of the board of directors of a community health center, any member of an employee's or board member's immediate family, any partner, or any organization that employs, or is about to employ, any of the above, from selling anything to any institution, facility or organization under the control of the Cabinet for Human Resources, now the Cabinet for Health Services. Those individuals stated above are also prohibited from participating in the selection, award and administration of a contract supported by state or federal funds if a conflict of interest, real or apparent, would be involved.

You state that, because this statute is so broad, it is almost impossible for community mental health centers to comply with it. For example, one center has on its board of directors the spouse of the publisher of the area's largest newspaper. Whenever the center places an advertisement in the paper, it is a violation of this statute. Additionally, you believe that this statute prohibits executive directors of community mental health centers from serving as executive directors of corporations developed to own housing funded by the U.S. Department of Housing and Urban Development.

KRS 273.219, enacted in 1988, requires only that directors of nonprofit corporations either disclose any conflicts of interest they may have with a board on which they serve, or else deal fairly with the corporation. All community mental health centers are operated by nonprofit corporations. You believe an enormous discrepancy exists between ethical requirements concerning conflicts of interest between community mental health centers and other nonprofit corporations in the state. Therefore, you request an opinion as to whether or not ethical issues exist provided the community mental health centers comply with KRS 273.219, and no individual is receiving a personal gain or advantage as the result of a conflict of interest, either real or apparent, with the board of a community health center.

KRS 11A.040(4) provides:

(4) No public servant shall 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, 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.

Additionally, KRS 11A.020(1)(a), (c) and (d) provide:

(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;

...

(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.

Statutory requirements stated above prohibit employees of the Cabinet for Health Services from contracting, selling to, or having any agreement with the state agency for which they work. In addition, employees are required to comply with the Model Procurement Code, in KRS 45A.340, which prohibits an employee from contracting, selling to, or having an agreement with any state agency unless it is less than \$25 or it is competitively bid. Thus, if the employees of community regional health centers are considered to be executive branch employees (employees of the Cabinet for Health Services), then they are subject to the limitations stated above. Board members, as well as community mental health employees who are not executive branch employees, are not subject to the provisions above.

Although the Commission does not have the authority to advise you regarding ethical issues concerning individuals that are not under the jurisdiction of the Executive Branch Code of Ethics found in KRS Chapter 11A, the Commission offers its opinion concerning board and commission members. The Commission believes that members of state boards and commission should not contract with or sell products to the board or commission on which they serve, and they should recuse themselves from any official involvement in matters which pose a conflict with their private interests.

Furthermore, the Commission does not have the authority to exempt individuals from statutory requirements. The Commission advises you to approach the Legislature for such an exemption.