

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 05-23**

May 27, 2005

RE:            May current board member be involved in nomination process for selection of applicants to be included on ballot if board member is an applicant?

DECISION:    No.

This opinion is issued in response to your April 28, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 27, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Board of Trustees (the "Board") of the Kentucky Retirement Systems is composed of nine members including the Secretary of the Personnel Cabinet, two trustees who are members or retirees of and elected by the County Employees Retirement System (CERS), one trustee who is a member or retiree of and elected by the State Police Retirement System (SPRS), two trustees who are members or retirees of and elected by the Kentucky Employees Retirement System (KERS), and three trustees appointed by the Governor of the Commonwealth.

When a position is open for election on the Board, the Board considers the applications, ranks and nominates three eligible individuals for each position from a list of qualified applicants that have submitted resumes as application for the nomination. Those nominated are included on the ballot along with individuals who present a petition for inclusion with the signatures of one-tenth of the voting population from that retirement system who voted in the last election. The membership of the retirement system then votes for two nominees and the two candidates receiving the highest number of votes are elected. KRS 61.645(4)

During the last election, both of the sitting CERS Board members were seeking re-election to their trustee positions, and thus recused themselves from all discussions regarding the election, including discussions of other candidates beside themselves. Thus, the CERS was left without any representation on the Board in the selection of the nominees for the CERS positions.

You ask for an opinion regarding the following:

- 1) *Whether it is required that Board members seeking re-election to the Board in a particular election recuse themselves from all discussions of nominations for the election,*

- 2) *Whether they may just decline to nominate or vote for themselves in the nomination process, or*
- 3) *Whether they may participate fully in the discussions and nomination process, including nominating and voting for themselves.*

KRS 11A.010(7) provides that the members of the Kentucky Retirement Systems board of trustees are “officers,” and thus are public servants subject to the Executive Branch Code of Ethics.

KRS 11A.020(1) (a) and (d) provide:

- (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;
  - ...
  - (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.

Further, KRS 11A.030(1) – (5) provide:

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.

The Commission believes that a conflict of interest will exist if a member of the Board is involved in any discussions/decisions regarding the nomination of applicants to be included on the ballot for election to a position on the Board. Clearly, a Board member's involvement in his own nomination is an attempt to use his influence in a matter that involves a substantial conflict between his personal interest and his duties in the public interest. Involvement in matters of other applicants, as well, would present that same conflict between personal interest and duties in the public interest.

A board member undoubtedly would be unable to remain truly independent in the selection process if he is an applicant for the position. His involvement in the selection process also could have a negative effect on public confidence in the integrity of the selection process for the Board. The Commission recognizes that such abstention from involvement in the selection process may leave a particular retirement system without representation in the selection process. However, any special knowledge by abstaining Board members that would need to be brought to the discussion regarding the applicants or application process could be presented to Board staff who then could make a decision as to whether the information should be shared with the remaining Board members.

See the enclosed advisory opinions that provide additional guidance in related matters. These opinions address public servants' abstention from involvement in matters regarding family members. Obviously, if a potential conflict exists for an employee to be involved in matters pertaining to his spouse's or daughter's personal interest, a conflict exists for a Board member to be involved in his own nomination or those of individuals with whom he may be competing for such a nomination.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

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**BY CHAIR:** James S. Willhite

Enclosures: Advisory Opinion 95-1  
Advisory Opinion 00-12  
Advisory Opinion 01-32