

ADVISORY OPINION 97-10

February 4, 1997

RE: May the Commonwealth lease facilities from assistant commonwealth attorney?

DECISION: Yes.

This opinion is in response to your January 30, 1997, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 20, 1997 meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. Proposals for office space for a commonwealth attorney and his staff recently were solicited through advertisements by the Division of Real Properties. An assistant commonwealth attorney, who is a member of the staff which will be housed in the office space, submitted a proposal to lease space for the office to the Commonwealth. You ask for an opinion concerning this matter because you have received conflicting information as to whether assistant commonwealth attorneys are state employees and subject to the provisions of KRS Chapter 11A, the Executive Branch Code of Ethics.

The Prosecutors Advisory Council advised you that it believes assistant commonwealth attorneys are exempt from the provisions in KRS 11A which prohibit employees from entering into contracts with their employing agency. However, the Personnel Cabinet advised that its records indicate that assistant commonwealth attorneys are "state employees" with the Unified Prosecutorial System of which the Prosecutors Advisory Council has oversight. You believe that assistant commonwealth attorneys appear to be included in the definition of "employee" provided in KRS 18A.005; however, KRS 18A.115 exempts commonwealth attorneys and their respective appointees from the provisions of 18A.005 to KRS 18A.200, the personnel provisions that apply to merit system employees.

You have reviewed Advisory Opinion 93-7 issued by the Commission which states that commonwealth attorneys are not public servants. However, the opinion does not address whether assistant commonwealth attorneys are considered public servants.

In answering this request, the Commission reviewed Advisory Opinion 93-7, issued on April 2, 1993, and Attorney General Opinion OAG 80-341, issued on June 24, 1980. Advisory Opinion 93-7 concludes that commonwealth and county attorneys, elected by the voters of a county or local district, are not accountable to the executive branch of state government, and thus are not subject to the Executive Branch Code of Ethics' prohibition against holding state contracts. However, the Commission did envision circumstances in which conflicts of interest could arise from such contracts and encouraged the state agency seeking the request to follow policies to avoid any real or perceived conflicts of interest if such contracts were awarded.

Attorney General Opinion OAG 80-341 addresses the issue of whether assistant county

attorneys are considered state or county employees. The opinion concludes that, because the county attorney is a county constitutional officer, pursuant to Section 99 of the Kentucky Constitution, it follows that an assistant county attorney is a statutory county officer for purposes of considering the general questions of conflicts of interest and incompatibility of office.

Based on the opinions cited above, the Commission believes that the conclusion concerning whether KRS Chapter 11A is applicable to commonwealth attorneys, applies equally to the assistant commonwealth attorneys who, in the absence of the commonwealth attorney, are responsible for acting as such. See KRS 69.090. Consequently, assistant commonwealth attorneys would not be subject to the requirements of the Executive Branch Code of Ethics.

Although neither commonwealth attorneys nor their assistants are subject to the code of ethics, the Commission points out that executive branch employees, who are subject to the code of ethics, are prohibited from leasing office space to the agencies for which they work. Thus, in order to uphold public trust in public officials, at a minimum, the Division of Real Properties should develop policies which would require commonwealth attorneys and their assistants, who wish to lease office space to the Commonwealth, to abstain from any involvement in matters pertaining to the leasing of space as part of their official duties.