

Executive Branch Ethics Commission
ADVISORY OPINION 07-16
June 29, 2007

RE: May a Commonwealth's Attorney lease to the state a building he privately owns for use as office space for his own office?
DECISION: Yes, with certain restrictions.

This opinion is issued in response to your April 10, 2007, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 10 and June 29, 2007 meetings of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You became a Commonwealth's Attorney in January of 1988, at which time the position was part time. Your private law office also served as your Commonwealth's Attorney's office. Until the position became full time in July of 2000, your office was not leased to the state, but you would periodically receive partial utility supplements from the state for the office. When the position of Commonwealth's Attorney became full time, you desired to keep the same location and lease the building to the state. You indicate that you consulted the Finance and Administration Cabinet ("Finance"), the Prosecutors Advisory Council, and the Attorney General's Office at this time and were advised that such an arrangement "would not violate the law nor any ethics provision".

According to your letter, you subsequently submitted a bid when the request for bids was advertised, and you were the successful bidder. You then entered into a seven-year lease with the Finance and Administration Cabinet, which was renewed in 2006 for an additional five years under the same terms. In late 2005, you indicate that you purchased a building adjacent to the leased office space hoping to lease additional office space to the state as your Commonwealth's Attorney office needed more space. This building could be connected to your existing office and provide an additional 1500 square feet of usable office space.

While you would like to continue to lease your building to the state, possibly along with the adjacent building, you are concerned that in light of the Commission's decision in Advisory Opinion 06-3, in which the Commission determined that Commonwealth's Attorneys and their employees are subject to the Executive Branch Code of Ethics, that this could place you in violation of the law. You seek an opinion from the Commission providing you with guidance regarding this situation.

KRS 11A.005 provides:

(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.

Further KRS 11A.020(1) states:

(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.

The Commission notes that, pursuant to KRS 56.800 to 56.823 which are the provisions relating to the lease of real property rentals required for use by state agencies, an agency that requires office or other space must submit a request to the Department of Facilities Management, within Finance, the agency responsible for the lease of all real property rentals. Once the request

is submitted, Finance drafts general requirement specifications for the space required, soliciting the interest of lessors owning property in the appropriate county, negotiating with those lessors submitting written responses, inspecting the proposed spaces, requesting "best and final" offers from those with suitable spaces, and assessing those final proposals. In assessing those proposals Finance, among other factors, consults with the head of the agency for whose use space is sought. Ultimately, Finance must choose the best proposal in the interest of the Commonwealth and justify that decision in writing. In the case of Commonwealth's Attorneys, the executed lease lists the Unified Prosecutorial System as the agency, but states that the lease is between the lessor and the Commonwealth of Kentucky, rather than the agency. The lease agreement is signed by a representative of the Unified Prosecutorial System, as well as Finance representatives.

First, in light of the provisions in KRS Chapter 11A stated above, it is the opinion of the Commission that an inherent conflict exists when a Commonwealth's Attorney, or any other public servant as defined in KRS 11A.010(9), is involved in the specifications or consultation for a request of space to be solicited by Finance and subsequently bids to provide the space through a lease in his private capacity. Involvement in requesting needed office space is certainly the "use of one's official position or influence," although it may be a necessary action of a Commonwealth's Attorney.

If a representative of the Prosecutors Advisory Council were to determine the specifications of the needed office space of Commonwealth's Attorneys and complete the requests for space for submission to Finance without any participation or involvement of the Commonwealth's Attorneys, it would serve to avoid any actual conflicts of interest, though an appearance of a conflict may still exist. Thus, if you are able to remove yourself from the request for space process, you can avoid an actual conflict, but not necessarily an appearance of one. Secondly, even if no conflict exists, you also must review the provisions in KRS 11A.040(4), stated below, in order to determine whether you are permitted to enter into a lease for such space.

According to KRS 11A.040(4):

A public servant shall not knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340.

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As stated above, you are prohibited from undertaking, executing, holding, bidding on, negotiating, or enjoying a lease made, entered into, awarded, or granted by the agency by which you are employed. As the Commission determined in Advisory Opinion 06-3, Commonwealth's attorneys and their staffs are employees of the Unified Prosecutorial System as administered by the Prosecutors Advisory Council, which is attached to the Office of the Attorney General for administrative purposes only. Thus in your private capacity you may not enter into a lease with the Unified Prosecutorial System/Prosecutors Advisory Council. It must therefore be determined what agency is party to the lease in question, the Unified Prosecutorial System or Finance.

Even though the lease agreement for space lists the Unified Prosecutorial System as the agency, it appears that your lease would be, in substance, with the Commonwealth of Kentucky, as administered by Finance, for the benefit of your agency, rather than with your agency directly. Such would be the case for all other full-time Commonwealth's Attorneys who wish to lease buildings in which their offices are located. Since the lease in question is not specifically with your own agency, KRS 11A.040(4) does not prohibit you from entering into such a lease if no other conflicts exist.

Furthermore, pursuant to KRS 45A.045(9),

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Subject to the provisions of this code, real property or any interest therein may be purchased, leased, or otherwise acquired from any officer or employee of any agency of the state upon a finding by the Finance and Administration Cabinet, based upon a written application by the head of the agency requesting the purchase, and approved by the secretary of the Finance and Administration Cabinet and the Governor, that the employee has not either himself or herself, or through any other person, influenced or attempted to influence either the agency requesting the acquisition of the property or the Finance and Administration Cabinet in connection with such acquisition. . . .

The Commission cautions you, however, to take special care not to use your official position to give yourself an advantage in the leasing or renewing process in violation of KRS 11A.020(1) stated above and to review the provisions of KRS 11A.030 in determining when to abstain from action on official decisions in which you have or may have a personal or private interest, in instances wherein a Commonwealth's Attorney seeks to lease space to the state, or renew a lease for space, for the purpose of locating his own office therein.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb