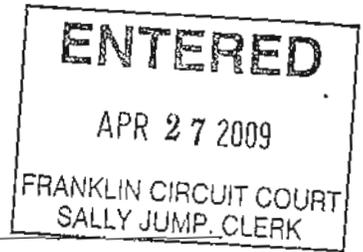




Opinion and Order
04-CI-1441

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II



CIVIL ACTION No. 04-CI-1441

WILLIAM HUFFMAN

APPELLANT

vs.

EXECUTIVE BRANCH ETHICS COMMISSION

APPELLEE

OPINION AND ORDER

This matter is before the Court upon the Appellant's, Mr. William L. Huffman, *Petition of Appeal* from the *Final Order* of the Appellee, the Executive Branch Ethics Commission (hereinafter, the "Ethics Commission"), adopting in its entirety the Findings of Fact, Conclusions of Law and Recommended Order (hereinafter, "Findings and Conclusions") of the Hearing Officer dated September 8, 2004. Pursuant to the *Final Order*, the Ethics Commission found the Appellant to have committed unethical conduct in violation of KRS 11A.020(1)(c) and (d), on the basis of the following acts:

- a. Claiming sick leave from the Plaintiff's state employer, on thirteen (13) separate occasions, for time periods when, in fact, he was working on a private legal case; and
- b. Misusing state-owned equipment (i.e., telephones, electronic facsimile machines, office computers, etc.) to create, transmit or otherwise process documents for use in his private legal case(s), from approximately 2001 until approximately February of 2003

For the foregoing violations, the Ethics Commission imposed the penalty of a public reprimand and a fine of \$2,500. The Ethics Commission, however, held in abeyance the enforcement of the penalty until the final disposition of this Appeal.

BACKGROUND FACTS

The Appellant is a licensed attorney in the Commonwealth since 1970. He was a classified state employee with status at the Department of Labor for at least thirteen years. Prior to his resignation on February 21, 2003, he served as a Staff Attorney in the classified service at the Division of Worker's Compensation Funds (hereinafter, the "Division"). His official responsibilities included attending benefit conferences and hearings, reviewing claim applications, reviewing and evaluating claim files for settlement purposes, attending depositions, performing legal research and drafting motions, memoranda and briefs. While employed at the Division, the Appellant obtained outside employment and served as co-counsel in a federal civil rights suit (the "Private Suit") against the Lexington-Fayette Urban County Government. The Private Suit was not related to the Appellant's official duties at the Division. After the Private Suit was settled for \$2,400,000.00, a fee dispute arose between the Appellant and one of his co-counsels.¹ At the fee dispute proceeding,² the Appellant gave a deposition which related to the working conditions at the Division. The substance of the Appellant's testimony at said deposition, which was investigated by the Ethics Commission, was as follows:

- a. "[The Appellant] was of the opinion that sending personal FAX messages on his employer's electronic facsimile machine was permitted, if not done for profit;
- b. "[The Appellant] and other employees employed by the Division routinely worked only 1.5 hours per day, and they read books the rest of the time; and
- c. Due to expected layoffs within the Division at the end of Governor Paul Patton's administration, the Secretary of Labor represented that he would carry the attorneys through the end of the administration."

¹ The attorneys at the Private Suit were awarded a fee of nearly \$960,000.00.

² The record establish that the Appellant initiated the fee dispute proceeding, claiming that he was entitled to receive an additional fee in excess of \$100,000.00.

Local print and broadcast media carried the story in their news reports and published the contents of the Appellant's testimony. In response to the news reports, the Labor Cabinet conducted on February 10, 2003 an internal investigation of the Appellant's allegations of malfeasance and misfeasance at the Division.

In the meantime, and shortly after the investigation commenced, the Appellant tendered his resignation to the Director of the Division, Mr. Robert Whitaker. His resignation was accepted, effective February 14, 2003.

Notwithstanding the Appellant's resignation, the Labor Cabinet continued with its internal investigation and uncovered the evidence below documenting the activities of the Appellant at the Division:

1. an accounting of telephone calls made by the Appellant from his work phone from January 2001 through December 2002;
2. his time sheets for various periods during his employment with the Division;
3. copies of billing records from the law offices of J. Dale Golden which reflect instances during business hours when the Appellant appeared in Mr. Golden's law office in Lexington, to discuss private legal matters;
4. documents retrieved at the Appellant's state office computer;
5. copies of faxed transmissions sent from the Appellant's office facsimile machine to attorneys Dale Golden and Michael Baker regarding a legal matter unrelated to the Appellant's work responsibilities.

