

Office of the President
December 7, 2010

Members, Board of Trustees:

APPROVAL OF AN EXCEPTION TO KENTUCKY STATUTE

Recommendation: that the Board of Trustees approve an exception to Kentucky Revised Statutes 164.131(7), under Governing Regulation I.E.1 and Kentucky Revised Statutes 164.367, upon recommendation of President Lee Todd and as outlined in the attached Recommendation of the University Ethics Committee.

Background: The UK Arts in HealthCare Program will provide local, national, and international art throughout the new Chandler hospitals and clinics. The program is proposing to contract to purchase an original piece of art from UK College of Fine Arts, Department of Art, faculty Arturo Sandoval, who is one of Kentucky's most original, influential, and significant artists and whose work is in the collections of the New York City Museum of Modern Art's Architecture and Design Collection, as well as galleries and private collections throughout the United States and the world.

KRS 164.131(7) prohibits an employee from having an interest in a contract with the University, unless approved by the Board. KRS 164.367 allows the University to establish a procedure whereby the Board may approve an employee having an interest in a contract with the University. Governing Regulation I.D.2.1 provides that procedure. Pursuant to the procedure, the Ethics Committee evaluates five criteria and makes a recommendation to the President. After evaluating the Ethics Committee's recommendation, the President may make a recommendation that the Board approve the relationship.

In reviewing the facts in accordance with the five criteria from GR I.D.2.1, the Ethics Committee has determined that:

- (i) Commissioning a work by probably the most renowned artist at the University and a native Kentuckian clearly fits the concept of being in the best interest of the University.
- (ii) Since the artists initially selected by the Arts in HealthCare Program staff were unaware that their names were submitted, and since Professor Sandoval has no influence or control over the decision makers, there was sufficient separation that no conflict of interest exists.

(iii) This purchase of artwork by the University is not subject to KRS Chapter 45A, the Kentucky Model Procurement Code. This commissioned work is a “best value” because the purchase and price were determined in consultation with the Arts in HealthCare Committee and the UK Arts in HealthCare staff. The negotiated price agreed to by Professor Sandoval was a substantial discount because the client was UK.

(iv) Since Department of Art Chair Ben Withers will approve and monitor a plan as to when Professor Sandoval will create this piece, there will be compliance with the University’s Conflict of Commitment regulation and the Department of Art’s guidelines.

(v) Through a plan of six efforts, the Ethics Committee concludes that there is sufficient and full disclose of Professor Sandoval’s interest in this contract.

President Todd accepted the Committee's recommendations and recommends that the Board approve Professor Sandoval’s interest in the contract with the University.

The attached opinion of the Ethics Committee fully discloses the nature of the conflict of interest and the reasons that the Board should take this action.

Action taken: Approved Disapproved Other _____

November 16, 2010

MEMORANDUM

TO: Lee T. Todd, Jr., President

FROM: T. Lynn Williamson, University Ethics Committee, Chair

RE: RECOMMENDATION

FACTS:

The UK Arts in HealthCare Program, an initiative of the new UK Chandler Hospital, will provide multiple forms of art throughout the new UK hospitals and clinics. The program, made possible entirely through private funds, will highlight local, national and international artists. Dr. Michael Karpf, Executive Vice President for Health Affairs, has stated: "The arts enhance the healing environment, but they also invite people to visit the hospital when they are well. If patients and families are familiar with the hospital, they will feel more comfortable in a time of need."

As a part of this program, the UK Arts in HealthCare Program is proposing to contract to purchase an original piece of art from UK College of Fine Arts, Department of Art, faculty Arturo Sandoval. Professor Sandoval is a fiber artist whose experimental techniques and expressive interpretations have earned him an international reputation. Professor Sandoval is one of Kentucky's most original, influential and significant artists. His extensive collection of artwork is in the collections of the New York City Museum of Modern Art's Architecture and Design Collection, as well as galleries and private collections throughout the United States and the world.

The UK Arts in HealthCare Committee, a volunteer community advisory council appointed by Dr. Karpf and composed of faculty, community leaders and leading local art collectors, has the mission of selecting the art work for the new Chandler Hospital. Upon recommendation of the Committee, the UK Arts in HealthCare Program is proposing to contract with Cerlan Gallery for a commissioned, original work of art, based on a preliminary design submitted by Professor Sandoval, for

the First Floor Surgical Waiting Area of the new Hospital. The payment to Cerlan Gallery would be \$12,000. The price was determined in consultation with the UK Arts in HealthCare Committee.

APPLICABLE REGULATIONS:

Governing Regulation I.D.2.(I) Financial Advantage

“Members of the University community must exhibit personal integrity, honesty and responsibility in all actions. Official position or office shall not be used to obtain financial gain or benefits for oneself or members of one’s family or business associates. Any action that creates the appearance of impropriety should be avoided. Except as specifically approved by the Board, purchases and *contracts shall not be made with an employee of the University of Kentucky for any item of supply, equipment, or service, nor may an employee have any interest, directly or indirectly, in any purchase made by the University of Kentucky....*”

Further, at the end of “Financial Advantage,” there is a section whereby an exception for an unusual case concerning financial interest may be approved by the Board of Trustees. The language notes that one seeking approval of an exception “under this section shall first make an application to the University Ethics Committee by submitting in writing a full disclosure of all aspects of his or her relationship with the contracting company or business. The Ethics Committee shall make a recommendation to the President, who shall forward to the Board the Committee’s recommendation together with his or her recommendation.”

