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EXECUTIVE BRANCH
ETHICS COMMISSION

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NOs. 12-CI-0512, 0760, and 0996
CONSOLIDATED INTO 12-CI-512

FELICIA WOOTEN
JAMES D. WOOTON, and
RON G. WINTERS **PETITIONER**

V. **OPINION AND ORDER**

KENTUCKY EXECUTIVE BRANCH
ETHICS COMMISSION **DEFENDANTS**

This matter is before the Court on Petitioners' appeals from Final Orders of the Kentucky Executive Branch Ethics Commission (hereinafter the "Commission") under KRS 11A.100 and KRS 13B.140. The issues have been fully briefed by the parties. Having reviewed the record and being otherwise sufficiently advised, the Court hereby **REVERSES** the Orders of the Commission, for the reasons stated below.

I. Background

The relevant factual background is undisputed. Petitioners are all elected Property Valuation Administrators (hereinafter "PVAs"). Beginning in the summer of 2007, the Commission initiated investigations into Petitioners' office hiring and promotion practices. Following separate investigations, in September 2008 all three Petitioners were charged with "using [his or her] official position or office to obtain financial gain for a member of [his or her] family," in violation of KRS 11A.020(1)(c). Petitioners' charges were based on either promotion of a family member already employed in their PVA office, or hiring a family member to work in

their PVA office. Petitioners Felicia Wooten, James D. Wooten, and Ron G. Winters were all found to have violated the Ethics Code based on findings of hiring or promoting relatives. The factual circumstances leading to Petitioners' penalization vary, but all petitioner were charged with hiring or promoting family members to work in their PVA offices.

A. Felicia Wooten

Felicia Wooten worked in the Harlan County Property Valuation Administrator's Office beginning in the early 1990's. (Nov. 1, 2011 Hearing Transcript, pp. 135-136) Felicia Wooten's son, Derrick Wooten, was first hired by Harlan County PVA Jerry Blanton in 2001. (*See* Nov. 1, 2011 Hearing Exhibit 7) In 2006, after Jerry Blanton retired, Felicia Wooten was elected Harlan County PVA. (Nov. 1, 2011 Hearing, Exhibit 3) Petitioner Wooten's orientation as a PVA did include some ethics training. (Nov. 1 Hearing Transcript, p. 92) In December 2006, Petitioner Wooten submitted a Request for Personnel Action ("RPA") to the Department of Revenue recommending her son, Derrick Wooten, for a discretionary promotion. (Nov. 1, 2011 Hearing, Exhibit 1) Derrick Wooten's promotion resulted in a salary increase. Petitioner Wooten also requested that Derrick Wooten's position be reclassified in 2007, which also resulted in a grade and salary increase. (Nov. 1, 2011 Hearing, Exhibit 6) The Commission concedes that the reclassification did not violate the Ethics Code, but did assert that the promotion of her son violated KRS11A.020(1)(c). (Nov. 1, 2011 Hearing Transcript, p. 32) The Commission entered a Final Order finding that Ms. Wooten violated KRS 11A.020(1)(c) by promoting her son, and ordering her to cease and desist any further violation of the statute. The Commission presented no evidence of illegal or unethical conduct on the part of Derrick Wooten, nor is there anything of record indicating that he is unqualified to perform the work he was hired to do.

B. James D. Wooton

Petitioner Wooton became PVA in Leslie County in 2002. In 2006 Mr. Wooton submitted a RPA to the Department of Revenue recommending that his daughter, Mara Wooton, begin working for him in the Leslie County PVA Office as a General Deputy Trainee. (Dec. 8, 2011 Hearing, Exhibit 1) This position was part time and seasonal. (Dec. 8, 2011 Hearing Transcript, pp. 76-77; Hearing Exhibit 1) Mr. Wooton submitted a second RPA again for Mara Wooton to work while she was home from college over her holiday break in 2006, and this employment was terminated on January 10, 2007. (Dec. 8, 2011 Hearing Transcript, pp. 76-77) Mara Wooton was also employed as a seasonal, part-time employee during the summer of 2007 and over the 2007 holiday. (*See* Dec. 8, 2011 Hearing Transcript, pp. 76-77; Hearing Exhibits 6, 8, 9, and 10) Mara Wooton was again employed as a seasonal, part-time employee in the PVA Office during the summer of 2008. In all, Petitioner Wooton submitted five RPAs to the Department of Revenue seeking seasonal employment for his daughter. Mr. Wooton stated that he did not interview anyone else or consider anyone else for the positions in which he placed his daughter. (Dec. 8, 2011 Hearing Transcript, pp. 76) Mr. Wooton acknowledged that he attended ethics training for new PVAs in 2002, and admitted that in 2006 or 2007 he became aware that the Ethics Commission viewed the conduct of hiring family members to violate the Ethics Code, but continued to recommend his daughter for hire. (Dec. 8, 2011 Hearing Transcript, pp. 81) The Commission presented no evidence of illegal or unethical conduct on the part of Mara Wooton, nor is there anything of record indicating that she is unqualified to perform the work she was hired to do. The Commission's Final Order directed Mr. Wooton to prominently post a copy of KRS 11A.020 in his office, and to pay a penalty of $4,000.00.