Simultaneous with the internal investigation of the Labor Cabinet, the Ethics Commission commenced its own investigation of the Appellant on February 22, 2003.

After completing its investigation on July 31, 2004, the Ethics Commission filed an Initiating Order against the Appellant for violations of KRS 11A.020(1)(c) and (d).

Whether the Appellant was afforded the rights and process prescribed under KRS 13B is not an issue in this appeal. The record reflects that the Ethics Commission observed the procedure prescribed in KRS 13B, as required under KRS 11A.100.

STANDARD OF REVIEW

The standard of judicial review for decisions of the Ethics Committee are the same standards found in KRS 13B for reviewing administrative agency decision. It is fundamental that judicial review insure that an agency action is not arbitrary and that the correct rule of law was applied to the facts of the case. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). The task of this Court in administrative matters is one of review, not of reinterpretation. *Kentucky Unemployment Ins. Commission v. King*, 657 S.W. 2d 250, 251 (Ky Ct. App. 1983). The framework for judicial review of administrative action, codified in KRS 13B.150, confines this Court's authority to determining whether the agency decision: a) violates constitutional or statutory provisions; b) is in excess of the agency's statutory authority; c) is supported by substantial evidence based upon the whole record; d) is arbitrary, capricious or constitutes an abuse of discretion; e) is based upon improper and prejudicial ex parte communications; f) has been prejudiced by the failure to disqualify the hearing officer; or g) is deficient as otherwise provided by law. The statute also clearly specifies that the reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." KRS 13B.150(2). Furthermore, we are bound by the agency's properly supported factual findings, regardless of the existence of conflicting evidence in the record. *Urella v. Ky. Board of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. Ct. App. 1997).

ANALYSIS

Before the Court begins its judicial review of the Ethics Commission's Final Order, it is appropriate to focus our attention initially on the origin, purpose and scope of the KRS

Chapter 11A, also known as the “Executive Branch Code of Ethics,” (hereinafter, the “Code of Ethics”).

Ethics in government or in public service is the application of basic moral standards to government. It is a set of rules that translate characteristic ideals or ethos in everyday practice. Ethics bestows conduct that is fair, just and socially responsible. The primary objective of a code of ethics in government is to hold accountable government employees who place personal gain, economic or otherwise, above the discharge of their fiduciary duty to the public. See *Zerweck v. Commission on Ethics*, 409 So.2d 57, 60 (Fla Dist. Ct. App. 1992). Ethics regulation serve a valuable purpose in government and in public service – ethics in government assists the state employees focus on the public nature of their duties and instills in them a sense of public accountability.

In 1992, our General Assembly adopted the Code of Ethics for public servants in the Executive Branch. The Code of Ethics sets the minimum standards of ethical behavior expected of every public servant. The obvious purpose of the Code of Ethics is to insure honesty from state employees, and restore the public’s confidence in their government. See KRS 11A.005. As most government code of ethics, Kentucky’s Code of Ethics is based on the maxim that “no man may serve two masters,” which is especially pertinent if one of the masters happens to be economic self-interest.

In the case at bar, the Hearing Officer and the Ethics Commission found the Appellant to have used his official position for his own financial gain, as well as in securing a privilege or advantage in derogation of the public interest at large. In short, the Appellant failed to live up to the ethical standard expected of him as a public servant.

In his Appeal, the Appellant challenges the Ethic Commission’s Final Order on the following grounds: (1) the Ethics Commission did not have jurisdiction to impose

penalties against a classified state employee for violations of administrative regulations relating to sick pay; (2) the doctrine of issue preclusion and *res judicata* barred the proceedings before the Ethics Commission; (3) the Appellant enjoyed equal protection of the laws; and (4) the Final Order was not supported by substantial evidence.

