

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-23

August 5, 2004

REQUEST WITHDRAWN

RE: Do potential conflicts of interest exist for the prospective Executive Director of the Kentucky Horse Racing Authority?

DECISION: Yes

This opinion is issued in response to your May 25, 2004 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 27 and August 5, 2004 meetings of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Kentucky Horse Racing Authority (the "Authority") is considering recommending an individual to the Governor to serve as the Authority's Executive Director. The prospective Executive Director and spouse are the sole owners of two horse-related businesses in Kentucky. Neither of these businesses is regulated by the Authority. You, as well as other state officials and the prospective Executive Director, want to ensure that his continued ownership of and participation in these businesses will not create any apparent conflict of interest. You have discussed with other state officials and the prospective Executive Director concerns that conflicts of interest may arise for the prospective Executive Director if asked to make a decision on behalf of the Authority that would affect one of his private businesses, or if the scope of the Authority's regulatory oversight should expand to include one of the business's activities, such as horse breeding. You have been assured by the prospective Executive Director that should a conflict arise in the future, he would disclose the conflict and recuse himself from acting on Authority matters affecting the personal business. Because of these concerns, you ask the Commission if this person's employment would be in violation of any state ethics laws or regulations.

KRS 11A.005 and KRS 11A.020(1) of the Executive Branch Code of Ethics (the “Code”) state:

(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.

(2) The principles of ethical behavior for public servants shall recognize that:

(a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;

(b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and

(c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

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.

Section 39 of Senate Bill 156 enacted by the 2004 General Assembly, authorizes the Authority to “promote, enhance, improve, and encourage the further and continued development of the thoroughbred breeding industry in Kentucky by providing ...supplemental purses for designated stakes, handicap, allowance, and nonclaiming maiden races ... by Kentucky bred thoroughbred horses.

Based on the information that you have provided that the Authority does not directly regulate the two horse-related businesses in which the prospective Executive Director’s is engaged, it initially appears that a direct conflict of interest for the prospective Executive Director would not exist if he were to continue ownership and operation of these two businesses. However, the Commission envisions circumstances that would pose a substantial conflict between the mission of the Authority and the prospective executive director’s private business interest, if the prospective executive director were to accept the position

In order to avoid such conflicts of interest, the prospective Executive Director, upon acceptance of the position, would need to abstain from involvement as part of his official duty in any matters involving the thoroughbred breeding industry in Kentucky, including supplemental purse winnings, pursuant to KRS 11A.020(3) and 11A.030 which provide:

- (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.

KRS 11A.030

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.

Conceivably, in such a case, the Authority members could assume all responsibilities with regards to the thoroughbred breeding industry and use the administrative services of the Environmental and Public Protection Cabinet (the "Cabinet"). The prospective Executive Director would need to comply, as well, with the provisions of KRS 11A.020(3) above. Such abstention that may be required in order for the prospective executive director to avoid conflicts of interests may affect his ability to perform his job responsibilities.

Furthermore, in the future if some function of these businesses should come under regulation by the Authority, or if the prospective Executive Director has the potential to be involved in decision-making for the Authority that would affect his private businesses, the Commission believes that a vast potential for conflict would exist for him. In order to avoid an actual conflict of interest, neither the prospective Executive Director, nor anyone under his supervision, should be involved in the regulation of or decision-making affecting the private businesses. The standard caveat applies that as a state employee he must not use his state position or resources to give his private businesses an advantage, or use his influence in a matter

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that poses a conflict between his private interest and his duties in the public interest, per KRS 11A.020(1), above.

The Commission further advises that, although such action may eliminate the actual conflict, an appearance of a conflict may still exist in such a situation. Please find enclosed for your review several previously issued advisory opinions that may provide you with additional guidance.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Joseph B. Helm, Jr.

Enclosures: Advisory Opinion 95-6
Advisory Opinion 96-9
Advisory Opinion 01-39