C. Ron G. Winters

Mr. Winters became a PVA in Oldham County in 2002, and attended ethics training in that year. (Feb. 7, 2012 Hearing Transcript, p. 90, 189) Petitioner Winters, in 2006, recommended that his wife, Barbara Winters, be promoted from deputy to chief deputy. (Feb. 7, 2012 Hearing, Exhibit 4H) Mrs. Winters reports directly to her husband, and her promotion resulted in a significant salary increase. Previously, Mrs. Winters had been hired by her husband as a part-time employee in 2004, and within five months she was recommended by Petitioner Winters for full-time employment. (Feb. 7, 2012 Hearing, Exhibits 5-6) Mr. Winters acknowledged that he did not advertise the position, and did not interview anyone but his wife for this position. (Feb. 7, 2012 Hearing Transcript, p. 103) Mr. Winters admitted during the hearing that it would be difficult to fire his wife, as the couple lives together. (Feb. 7, 2012 Hearing Transcript, p. 108) The Commission presented no evidence of illegal or unethical conduct on the part of Mr. Winter's wife, nor is there anything of record indicating that she is unqualified to perform the work she was hired to do. The Commission imposed a $5,000.00 fine on Mr. Winters, and ordered him to prominently post a copy of KRS 11A.020 in his office.

D. The Commission's Interpretation of KRS 11A.020(1)(c)

KRS 11A.020(1)(c) was enacted in 1992, and no rules or regulations have ever been adopted by the Commission interpreting this part of the statute. By Advisory Opinion 92-10, the Commission established that PVAs are covered by the Executive Branch Code of Ethics and thus must comply with KRS Chapter 11A. In response to a 1992 inquiry about the PVAs' responsibilities under the Code of Ethics, the Commission stated, "the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices." EXEC. BRANCH ETHICS COMM., Advisory Opinion 93-24 (June 7, 1993). The Opinion goes on to quote

KRS 11A.020(c), and states "the Commission envisions certain circumstances where conflicts of interest could arise under such employment. The Commission encourages your agency to follow policies to avoid any real or perceived conflict of interest in this area." (Id.) By this Advisory Opinion, it is clear that in 1993, soon after the passage of the KRS 11A.020, the Commission did not consider hiring or promoting relatives in PVA offices to be an automatic violation of the Ethics Code.

The Commission later proposed an amendment to KRS Chapter 11A, to address the question of nepotism under the Ethics Code. Legislation was submitted to the 2000 General Assembly, which would have explicitly prohibited employment or promotion of any "member of a public servant's family to an executive branch position which the public servant supervises or manages." House Bill 513, 2000 General Assembly (proposed KRS 11A.035) (Attached to Petition, Exhibit 8).[1] At the time this amendment was proposed, the Commission had initiated proceedings against some PVAs, having informed one such public servant that, "the Commission will put the matter regarding employment of your spouse in the Property Valuation Administrator's office on hold pending the passage of the proposed legislation." (Id.) This proposed legislation was never enacted by the General Assembly.

After the General Assembly failed to enact the proposed legislation, the Commission unilaterally changed its interpretation of KRS 11A.020(1)(c), effectively incorporating the proposed (but rejected) legislative amendments into its own interpretation of KRS Chapter 11A

[1] The proposed nepotism statute specifically stated that "a public servant shall not cause the employment, appointment, promotion, transfer, or advancement of a member of the public servant's family to an executive branch position which the public servant supervises or manages. A public servant shall not participate in an action relating to the discipline of a member of the public servant's family." This legislation was introduced on January 28, 200, and referred to the State Government Committee of the House of Representatives on February 1, 2000. It was posted in committee on February 2, 2000, but on March 8, 2000, its posting was withdrawn and it died without obtaining a hearing in the State Government Committee. *See* Legislative Record (Final Legislative Action), 2000 General Assembly (LRC). (www.lrc.ky.gov/recarch/00rs/HB513).

by administrative fiat. Advisory Opinion 04-34, released by the Commission on its own motion, finds that a public servant may never be involved in a personnel matter concerning a family member. EXEC. BRANCH ETHICS COMM., Advisory Opinion 04-34 (September 30, 2004). The Advisory Opinion goes on to state that "the Commission believes that KRS 11A.020(1)(a), (c), and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment, promotion, transfer, or advancement or a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages." (Id.) Additionally the Advisory Opinion states that direct supervision or evaluation of a family member "could only be perceived as the use of one's official position to give a family member an advantage or financial gain."

The language of this 2004 Advisory Opinion mirrors the language of the rejected 2000 legislation verbatim. This 2004 Advisory Opinion flatly contradicts the 1993 Advisory Opinion. The Commission in 1993 stated that hiring or promoting a family member did not *per se* violate Chapter 11A absent "certain circumstances" which were undefined, but presumably included such things as hiring a relative who was unqualified or paying a relative who did not show up for work. In 2004, the Commission formally opined that the hiring or promoting of a family member by a public servant is a *per se* violation of the Ethics Code.

Finally, in Advisory Opinion 07-19 the Commission addressed its own inconsistency. The Opinion states,

> the Commission believes that the need to be fair to such employees who were in employment situations prior to the issuance of Advisory Opinion 04-34 serves to allow such employee to remain in their positions under the supervision of family members provided the family member takes action to remove as much potential for conflict as possible.

EXEC. BRANCH ETHICS COMM., Advisory Opinion 07-19 (June 29, 2007). This Advisory Opinion goes on to warn that public servant who has promoted or hired a family member after September 30, 2004 may be in violation of the Ethics Code.[2]

E. Appeal of the Commission's Final Orders to Franklin Circuit Court

An initial 2008 Petition for Declaration of Rights was filed by eleven PVAs[3], seeking a declaration that the Commission's interpretation of KRS 11A.020 is unconstitutional and not supported by statutory or regulatory authority. This Court granted summary judgment to the Petitioners on the grounds that PVAs are local elected officials, and not state employees, and thus KRS Chapter 11A does not apply. This ruling was reversed on appeal. The Court of Appeals in Ky. Branch Ethics Com'n v. Atkinson, held that although exhaustion of administrative remedies is not necessary when the constitutionality of a statute is in question, "exhaustion of administrative remedies is not futile to an as applied challenge to a statute. Quite the contrary, it is the administrative actions which determines the extent, if any, of the constitutional injury." 339 S.W.3d 472, 476 (Ky. App. 2010) (*quoting* Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 470 (Ky. 2004)). The Commission, having already investigated the alleged violations of KRS 11A and initiated administrative proceedings, then issued Final Orders against Petitioners for violation of KRS 11A.020(1)(c). Of the eleven Petitioners who were party to the 2008 suit, only five of the Petitioners brought suits

[2] Advisory Opinion 07-19 includes a caveat specific to PVAs. The Opinion states that for PVAs and other public servants elected to their positions, any previously employed family member may retain their position. However, the elected official the responsible for supervising their relatives may only take actions regarding their relative that are fair and impartial. Advisory Opinion 07-19 also notes that Advisory Opinion 06-14 extends these prohibitions to any two employees sharing a household who have a close family-like relationship.

[3] In 08-CI-1798 Petitioners included: Betty Atkinson, Bradford S. Bailey, Phillip R. Mobley, Joyce Parker, Vicky M. Reynolds, Julie R. Shields, Roger W. Tomes, Renee T. True, Ron G. Winters, Felicia M. Wooten, and James D. Wooton. The Commission later appealed this Court's Opinion and Order, this appellate decision styled Ky. Executive Branch Ethics Com'n v. Atkinson, 339 S.W.3d 472 (Ky. App. 2010).

challenging these Final Orders in Franklin Circuit Court.[4] It appears that the other PVAs originally charged were also found guilty by the Commission, but several opted against undertaking another appeal to the court system.

Petitioners Wooton, Wooten, and Winters separately appealed the Commission's Final Orders, challenging the Commission's interpretation of KRS 11A.020(1)(c). By Order entered October 4, 2012, these cases were consolidated. Thereafter the parties briefed the issues, and the Court then took the case under submission. As Petitioners have exhausted all administrative remedies, the sole question before the Court is whether the Commission's interpretation KRS 11A.020(1)(c) was constitutional as applied to Petitioners.