The Court will focus its discussion and analysis on the first two grounds only. The Appellant failed to present any argument in support of his assertion that he was denied his right to equal protection of the laws. Nothing in his brief expound on this ground. Moreover, the Appellant admitted, by way of stipulation, that he claimed sick leave, on at least thirteen (13) separate occasions, for days when he was, in fact, not sick but was working on a private legal matter, (i.e., the Private Suit). He further stipulates that he used government equipment in connection with the Private Suit. Having admitted the substance of the unethical conduct charged, there are no genuine issues of material fact requiring an examination of whether the Ethics Commission's finding of unethical conduct is supported by substantial evidence.

The Ethics Commission lacked jurisdiction to impose penalties against a classified state employee for violations of administrative regulations relating to sick pay

The Appellant contends that the Ethics Commission is not charged with oversight of personnel matters, i.e., misuse of sick leave or government equipment and supplies, and is not an adjunct of the Personnel Board. The Appellant posits that the Ethics Commission has a special or higher mandate than overseeing personnel and employment issues. The Ethics Commission is charged by law to police Executive Branch officials who profit from their position, who use their contacts and/or expertise gained from their state employment to benefit themselves at the state's expense. According to the Appellant, he is not an "official" under KRS 11A, which the Appellant insinuates is the

only focal point of the Code of Ethics. To the Appellant, his misconduct did not involve “securing some advantage contrary to the public interest.”

The Court disagrees. Without a doubt, the Personnel Board has comprehensive authority in regulating the personnel system in the agencies of the state government. The Ethics Commission, on the other hand, serves a different function and purpose: to promote and protect the public’s confidence, trust and faith in our governmental institutions. The object of their respective jurisdiction may overlap, but the subject and purpose of their mandate are not the same. The Personnel Board directs its authority upon the status of a classified state employee vis-à-vis the state, in the latter’s capacity as an employer, while the Ethics Commission direct its authority upon the personal conduct of a present or former state employee vis-à-vis the public. Unlike that of the Personnel Board, the statutory system of the Ethics Commission is to promote ethical conduct of present and former public employees, and to investigate and adjudicate ethical violations. See *Executive Branch Ethics Commission v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). The jurisdiction and mandate of the Personnel Board should not be so broadly interpreted as to nullify the provisions of KRS 11A. In the words of our Supreme Court in *Executive Branch Ethics Commission v. Stephens, supra*, “it is abundantly clear that such was not the intention of the General Assembly when enacting the ethics code.” *Executive Branch Ethics Commission v. Stephens*, 92 S.W.3d at 73. KRS 18A applies to the employment status of classified personnel, while KRS 11A targets the personal behavior of the state’s personnel. Even where there is doubt from the language used by the legislature as to the intent and purpose behind the ethics code, it is a cardinal rule of interpretation for this Court to avoid a construction which is unreasonable and absurd in preference to one

which is reasonable, rational, sensible and intelligent. See *Johnson v. Frankfort and Cincinnati R.R., et al.*, 197 S.W.2d 432, 434 (Ky. 1946).

Here, the basis for a finding of unethical conduct relates to his misuse of sick leave and of government equipment and supplies. Concededly, the Appellant's (mis)conduct could have been subject to discipline by the applicable appointing authority, i.e., the Director of the Division or the Secretary of the Labor Cabinet. Regardless of whether he was subject to any discipline or penalization by his appointing authority,³ his misconduct had other dimensions, one of which properly triggered the jurisdiction of the Ethics Commission. The Appellant's misconduct constitutes a breach of the public trust, and a breach of a fiduciary obligation when dealing with public property, i.e., public funds, government equipment and supplies. Moreover, his conduct, carried out to obtain a personal benefit, i.e., compensation from outside employment, was tainted with a conflict between his personal interest and that of his fiduciary duty to the public. In cases of such conflicts of interests, the Ethics Commission properly has jurisdiction to investigate and adjudicate. A public office is a trust conferred by the public, and the holder of such office may not directly or indirectly use it for personal gain. The Appellant, a government lawyer, is required to hold his office faithfully and honestly at all times. Considering the foregoing, the Court finds that the Ethics Commission acted in accordance with law when it investigated and adjudicated allegations of the Appellant's unethical conduct.

