

Executive Branch Ethics Commission
ADVISORY OPINION 10-01
March 19, 2010

RE: Should the Secretary of State, a candidate for U.S. Senate, who by statute serves as the chair of the State Board of Elections, recuse himself from his official duties in that capacity in regards to the election in which he is a candidate?

DECISION: No, unless a conflict of interest develops.

This opinion is issued in response to your February 11, 2010 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The matter was reviewed by the Commission at its meeting on March 19, 2010 and the following opinion is issued.

The current Secretary of State is running in the Republican primary for the U.S. Senate. Under KRS 117.015, the Secretary of State serves as the chairperson of the State Board of Elections ("State Board"), and you are concerned that this may create a substantial conflict between his public duties and his personal or private interest.

KRS 11A.005(1) 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.

KRS 11A.020(1)(a)-(d) provides:

(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.

KRS 11A.030 provides:

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.

KRS 11A.020(1) provides that “no public servant, by himself or through others, shall knowingly use or attempt to use his influence in any matter which involves a substantial conflict

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between his personal or private interest and his duties in the public interest.” KRS 11A.030(1) guides the public servant “to abstain from action on an official decision because of a possible conflict of interest” if the public servant determines that “a substantial threat to his independence of judgment has been created by his personal or private interest.”

The following summary of Kentucky’s election process was provided, upon request, by the staff of the State Board of Elections:

Kentucky’s election system is designed so that no one individual has the ability to affect the outcome of a statewide election. From the ground up, the responsibilities for conducting statewide elections are dispersed on a bipartisan basis across Kentucky’s 120 county clerks and county boards of elections and between the Secretary of State and the State Board. The Secretary of State is a Constitutional officer elected in a statewide election, and his duties with regards to elections are set by statute.

The county board of elections administers the election laws on the local level, supervises the registration and purgation of voters within the county, chooses and trains the precinct election officers, and acts under the supervision of the State Board. The county board of elections is made up of the county clerk, the county sheriff, and two members appointed by the State Board from lists of five names submitted by the two political party’s executive committees in each county. KRS 117.035. By statute, the sheriff and the two members of the county board of elections may not serve during a year in which they are candidates for office. The county clerk, in his or her discretion, may recommend a temporary replacement in a year in which he or she is a candidate for office, but is not required to do so.

The State Board consists of the Secretary of State, who by statute serves as Chairman, and six members, three Republicans and three Democrats, appointed by the Governor from lists supplied by the state central executive committee of the two political parties in the Commonwealth. KRS 117.015(2). There is no provision in the law requiring the State Board members or the Secretary of State resign or abstain from service on the State Board during a year in which they are a candidate. The State Board holds regular meetings on the third Tuesday of each month at 1:00 p.m. The Chairman presides at the meetings and may vote; however, it has been the practice of the current Secretary of State and his predecessors to abstain from voting unless a tie vote or quorum issues necessitates his vote. During the tenure of the current Secretary of State on the State Board, the Chairman has voted only a few times to break a tie vote and on one occasion voted to meet the quorum requirements. None of these votes was to certify an election.

The State Board’s staff consists of an executive director and an assistant director, who are of differing political parties and a bipartisan staff sufficient to carry out its duties. KRS 117.025(1) and (2). The State Board currently has twelve staff members. The State Board administers the election laws of the state and supervises the registration and purgation of voters within the state. KRS 117.015(1). The State Board administers the election laws contained in

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Kentucky Revised Statutes (KRS) Chapters 116, 117, 118, 118A, 119, and 120 and is responsible for establishing the administrative regulations in Title 31 of the Kentucky Administrative Regulations (KAR).

Pursuant to KRS 117.015(2), the Secretary of State is Kentucky's Chief Election Official. As such, the Secretary of State, along with the State Board of Elections, is responsible for ensuring Kentucky complies with the following federal laws: the Voting Rights Act of 1965, the National Voter Registration Act of 1993 ("NVRA"), the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), the Help America Vote Act of 2002 ("HAVA"), and the Military and Overseas Voters Empowerment Act of 2009 ("MOVE").