Petitioners assert that the Commission unconstitutionally interpreted and applied KRS 11A.020(1)(c). They argue that the Commission's interpretation of this statute, imposing strict liability for the hiring or promotion of a relative, is arbitrary and capricious. Petitioners note that the Commission presented no evidence of specific misconduct or impropriety, beyond hiring or promoting a family member. The Commission did not dispute that Petitioners were all qualified to be PVAs; that the family members promoted or hired met all necessary educational and experiential qualifications for work in the PVA office; all family members hired were paid for their service within the legally established pay range; and *Requests for Personnel Action* ("RPAs") forms were filed with and approved by the Revenue Department for the promotions and hires at issue. Jojuana Leavell-Greene is a Human Resources employee assigned by the Revenue Department to assist PVAs statewide, and is responsible for approving all RPAs. Ms. Leavell-Greene testified that she was unaware of the Commission's prohibition against hiring and promoting family members until November, 2006. Petitioners assert that November, 2006

[4] Petitioners Joyce Parker and Julie Shields, consolidated in 12-CI-758, were assigned to Franklin Circuit Court, Division II.

was the earliest occasion that they became aware of the Commission's changed position adopting a *per se* prohibition on hiring or promoting relatives. Petitioners submit that employment and promotion of family members within PVA offices has been a common practice throughout the Commonwealth, both before and after adoption of KRS 11A.020. (*See* Petitioner's Consolidated Brief in Support of Appeals, Exhibit A). Citing the Rule of Lenity, Petitioners assert that KRS 11A.020 is ambiguous, and that the Board's Final Orders are punitive and should be overruled. Petitioners also cite the Contemporaneous Construction Doctrine as grounds to overrule the Board's Final Order, asserting that the Respondents' interpretation of KRS 11A.020 is ambiguous and inconsistent with the Commission's prior longstanding interpretation.

The Commission maintains that it correctly applied KRS 11A.020(1)(c) to Petitioners, and found that Petitioners violated the statute based on substantial evidence. KRS 11A.020(1)(c) explicitly forbids public servants from using their official position to obtain financial gain for members of their family, and the Commission asserts that Petitioners' hiring and promotion of family members plainly violated this statute. A court may not substitute its own construction of a statutory provision for a reasonable interpretation by an administrative agency. Respondents argue that their interpretation and application of KRS 11A.020(1)(c) is reasonable, and thus this Court must affirm the Final Orders.

Standard of Review

This Court may only overturn an agency decision on review where the "agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record." Lindall v. Kentucky Retirement Systems, 112 S.W.3d 391, 394 (Ky. App. 2003). If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be

affirmed. Brown Hotel Co. v. Edwards, 365 S.W.2d 299, 302 (Ky. 1963). "A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations as long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious." Trading Post Mgmt. Co., LLC v. Ky. Unemployment Ins. Com'n, 335 S.W.3d 451, 454 (Ky. App. 2011) (*quoting* Commonwealth, Cabinet for Health Services v. Family Home Health Care, Inc., 98 S.W.3d 524, 527 (Ky. App. 2003) (*citations omitted*)).

II. Discussion

1. The Language of KRS 11A.020(1)(c) Cannot Reasonably be Interpreted to Prohibit PVAs from Hiring and Promoting Family Members

Words used in a statute are to be given their common and approved usage. KRS 446.080(4). Upon review of the plain language of KRS 11A.020(1)(c), and the Commission's own disparate interpretations of the statute over time, the Court finds it arbitrary for the Commission to assert that the statute unequivocally prohibits PVAs from hiring or promoting family members. KRS 11A.020(1)(c) was adopted in 1992 and has never been amended by the Legislature. Since its enactment, the Commission has promulgated no rules or regulations interpreting this statute. KRS 11A.020(1)(c) states, "no public servant, by himself or through others, shall use his official position or office to obtain financial gain for himself or any member of the public servant's family." The statute does not mention hiring or promotion of relatives for jobs in which they are paid for services rendered, and the Commission's position that such actions are prohibited is based on its own changing inferences from the ambiguous language of the statute.

"Family" is explicitly defined in KRS 11A.010(4), but "obtain financial gain" is not defined by the statute. In the present action the Commission asserts that "financial gain" can

reasonably be interpreted to encompass any earned "compensation" and "income," two terms which *are* defined by KRS 11A.010. The Court finds the Commission's interpretation to be arbitrary and capricious. Here, the Commission argues that "financial gain" includes earned income or payment for services rendered. Yet the legislature used the defined term "compensation" (and not "financial gain") to describe "money, thing of value, or economic benefit conferred on, or received by, any person in return for services rendered." KRS 11A.010(3).