Turning to the Appellant's assertion that he is not a public official which is the target of KRS 11A, his assertion is clearly erroneous. The ethical conduct and standards prescribed under KRS 11A apply to all public servants. Under KRS 11A.010(9), a

³ The Appellant voluntarily resigned from his employment with the Division, (without loss of any of his retirement benefits), rendering moot any disciplinary action by the Division or the Secretary of the Labor Cabinet.

“public servant” is defined as and includes “all employees in the executive branch including ... merit employees.”⁴ From the lowliest janitor to the highest office in the Executive Branch, i.e., the Governor, each and every public servant is called upon to observe and live according to the same standards of ethical conduct, the Appellant included.

The Court also takes a brief moment to address the Appellant’s contention that his conduct did not involve “securing some advantage contrary to the public interest.” According to the Appellant, any economic loss to the state from his misconduct is “minimal, and probably non-existent.”⁵ He contends that investigating and penalizing the nature of misconduct in this case is like opening a pandora’s box. He asks this Court to take judicial notice that “sick leave was and is routinely used by government employees to offset the inequity of comp time nightmare.”

The goal or mission which the Code of Ethics addresses is not simply to recoup the monetary value of the privilege, benefit or advantage misused and/or abused by a public servant. What is more valuable than recovering any economic loss to the State’s treasury is preventing the erosion of (and restoring) the public’s confidence in the government and their public servant. The public’s confidence in government is to a large extent determined by the reputation for honesty of the government employees. “A democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.” *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). The Appellant’s dishonest conduct in this

⁴ The term “public servant” also includes the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the Treasurer, the Commissioner of Agricultural and the Auditor of Public Accounts.

⁵ See Appellant’s Brief, p. 2.

case, underscored by his callous attempt to justify or mitigate the damage he inflicted upon his office, threaten to bring all public servants in disrepute and our governmental institutions as a whole in jeopardy. His excuse, that other state employees have misused and abused public trust and public office, neither justifies nor exonerates him for his own unethical conduct. If, as the Appellant claims, the practice of abuse and misuse of the public trust is endemic in the Executive Branch, he, as a public servant, should have reported the abuses (through established and recognized channels) instead of rationalizing his own deceitful behavior.

Considering the foregoing, the Ethics Commission correctly exercised jurisdiction to hold the Appellant responsible and accountable for his unethical conduct in public service.

The doctrine of issue preclusion and res judicata barred the proceedings before the Ethics Commission

The Appellant next argues that the investigation conducted by the Ethics Commission is barred because he already resigned and that the “arrangement” for his voluntary resignation was reached to the satisfaction of the Director of his (the Appellant’s) Division, Mr. Bob Whitaker.

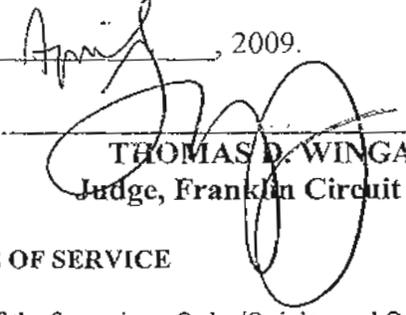
The Court agrees with the Ethics Commission that it had jurisdiction to pursue an independent investigation of the Appellant’s unethical conduct in violation of KRS 11A.020(1)(c) and (d). Any arrangement which the Appellant may have entered into with the Director of his Division, or even with the Secretary of the Labor Cabinet, did not clothe him with immunity from any other investigation of a violation of law or regulation, whether administrative, criminal or professional. Neither Mr. Whitaker nor the Secretary of the Labor Cabinet had any legal authority to grant the Appellant any

immunity from any other related prosecution. In any case, *res judicata* does not apply where the elements of the offenses or violations charged are not identical.

ACCORDINGLY, the Final Order of the Executive Branch Ethics Commission is hereby **AFFIRMED**. The Petition of Appeal is hereby **DISMISSED WITH PREJUDICE**.

This Order is final and appealable and there is no just cause for delay.

SO ORDERED, this 27 day of April, 2009.


THOMAS D. WINGATE
Judge, Franklin Circuit Court

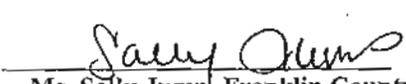
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order/Opinion and Order was mailed, this 27 day of April, to the following:

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