The State Board is responsible for certifying the voting systems for use in the state of Kentucky. KRS 117.379 and 117.381. No voting system may be used in any election in this state without first being approved by the State Board. KRS 117.379(3). The State Board may only certify voting systems that meet or exceed all Federal Election Commission (now the Election Assistance Commission ("EAC")) voting system standards. Therefore, the State Board of Elections may only certify voting systems for use in Kentucky that have first been certified by the EAC.

The State Board provides training and guidance to election officials on the administration of the election laws. KRS 117.187. The State Board provides training on a regular basis to county clerks and county board of elections members. Periodically, the State Board provides training to county attorneys and other officials involved in the election process. The State Board also provides guidance on a daily basis to the public on Kentucky's election laws.

The State Board maintains the Statewide Voter Registration Database, a roster of all qualified registered voters within the state by county and precinct. 117.025(3)(a). The State Board publishes the Precinct Signature Rosters for each precinct prior to each election day. KRS 117.025(3)(b)&(c). The State Board performs regular maintenance of the Voter Registration Database pursuant to KRS 116.112 and the NVRA and purges voters who have died, been declared incompetent, and been convicted of a felony offense under KRS 116.113. The State Board also furnishes precinct lists to duly qualified candidates, political party committees or officials thereof, any committee that advocates or opposes an amendment or public question, and others in its discretion. KRS 117.025(3)(h). The Secretary of State does not have access to the Statewide Voter Registration Database.

KRS 117.035(4) requires the county board of elections to meet at least once a month and to be in session on election day "to correct clerical errors and rule on questions regarding voter registration and may make to the election officers such certifications as may be necessary." Decisions by the county board of elections made during a monthly meeting may be appealed within ten days or, if made on election day, may be immediately appealed to a circuit judge, "but a ruling of the board shall be reversed only upon a finding that it was arbitrary and capricious."

The State Board does not make rulings on whether an individual voter is eligible to be registered to vote and the Secretary of State has no authority to rule on a person's ability to register to vote.

The voting equipment in each county is chosen and purchased by the county fiscal courts, KRS 117.105-125, the custody of which is placed with the county clerk for protection and preservation between elections, KRS 117.135, and once prepared for the election, is delivered into the possession of the county board of elections, KRS 117.165. The county board of elections then ensures delivery of the voting equipment to the precincts on election day and places control of the voting equipment into the possession of the precinct election officers, KRS 117.195, who are also appointed by the county board of elections on a bipartisan basis, pursuant to KRS 117.045.

The only equipment used to record and tabulate the vote count with which the current Secretary of State comes into contact is the voting machine upon which he casts his own ballot. The Secretary of State does not encounter the vote tabulation equipment or software, the control of which is maintained by the county board of elections and the county clerk.

At the close of the polls on election day, the precinct election officers are responsible for taking the tally of the votes in an open and public setting in the presence of media and candidates' representatives. KRS 117.275(1)-(3). The precinct election officers must then deliver the return sheets and all election supplies to the county board of elections. KRS 117.275(4). The county board of elections, in the presence of the media and candidate representatives, tabulates all votes cast in the election, including the absentee votes and write-in votes. See KRS 117.087, 117.265, and 117.275. The county board of elections certifies the results of the tally of the votes to the county clerk and the Secretary of State. KRS 117.275(7). For statewide races, the county board of elections provides this certification to the Secretary of State no later than 12 p.m., on the Friday following the election. KRS 118.425(4). The county board of elections sends the precinct-by-precinct results for all races to the State Board. KRS 117.275(4). No later than the third Monday after the election, the State Board meets, in an open and public meeting, to count and tabulate the vote as certified to the Secretary of State by the various county boards of elections. KRS 118.425(5). On election night, the unofficial results are reported by the county board of elections to the State Board and posted on the State Board's website. Every document generated throughout the course of the election is an open and public record pursuant the Kentucky Open Records Act.