It is significant that the portion of the statute relied on by the Commission[5] does not provide that a public servant may not "use his official position or office to obtain **compensation** for himself or any members of the public servant's family." The statute uses the term "financial gain" rather than "compensation." Yet if the Commission's interpretation of "financial gain" is accepted, then all public servants would be barred from helping any family member obtain any job. By the use of the defined term "compensation" in the statute, the legislature clearly distinguished between "earned income" (which is not prohibited) and gifts, gratuities, kickbacks or other forms of "financial gain" that do not require an honest day's work for an honest day's pay. As the Commission recognized in its initial evaluation of this question shortly after the enactment of the statute, there is no blanket prohibition against hiring relatives.

Upon review of other Kentucky statutes which plainly prohibit nepotism, the Court finds KRS 11A.020(1)(c) to be distinct. KRS 11A.020(1)(c) is indefinite, whereas statutes that plainly outlaw nepotism are crafted with language that is explicit and absolute.[6] If a blanket prohibition

[5] KRS 11A.020(1)(c).

[6] *See e.g.* KRS 160.380(2)(f), which states "No superintendent shall employ a relative of a school board member of the district, unless . . . However, the superintendent shall not promote any relative of a school board member who continues employment under the exception of this subsection." *See also* Craig v. Ky. State Bd. For Elementary & Secondary Educ., 902 S.W.2d 264 (Ky. App. 1995) (holding the language of KRS 160.380 constitutional, as it leaves no room for arbitrary or discriminatory enforcement). The Court finds this statutory language to be in no way vague, in contrast to the statutory language of KRS 11A.020(1)(c). *See e.g.* KRS 96.172(2) prohibiting family

on hiring or promoting family members was the intent of KRS 11A.020(1)(c), the Legislature would have used similarly specific and unequivocal language, as it has done in every other instance in which nepotism in outlawed.

The Court finds it also important to note the expansiveness of KRS Chapter 11A. "Public servant" is defined broadly to include virtually every officer and employee in the executive branch, from the Governor to janitors. KRS 11A.010(9). If interpreted as the Commission asserts, any state employee could be in violation of the statute by putting in a good word for a relative seeking state employment. While this case involves elected PVAs, the Commission's interpretation of the statute would apply equally to the single mother who works in a merit system job who asks her boss for help in getting her child a summer job mowing grass in a state park.

The goal of the Commission is laudable. But because the Commission has chosen to change its interpretation of the statute by administrative fiat, rather than by amending the statute, the contours of this laudable "anti-nepotism" policy are left to the unbridled administrative discretion of the Commission. While the current membership of the Commission may limit its application to situations in which the public servant directly (or indirectly?) supervises the employee, there is no reason to believe future Commissions will not broaden this interpretation, just as the current Commission has rejected the original interpretation of this provision.

This problem is illustrated by the case of Leslie County PVA Wooton, who hired his daughter as a seasonal employee during her breaks from college. The prudence of such a hiring is questionable, and ultimately the Department of Revenue has the ability to disapprove such

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members of utility board members in cities of the third class from employment by the utility; and KRS 160.180(2)(i) prohibiting local boards of education from employing relatives of a school board member. *See* Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992), upholding the anti nepotism statute enacted as part of the Kentucky Educational Reform Act of 1990.

hiring. Yet one wonders if the Commission would equally frown on the PVA's daughter obtaining employment from a *taxpayer* during her summer breaks, since all property owners in Leslie County are regulated by the PVA in the tax assessment of their property. Would it equally violate the statute if the PVA asked a fellow public official in county or city government to hire his daughter? In light of the vagueness of the language relied on by the Commission, these questions cannot be answered, and KRS 11A.020(1)(c) will continue to be an ethics trap for all public employees, lacking any clear statutory guidance as to the scope of the prohibition.

If the Commission's interpretation is accepted, any state employee could be in violation of the statute if he or she in any way helped a family member get a job within the executive branch. If a prohibition on nepotism were the Legislature's aim in crafting KRS 11A.020(1)(c), the General Assembly would have used specific language. *See* Craig v. Ky. State Bd. for Elementary & Secondary Education, 902 S.W.2d 264 (Ky. 1995). Tellingly, the Legislature did not use such language in crafting the statute.[7] The Commission's interpretation of the statute would contravene the plain language of the statute, and result in a major policy change enacted by implication. The Commission sought to amend Chapter 11A in 2000, but the proposed nepotism statute was not adopted by the General Assembly.[8] Thereafter, the Commission issued Advisory Opinions drastically changing its own interpretation of KRS 11A.020(1)(c), declaring its new interpretation using the *exact same language* that the legislature declined to adopt. This sea change was initiated without any formal rulemaking, absent any legal process. The Court finds that such an interpretation cannot stand.

[7] The Court notes that the Commission actually did unsuccessfully attempt to amend the language KRS Chapter 11A to specifically prohibit nepotism. The proposed amendment, KRS 11A.035 stated, "a public servant shall not cause the employment, appointment, promotion, transfer, or advancement of a member of the public servant's family ot an executive branch position which the public servant supervises or manages." This language is much more akin to the language of statutes cited in Footnote 1, but this proposed amendment was not adopted by the Legislature. (Petitioners' Consolidated Brief in Support of Appeals, Exhibit A).

[8] *See* f.n. 1 *supra.*

Moreover, a prohibition against "obtaining financial gain" for oneself or one's family is a phrase common to Kentucky statutes. This phrase has been consistently used to indicate receipt of a gain one did not earn or did not obtain for services rendered.[9] In other cases the Commission's own interpretation and application of KRS 11A.020(1)(c) has been consistent with this construction.[10] The Court finds this to be the only logical interpretation of KRS 11A.020(1)(c). It is this Court's charge to give effect to the intent of the General Assembly without adding or subtracting from the legislative enactment or discovering meaning not reasonably ascertainable from the language used. Beckman v. Bd. Of Educ. Of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994). Unreasonable and absurd construction of statutes should be rejected, in preference for construction that is reasonable, rational, sensible, and intelligent. Commonwealth v. Kash, 967 S.W.2d 37, 43-44 (Ky. 1997). To interpret "financial gain" to encompass any earned "compensation" and "income" would mean that every PVA in the state is in violation of the KRS 11A.020 with every pay check they cash. This is of course an absurd result, and could not have been the intent of the Legislature in enacting the statute. It is equally absurd to interpret KRS 11A.020(1)(c) to absolutely prohibit hiring or promoting any

[9] *See e.g.* KRS § 6.731(2) (a) (A legislator may not "use his official position or office to obtain financial gain for himself, any member of the legislator's family, or a business associate of the legislator."); KRS § 154A.030(2)(a) (No member of the State Lottery Board of Directors may "use his official position or office to obtain financial gain for himself, or any spouse, parent, brother, sister, or child of the director."); KRS § 21.540(5)(e) (No member of the Judicial Retirement System Board of Directors may "use his or her official position with the retirement system to obtain a financial gain or benefit or advantage for himself or herself of a family member.") While "financial gain" is not defined by any of these statutes, the Court finds it unlikely that the Legislature intended "financial gain" be interpreted to include earned income, as both legislators and relevant board members are all *compensated* for their service.

[10] *E.g.*, a Kentucky state attorney did use his official position for "financial gain," in violation of KRS 11A.020(1)(c), when he brought his personal computer to work, and used it to post answers to questions on JustAnswer.com for profit, occasionally using his office Westlaw account. *See* Kinley v. Kentucky Bar Ass'n, 378 S.W.3d 313 (Ky. 2012) Likewise, the Commission interpreted "financial gain" to mean improper use of sick time, finding that a staff attorney who took thirteen sick days when she was not in fact sick had violated KRS 11A.020. *See* Huffman v. Executive Branch Ethics Com'n, 2010 WL 1508188 (Ky. App, Apr. 16, 2010). These interpretations are in harmony with "obtaining financial gain" as it is interpreted in other statutes by agencies and Kentucky courts.

relatives within the PVA office. The Court finds the Commission's interpretation as applied to Petitioners to be arbitrary and capricious.[11]

2. The Commission Explicitly Stated on Numerous Occasions That It Does Not Interpret KRS 11A.020(1)(c) to Prohibit Hiring and Promoting Family Members

The Commission itself has interpreted KRS 11A.020(1)(c) to permit hiring and promotion of family members. In 1993, soon after the statute was enacted, the Commission was asked whether PVAs in Kentucky could work with family members. In Advisory Opinion 93-24 the Commission stated, "the Executive Branch Code of Ethics does not specifically prohibit the employment of relatives in PVA offices." This pronouncement was reaffirmed in 1999, when Ms. Jill LeMaster (then Executive Director of the Commission) answered a letter from a PVA inquiring about the propriety of hiring a spouse. Ms. LeMaster answered by letter dated August 31, 1999, that the Commission voted to approve proposed legislation that would "prohibit an employee from taking certain action regarding a family member such as involvement in an appointment, promotion, etc." (Felicia Wooten Petition, Exhibit 8; *see also supra* note 2) Ms. LeMaster's letter stated that the inquiry would be put on hold pending legislative action. This proposed statute was never enacted into law. In 2004 the Commission issued Advisory Opinion 04-34, stating:

> [T]he Commission believes that KRS 11A.020(1)(a), (c), and (d) serve to prohibit a public servant from advocating or influencing in any way the employment, appointment,

[11] Even if the Court were to accept the Commission's interpretation as correct, it could not affirm the Commission's decision because the statute as applied would be impermissibly vague. "A statute is impermissibly vague when a person disposed to obey the law cannot determine with reasonable certainty what conduct is prohibited." Craig v. Ky. State Bd. For Elementary and Secondary Educ., 902 S.W.2d 264, 268 (Ky. App. 1995) (*citing* Commonwealth v. Foley, 798 S.W.2d 947 (1990)). A statute is impermissibly vague where a person of ordinary intelligence cannot identify the conduct prohibited. State Bd. For Elementary and Secondary Educ. v. Howard, 834 S.W.2d 657 (Ky. 1992) (*citing* Buckley v. Valeo, 424 U.S. 1 (1976)). In the instant case the Court finds that the Commission's statutory interpretation is erroneous and arbitrary. However if it had been the intent of Legislature to prohibit nepotism by KRS 11A.020(1)(c), the Court here notes that the language of the statute, as applied, is too vague to inform state employee of the nature of the prohibited conduct.

promotion, transfer, or advancement of a member of the public servant's family to an executive branch position of employment that the public servant directly supervises or manages.

In 2007 the Commission issued Advisory Opinion 07-19, which interprets AO 04-34 and states:

> Since the date of the issuance of Advisory Opinion 04-34, on September 30, 2004, public servants should not have been involved in the employment or supervision of family members. No employees should have been appointed after September 30, 2004 to work for and be supervised by a family member. After that date any public servants who have used their positions to give an advantage in the employment or promotion of a family member may be in violation of the executive branch code of ethics.

It is contradictory for the Commission to claim that the provision as adopted in 1992 must reasonably be interpreted to entirely prohibit hiring or promoting family members, when the Commission itself tried to amend the statute to be more prohibitive. The Commission's arguments in the instant case demonstrate its new position that the statute contains an absolute prohibition against hiring family members. The Court finds that the Commission inconsistently interpreted and applied KRS 11A.020. "Statutory construction is a matter of law for the courts, and a reviewing court is not bound by an administrative body's interpretation of a statute." Cabinet for Human Resources v. Jewish Hospital, 932 S.W.2d at 390 (*citing* Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet, 689 S.W.2d 14 (Ky. 1985)).

3. The Commission's Interpretation of the Statute as Applied to Petitioners Violates the Contemporaneous Construction Doctrine

The Court of Appeals, in Revenue Cabinet v. Humana, 998 S.W.2d 494 (Ky. App. 1998), rejected the administrative agency's very similar attempt to unilaterally change a longstanding interpretation of the law, holding that the doctrine of contemporaneous construction prohibits such a unilateral change in policy. In Humana, the court noted, "For eighteen years, Revenue applied the statute in one manner. Suddenly it announced, without any legislative change, any public hearing, or any other logical reason, an opposite interpretation of the statute. Such

arbitrary and naked exercise of power is forbidden by the Constitution of Kentucky, Sec. 2; the contemporaneous construction doctrine is merely an application of that constitutional provision." Id. at 495. *See also* GTE v. Revenue, 889 S.W.2d 788 (Ky. 1994).

As the Court explained *supra*, the Commission's interpretation of KRS 11A.020(1)(c) exceeds reason, and is inconsistent with the Commission longstanding interpretation of the statute. Thus the Court finds the Commission's Final Orders entered against Petitioners arbitrary. "The doctrine of contemporaneous construction means that where an administrative agency has the responsibility of interpreting a statute that is in some manner ambiguous, the agency is restricted to any long-standing construction of the provisions of the statute it has made previously." 889 S.W.2d at 792 (internal citations omitted). KRS 11A.020 is in some manner ambiguous, as "obtaining financial gain" is an imprecise and undefined term within the statute. As such, the agency is restricted to its long-standing construction evidenced by its early issued Advisory Opinions.