The GR’s language permitting the exception continues, “In recommending approval of a contractual relationship, the Committee shall determine that:

- (i) the contractual relationship is in the best interest of the University;
- (ii) the employee has taken whatever actions are necessary to avoid any conflict of interest or any appearance of a conflict of interest;
- (iii) if the conflict is subject to the provision of KRS Chapter 45A, the employee’s contract shall be the lowest price bid or otherwise provides the best value to the University;
- (iv) the employee’s interest in the contract does not present a conflict with the employee performing his or her job; and,
- (v) the nature of the contract and the nature of the employee’s interest in the contract or business shall be fully disclosed to the University community by as broad communications as feasibly possible.

Action taken by the Board shall be in open session, by affirmative vote. The action item shall fully disclose the nature of the conflict, and the reasons for the action.”

Governing Regulation I. E.

E. Kentucky Ethics Statutes

1. Unless specifically approved by the Board, no employee of the University shall be directly or indirectly interested in any contract with the University for the sale of property, materials, supplies, equipment, or services, with the exception of compensation to the two (2) faculty members and the one (1) staff employee who are members of the Board of Trustees. [KRS 164.131(7)]

DISCUSSION:

The language in the University's Governing Regulation I.D.2.I. basically parallels the language in Kentucky Revised Statutes, KRS Chapter 164.131(7).

Governing Regulation I.D.2 (I) begins by stating that all University Members are held to the standard of exhibiting "...personal integrity, honesty and responsibility...." It provides that a University member may not use one's "official position" to "obtain financial gain or benefits for oneself or members of one's family...." Further, this states, "Except as specifically approved by the Board, purchases and contracts shall not be made with an employee of the University of Kentucky for any item of supply, equipment, or service, nor may an employee have any interest, directly or indirectly, in any purchase made by the University...." The KRS statute applies to "employees" whereby an employee might contract to sell and the University might contract to purchase property, material, supplies, or services. The statute even enumerates an exception for employment contracts (sic) by the employee members of the Board (faculty and staff).

Per the facts noted above, although the UK Art in HealthCare Program is technically contracting with Cerlan Gallery, the contract is for a University employee to create a piece of art for the University. If the Cerlan Gallery already owned a piece of art of a University employee, and the sale from the Gallery to the University proceeded per University Purchasing Regulations and in compliance with KRS Chapter 45A, there might be a debate as to whether the facts present a violation of the noted Regulations. Since the contract is a commission for a specific artist (University employee), the contract falls under the above noted regulations.

The second half of GR I.D.2.(I) provides a procedure whereby an employee may seek an exception to the regulation and thus be a party to a contract with the University. The exception procedure mirrors language in KRS 164.367 whereby a board of trustees or regents may permit an employee to have an interest in a contract. Officials at UK sought this exception to the statute from members of the General Assembly after dealing with a couple of cases whereby research employees owned invented or patented products that could produce significant contracts/grants to the University. Since the Kentucky Legislature passed this legislation, the University Board of Trustees has approved two exceptions.

The wording of the regulation provides a process for an exception for an employee to have a contract or an interest in a contract with the University. The Ethics Committee uses the exception criteria to recommend or not recommend an exception in this case. This Committee reviews these five criteria and makes a recommendation to you as President of the University.

(i) The first criteria is that the contractual relationship is in the best interest of the University. Professor Sandoval is a locally, nationally, and internationally recognized artist. The UK Art in HealthCare Program has placed a significant effort to purchase Kentucky art. Professor Sandoval is a native of Lexington and a faculty member at the University for 36+ years. The Ethics Committee believes that commissioning a work by probably the most renowned artist at the University and a native Lexington Kentuckian for the extensive exhibit of art in the new Chandler Hospital clearly fits the concept of being in the best interest of the University.

(ii) The second criteria is that the University member (employee Sandoval) has taken whatever actions are necessary to avoid any conflict of interest or any appearance of a conflict of interest. The volunteer community advisory council, UK Arts in HealthCare Committee, has the mission of selecting the art work for the new Chandler Hospital. Aside from internationally commissioned pieces in key public locations, the Committee was charged with selecting a core collection that features artists who work in all media, who have a Kentucky connection, and many of whom have achieved national or international attention. The UK Arts in HealthCare Program office staff compiled a list of Kentucky or Kentucky-connected artists for possible commission for piece(s) in the surgical area. From that list of artists, the Committee chose Arturo Sandoval. Professor Sandoval was asked to submit a concept for a unique piece to be commissioned for the surgical area. The Committee has accepted Professor Sandoval's concept and asked the staff to complete a contract. The Ethics Committee sees no conflict of interest and no appearance of a conflict of interest in the proposal to commission Professor Sandoval for this piece. The names of the artists were submitted by the Arts in HealthCare Program staff. The artists, including Professor Sandoval, were unaware that their names were being submitted. The Committee making the decision was an advisory council over which Professor Sandoval has no influence or control. Further, the Committee is not a UK committee; thus, there is sufficient separation that neither a conflict nor an appearance of a conflict of interest exists.