After the election, the County Board of Elections may bring a contest action to correct administrative or clerical errors that occurred during the tabulation of the vote. KRS 120.017. Within 15 days of the election, the county clerk shall file action in the circuit court (Franklin Circuit Court for statewide offices or public questions) upon notice of an error requesting a recount of ballots for the precinct reporting the administrative or clerical error.

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In primaries, any candidate who received not less than 50% of the vote of the successful candidate may contest. KRS 120.055-065. The petition must be filed in circuit court in the county where the contestee resides (Franklin Circuit Court for statewide races) within ten days after the day of the election. Any party may appeal to the Court of Appeals from a judgment entered under KRS 120.065 within ten days of the judgment. KRS 120.075. Any candidate may request a recount of a primary by filing a petition with the circuit court within ten days after the day of the election. KRS 120.095. The county board of elections or the State Board of Elections must be named as a party defendant. The party requesting the recount must post a bond for the costs of the recount. A recount proceeding may be appealed to the Court of Appeals. The recount may proceed regardless if a contest is filed.

In general elections, any candidate who received not less than 25% of the vote of the successful candidate may contest. KRS 120.155 and 120.165. The petition must be filed and process issued in circuit court of the county in which the contestee (the successful candidate) resides (Franklin Circuit Court for statewide races) within thirty days after the day of the election. Any party may appeal to the Court of Appeals from a judgment entered under KRS 120.155, in the same manner as provided in KRS 120.075, all of the provisions of which statute shall be applicable. KRS 120.075 and 120.175. Any candidate who received 25% of the vote of the successful candidate may request a recount by filing a petition with the circuit court (Franklin Circuit if a statewide race) within ten days after the day of the election. KRS 120.185. The County Board of Elections or State Board of Elections, whichever would issue a certificate of election under KRS 118.425, must be named as a party defendant. A recount proceeding may be appealed to the Court of Appeals. The recount may proceed regardless if a contest is filed.

Contests for Governor, Lieutenant Governor, or General Assembly member are handled by the General Assembly within thirty days of final action by the State Board. KRS 120.195-215.

In statewide races, the certification of the results of the election that the Secretary of State makes to the State Board is a compilation of the 120 certifications made by the county boards of elections. If any individual intended to affect the vote totals certified on the Secretary of State's certification, that person would have to change the certifications provided by the county boards of election. If any one individual had the intent to affect a statewide race, that person would need the complicity or acquiescence of a majority of the more than 14,300 precinct workers, or a majority of the 480 county board of elections members, or a majority of the State Board members, and commit such malfeasance under the observation of a bipartisan staff, candidates and their representatives, the media, and the public.

In 2007, the current Secretary of State performed his duties as Secretary of State, Chairman of the State Board of Elections, and Kentucky's Chief Election Official while he was a candidate for reelection as Secretary of State. Indeed, prior individuals who served as Secretary of State actively campaigned for various offices while performing their election-related duties.

The results of the elections certified by the current and past officeholders have not been challenged due to any question of wrongdoing or inappropriate behavior on the behalf of the Secretary of State. The General Assembly contemplated that the Secretary of State would be responsible, along with the State Board of Elections, for carrying out and supervising the conduct elections, and did not contemplate that the individual serving as Secretary would be prohibited from performing those duties merely because he or she had filed as a candidate for office.

Based on this summary and an independent review of the relevant statutes discussed above, it is the Commission's opinion that it is highly unlikely that any one individual holding the office of Secretary of State could alter or influence the results of a statewide election merely from the powers invested in the office by the General Assembly without having the universal cooperation of election officials across the state. For this reason it does not appear that the Secretary of State would be required by KRS 11A.030 to abstain from his official duties relating to the election. He quite simply, under normal circumstances, lacks the ability to affect the election's outcome. So long as the Secretary of State remains cognizant of the Executive Branch Code of Ethics during the election process, and there is no reason to believe he will do otherwise, it seems unlikely that his participation would affect the public's confidence in the integrity of the executive branch.

While the Commission believes that a potential conflict of interest is highly unlikely, should such an unforeseen event arise, the Secretary of State should seek additional guidance from the Commission at that time.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

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