The Commission's attempt to unilaterally change its interpretation of KRS 11A.020(1)(c) violates the contemporaneous construction doctrine. The Commission has the authority to implement administrative regulations in accord with KRS Chapter 13A. KRS 11A.110(3). The Commission, by ad hoc interpretation of its statute, completely usurps the administrative rulemaking process' procedural safeguards, and ignores the separation of powers by expanding its own power via internal policy without legislative authorization, in violation of KRS 13A.130. Commonwealth, Education & Humanities Cabinet, Dept. of Educ. v. Gobert, 979 S.W.2d 922, (Ky. App. 1998) ("an administrative agency is prohibited from modifying or expanding any statute or administrative regulation by internal policy, memorandum or other action and any attempt to do so is unenforceable, null and void." *Id.* at 926).

4. The Commission's Final Order Violates the Rule of Lenity

"Doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that will produce extremely harsh or incongruous [sic] results or impose punishments totally disproportionate to the gravity of the offense." Commonwealth v. Colonial Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961) (citations omitted). The Commission, by their interpretation of KRS 11A.020, did imposed significant civil penalties on Petitioners. Ms. Wooten was ordered to cease and desist, Mr. Wooton was assessed a $4,000 penalty, and Mr. Winters was assessed a $5,000 penalty.[12] As discussed *supra*, the Commission issued a new and expansive interpretation of KRS 11A.020(1)(c), and attempts to impose significant civil penalties for the violation of its new interpretation of the statute. Obtaining "financial gain" is undefined by statute, and the Commission itself has adopted conflicting interpretations of the statute. *See* Sections III. (a) and (b) *supra*. The Rule of Lenity mandates that any ambiguity in a penal statute is to be construed in favor of the accused. Kirby v. Commonwealth, 132 S.W.3d 233, 236 (Ky. App. 2004). "The statutes as well as the regulations that are written pursuant thereto must be clear and concise to give notice to those effected (sic) thereby." McGregor v. Commonwealth, 784 S.W.2d 785 (Ky. App. 1990) (The Court finds that the Commission's Final Orders penalizing Petitioner for violating KRS 11A.020(1)(c) should be reversed because the Commission cannot impose sanctions based on ambiguous language of this statute, as applied to these cases.

[12] The Court finds it noteworthy that while there are penalties established for violation of KRS 11A.040 and 11A.05, there are no statutorily established penalties for violation of KRS 11A.020. *See* KRS 11A.990. This is further evidence that the legislature in enacting KRS 11A.020 did not intend for it to be penal in nature, and that the Commission's interpretation of the statute is unreasonable as discussed *supra*. However, the Commission in imposing fines on Petitioners did implicate and violate the Rule of Lenity.

III. Conclusion

Nepotism has been defined as the, "bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee." Caudill v. Judicial Ethics Committee, 986 S.W.2d 435, 436 (Ky. 1998) (*quoting* State v. Keefe, 111 Fla. 701, 149 So. 638 (1933)) (*citing* 66 C.J.S. *Nepotism,* p. 6 (1950); BLACK'S LAW DICTIONARY (6th Ed.1990)). The merit or ability of the relatives hired and promoted by Petitioners to this suit has never been called into question. The Respondents presented no evidence that any of the hired relatives were unqualified for the positions they filled, that the hired relatives did not perform satisfactory work within the PVA offices, nor was there evidence that any of the hired relatives were overcompensated for their service. Further, all of the relatives hired by Petitioners in the instant action were approved for promotion or hire by the Revenue Department through the RPA process. This Court finds elimination of nepotism in state government to be worthy cause, but the laudable purpose of the Commission cannot substitute for the lack of clear legislative authority.

The legislature, not any administrative agency, is charged with the constitutional authority to make policy decisions of this nature. The legislature has acted to prohibit nepotism in numerous situations, but it has declined the Commission's invitation to extend the prohibitions of KRS Chapter 11A to prohibit all hiring of family members throughout state government. The contours of any prohibition against nepotism are subject to debate, and it is up to the legislature to enact these rules. Such punitive rules cannot be imposed by the Commission through administrative fiat.

The Court finds that the Commission's actions against Petitioners are arbitrary and outside the scope of its authority. The language of KRS 11A.020(1)(c) as it is currently worded, and as it was originally interpreted by the Commission, does not support the Commission's Final Orders entered against Petitioners in this action. Therefore this Court, being sufficiently advised, hereby **REVERSES** the Final Orders of the Kentucky Executive Branch Ethics Commission. This is a final and appealable order and there is no just cause for delay.

So **ORDERED**, this 5th day of March, 2013.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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