

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 99-49**

December 10, 1999

RE: May Director privately employ contract workers employed by the agency for which he works?

DECISION: Yes, within limitations

This opinion is in response to your November 9, 1999, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 10, 1999, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Director of the Construction Division (the "Director") within the Department of Parks (the "Department") is the second-line supervisor of contract workers who are hired by the Department to perform craft skills on capital construction or other special projects pursuant to KRS 56.491(5) and KRS 148.026, provided below:

KRS 56.491(5)

A capital construction project, the total cost of completion of which the Finance and Administration Cabinet determines will not exceed one hundred and twenty-five thousand dollars (\$125,000), may be performed by the employees of the requesting agency or by individuals hired specifically for the project who shall be exempt from the requirements of KRS Chapter 18A, if the project is approved and authorized by the cabinet...

KRS 148.026 Employees - Contract for services.

The commissioner of parks may employ or contract with such persons, firms or corporations as he may deem necessary or desirable to accomplish the duties and functions assigned by law to the Department of Parks; may fix the compensation and the terms of employment or contract of those employed or contracted with; and may assign to them such duties and responsibilities as he may

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determine; provided, however, that any contract shall be approved by the Finance and Administration Cabinet before it shall become effective. Individuals employed by the commissioner of parks on a temporary basis for specific construction projects under KRS 56.491(5) or for maintenance projects shall be exempt from the requirements of KRS 18A.005 to 18A.200.

Construction superintendents in the Construction Division of the Department interview and hire the contract workers to work on special projects at the parks. The construction superintendents also supervise the contract employees. The contract workers are paid an hourly rate, receive no benefits and do not receive a P-1, the standard employment document issued by the Department of Personnel on all employees. Taxes are withheld on the contract employees, but they are not subject to the requirements of KRS Chapter 18A.

The Director is in the process of building a new home and has employed numerous subcontractors, privately, to help complete this project. In addition, he has hired some workers, privately, who also are employed as contract workers by the Department. The contract workers have provided these services on their days off, and have not been paid by the Department for hours actually worked on the Director's house. In his official position, the Director has no supervisory contact with the contract workers, but does have supervisory contact with the construction superintendents.

All payments relating to this project are paid by the Director's spouse. She has purchased most of the materials and supplies for this project from a hardware store through an agreement with the business to furnish all materials and lumber on the project. This company gives all customers a five percent (5%) discount for using it as the sole source of purchases for the house. This business also has a prime vendor contract with the Commonwealth of Kentucky.

You ask for an advisory opinion as to whether the Director may have violated KRS 11A.020(1)(a), (c) or (d), or any other applicable provisions of KRS Chapter 11A by using the Department's contract workers on their off-duty hours in the construction of his home.

KRS 11A.010(9) provides:

(9) "Public servant" means:

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(i) All employees in the executive branch including officers as defined in subsection (7) of this section and merit

The Commission believes that it must first address the question of whether contract employees hired by the Department are considered public servants. In Advisory Opinion 93-39 (a copy of which is enclosed), the Commission concluded that all employees in the executive branch, including temporary employees, are public servants under KRS Chapter 11A. However, in Advisory Opinion 98-42 (a copy of which is enclosed), the Commission concluded that substitute teachers who are not appointed through an employment document (P-1), but work on an occasional basis as needed, are not public servants. Similarly, the Commission believes that contract workers hired by the Department to work on special projects are not public servants subject to the requirements of KRS Chapter 11A. Although they may be employees for tax purposes, because of the nature and duration of their employment, and because they are not hired through an employment document (P-1), the Commission does not believe that they are subject to the Executive Branch Code of Ethics.

KRS 11A.020(1) 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.

The Commission believes that the Director is not prohibited from employing, privately, those individuals who also are employed by the Department as contract workers. However, the Commission cautions the Director not to use his official position with the Department to give himself an advantage in any way. Specifically, the Director should not require workers to work for him privately as a condition of their employment with the Department. He should pay them a fair wage and make a clear distinction between their official duties for the Department and the work they provide for him privately. We caution the Director not to make contacts during state time pertaining to his private project and not to use state materials or equipment.

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Because the contract workers are actually doing business with the Department, and thus are vendors of the Department, the Commission believes that the Director should be very careful to avoid even the appearance of a conflict of interest.

The employee and his spouse may accept the five percent (5%) discount from the hardware store. Although the store does business with the Commonwealth, the Commission does not believe that the discount given by the hardware store is a gift because the store receives consideration for the discount (sole source for purchases).

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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By Chair: Bertie Oldham Salyer, M.A., A.M.E.

Enclosures: Advisory Opinion 93-39  
Advisory Opinion 98-42