

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-11

April 8, 2004

RE: Does the issuance of a formal legal opinion by the Attorney General regarding benefit calculations for the Legislators' Retirement Plan create a conflict of interest for the Attorney General?

DECISION: Yes.

This opinion is issued in response to your March 26, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The matter was reviewed at the April 8, 2004 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Attorney General, the chief law officer of the Commonwealth, is statutorily directed by KRS 15.020 and 15.025(2) to issue legal opinions "when public questions of law are submitted by either the Legislature or by any member of the Legislature." The Attorney General received a written request for an opinion from a member of the legislature relating to benefit calculations regarding the Legislators' Retirement Plan.

The Attorney General served some 24 years in the legislature, and is himself a participant in the Legislators' Retirement Plan. You note that any official legal opinion issued by the Attorney General in this matter would directly impact the Attorney General financially. The Attorney General is concerned that rendering an opinion on this issue will constitute a conflict of interest under the Executive Branch Code of Ethics (the "Code") at KRS 11A.

In light of the above, you ask: "*[D]oes the Attorney General's participation in the Legislators' Retirement System and the fact that he will be directly financially affected by any opinion he renders, create a conflict of interest that prevents him from rendering a legal opinion in this case? If the answer to this question "yes", by what procedure can the Attorney General properly fulfill his statutory mandates contained in KRS 15.020 and 15.025?*"

KRS 15.020 and KRS 15.025 provide, in pertinent part:

KRS 15.020, in part:

The Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties, and shall

prepare proper drafts of all instruments of writing required for public use...

KRS 15.025, in part

The Attorney General, when requested in writing, under KRS 15.020, shall furnish such opinions subject to the following conditions:

...

(2) When public questions of law are submitted by either house of the Legislature or by any member of the Legislature;

It appears that the Attorney General, having received a written request from a member of the Legislature, is statutorily required to render a formal legal opinion. As you suspect, however, to do so, may cause a conflict of interest for the Attorney General under KRS 11A.

KRS 11A.005(1) and KRS 11A.020(1) state:

KRS 11A.005(1):

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

KRS 11A.020(1):

(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.

Additionally, KRS 11A.030 provides guidelines to consider when determining whether to abstain from action on an official decision:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

In Advisory Opinion 03-5 (a copy of which is enclosed), the Commission addressed the issue of whether the Office of the Attorney General could be involved in the investigation of a political opponent of the Attorney General. The Commission held that the Attorney General could not continue an ongoing criminal investigation regarding his political opponent without creating an unavoidable conflict of interest. The Commission advised the Attorney General to remove himself from any involvement in the investigation, and to suspend the investigation until after the election, or refer the investigation to an agency not under his supervision.

The same logic applies here. Clearly the Attorney General has an interest in any legal opinion that would affect benefit calculations of the Legislators' Retirement Plan. Thus, should the Attorney General or an employee under his supervision draft a formal legal opinion that would be issued by the Attorney General and would affect the Legislators' Retirement

Plan, it would very likely create a conflict of interest for the Attorney General between his personal interest and his duties in the public interest. Thus, the Commission advises the Attorney General not to issue a formal legal opinion regarding benefit calculations for the Legislators' Retirement Plan.

KRS 11A.020(3), provided below, provides further guidance to state officials when abstaining from involvement on official actions because of a conflict of interest.

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

However, the Attorney General, as he is the ultimate head of his office, cannot avail himself of the disclosure and abstention language at KRS 11A.020(3) to avoid a conflict of interest because he has no "superior." The only option available for the Attorney General is to decline to issue the opinion based on KRS 11A.020(1) and 11A.030.

The Commission is not in a position to answer your follow-up question as to how the Attorney General can fulfill the statutory mandates of KRS 15.020 and KRS 15.025(2) if doing so will cause him to violate the conflict of interest provisions at KRS 11A.020(1). The Commission observes that all public servants as defined in KRS 11A.010(9) are subject to the provisions of the Executive Branch Code of Ethics. Nowhere in KRS 15.020 or KRS 15.025 is the Attorney General, even in the fulfillment of those statutorily mandated duties, relieved from compliance with the provisions of KRS 11A.

BY CHAIR: Joseph B. Helm, Jr.

Enclosure: Advisory Opinion 03-5