(iii) The third criteria is, if the conflict is subject to the provision of KRS Chapter 45A, the University member's contract shall be the lowest price bid or otherwise provide the best value to the University. The Ethics Committee concurs with the Director of Purchasing that artwork purchased by the University, including this commissioned piece by Professor Sandoval, may be purchased under the provisions of the noncompetitive negotiation section of Chapter 45A, the

Kentucky Model Procurement Code. Section 45A.095 provides for noncompetitive negotiation for “sole source purchases, or when competition is not feasible, as determined by the purchasing officer prior to the award. As a guideline, Title 200 KAR 5:309 Section 1 (7) of the Kentucky Administrative Regulations states that contracts may be awarded on the basis of noncompetitive negotiations for “recordings, films, and works of art for museum and public display.” As to the “best value” criteria, the price of the commissioned work was determined in consultation with the Arts in HealthCare Committee; the UK Arts in HealthCare staff negotiated the price, and Professor Sandoval agreed to a substantial discount because the client was UK, a public non-profit organization.

(iv) The fourth criteria is that the employee’s interest in the contract does not present a conflict with the employee performing his or her job. Governing Regulation I.D.2.i. addresses “Conflict of Commitment” by stating as follows: “The University of Kentucky permits external employment or self-employment in an employee’s profession or specialty...where there is not a conflict of interest or commitment. Faculty and professional administrative employees are expected to devote their primary professional loyalty, time, and energy to University of Kentucky teaching, research and service endeavors; activities outside the University must be conducted without detracting from these primary commitments. A conflict of commitment generally occurs when the pursuit of outside activities interferes with obligations to students, to colleagues and to the missions of the University.”

Although Administrative Regulation 3:9 Faculty Consulting and Other Overload Employment Outside the University states policies as to consulting employment “outside” UK, we believe that the principles of AR 3:9 should apply in this case, along with the guidelines in the UK Department of Art whereby art faculty are permitted to create works of art. The Ethics Committee recommends that the Department Chair Ben Withers monitor the situation and approve a plan by Professor Sandoval as to when he will produce this piece so as to comply with the University’s Conflict of Commitment regulation and the Department of Art’s guidelines, and not interfere with Professor Sandoval’s instruction obligations.

(v) The fifth and final criteria is that the nature of the contract and the nature of the University member’s interest in the contract or business shall be fully disclosed to the University community by as broad communications as feasibly possible. Most of the art work in the First Floor Surgical Waiting Area of the new Hospital are commissioned pieces. Information about the pieces and the artists who created the pieces will be a part of a wide communication plan. (a) The UK Public Relations Office will make press releases concerning Art in HealthCare nearer the time of the opening of the new Chandler Hospital. Thus, the works of art and the artists will receive wide-spread note in the media. (b) A coffee-table book produced on the art in the new facility will feature the art, the artists, and the processes of the creation of their art. (c) A brochure as well as a cell phone application will feature the art and give self-guided tours. (d) A dedicated

channel in the Chandler Hospital will feature the artists and their art. (e) The web pages for UK Arts in HealthCare will feature the artists and their works. (f) Finally, all contracts of the University are public documents. In addition, opinions of the Ethics Committee are also public documents. The Committee concludes that all of these actions will sufficiently and fully disclose Professor Sandoval's interest in this contract.

CONCLUSION and RECOMMENDATION:

Having reviewed the facts of this case and the criteria set forth in GR I.D.2.I., the University Ethics Committee concludes that the required criteria have been met for an exception under the regulation. The Committee recommends that you forward a recommendation to the Board of Trustees that they approve the requested contractual arrangement as per the attached "Commission Agreement for Artwork".

ATTACHMENT (1)

C: Dr. E. Britt Brockman, Chair, Board of Trustees
Dr. Kumble Subbaswamy, Provost
Dr. Michael Karpf, Executive Vice President for Health Affairs
Dr. Michael S. Tick, Dean, College of Fine Arts
Dr. Benjamin C. Withers, Chair, Department of Art
Professor Arturo Sandoval, Department of Art
Members of the Ethics Committee:
Dr. Jeannine Blackwell, Dean, The Graduate School and Associate
Provost for Academic Administration
Dr. Judith Lesnaw, Professor, Biology Department, College of Arts
& Sciences and University Senate Representative
David Melanson, Public Relations Office & Staff Senate
Representative
Brett Short, Chief Compliance Officer, UK HealthCare
Jack Supplee, Director, Administrative & Fiscal Affairs, Office of the
Vice President for Research, Associate Director & Secretary
for UK Research Foundation
Kim Wilson, Associate Vice President for Human Resources
Joseph Reed, Senior Director, Internal Audit
Bill Harris, Director of Purchasing