

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 06-16**

June 16, 2006

RE: Does a conflict exist for the Attorney General if the Office of the Attorney General is involved in the investigation or prosecution of the Governor?

DECISION: No, unless the Attorney General becomes a candidate for the office of governor.

This opinion is issued by the Executive Branch Ethics Commission (the "Commission") upon its own motion. The matter was reviewed by the Commission at its June 16, 2006 meeting, and the following opinion is issued.

Questions have arisen as to whether the involvement of the Office of the Attorney General in the merit hiring investigation and prosecution relating to the Governor constitutes a conflict of interest for the Attorney General. The Commission has reviewed this matter in order to provide the Attorney General with guidance to uphold the public trust in the independence and integrity of state government officials.

The Commission recognizes that being the Attorney General carries with it the responsibility of enforcement of the laws of the Commonwealth with respect to state officials. However, being the Attorney General also carries with it the responsibility to uphold the public trust in the operation of state government.

KRS 11A.005(1)(a), (c) and (d) provide:

(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:

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- (a) A public servant be independent and impartial;
- ...
- (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.

Further KRS 11A.020(1)(a) through (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;
  - (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.

In Advisory Opinion 03-5, the Commission addressed a situation where the then-Attorney General had filed as a candidate for the office of governor. Another filed candidate for the office of governor was simultaneously under investigation by the Office of the Attorney General. The Commission advised the Office of the Attorney General to remove itself from the investigation of the other candidate until after the primary election, or refer the case to another law enforcement agency not under the jurisdiction of the Office of the Attorney General.

Although the current Attorney General has not yet filed as a candidate, he previously made a public statement that he was "considering" a run for governor. However, since that time, he has further stated publicly that he will not be a candidate against the sitting Governor as long as the Office of the Attorney General is prosecuting the Governor's case. The Commission commends the Attorney General for taking this action. As the Commission stated in Advisory Opinion 03-5, KRS 11A.020(1)(a) states clearly that no public servant can use his influence in a matter that involves a substantial conflict between his private interest (in this case, the Attorney General's potential candidacy for political office) and his duties in the public interest (in this case, the Attorney General's mandate to enforce the law in Kentucky.).

Moreover though, the Commission believes that due to the Office of the Attorney General's involvement to date in the investigation and prosecution of merit hiring violations involving the current Governor, a potential conflict of interest will present itself should the Attorney General at any time file as a candidate in the 2007 gubernatorial election, regardless of whether the investigation and prosecution have been completed, or whether the current Governor remains a candidate in that election. One cannot erase a possible conflict of interest by merely completing the action that would have made the matter a conflict in the first place. Nor would the possible conflict disappear if the action, once completed, was then used for the purpose of furthering one's own personal or private interest over one's duties in the public interest. Should the Governor withdraw as a candidate in the 2007 gubernatorial election as the result of his investigation and prosecution by the Office of the Attorney General, the Attorney General should continue to take care not to take any action that will make it appear that he used his public office to obtain private benefits. Becoming a candidate for governor after the sitting Governor withdrew as a candidate due to actions taken by the Office of the Attorney General could lead, at the very least, to the perception that a conflict of interest existed all along.

Unlike the situation addressed in Advisory Opinion 03-5, in this matter prosecutorial action was taken by the Office of the Attorney General against the Governor after the Governor had already announced his candidacy for 2007. For this reason, the Commission believes that the Office of the Attorney General's referral, at this point and time, of the merit hiring investigation and prosecution relating to the Governor to another law enforcement agency would not remove the perceived or actual conflict of interest for the current Attorney General as contemplated in Advisory Opinion 03-5, if he were then to become a candidate for governor in the 2007 election. Nor, would the completion of the investigation and prosecution by the Office of the Attorney General remove such a potential conflict of interest.

If the Attorney General contemplated an eventual candidacy for the office of governor in 2007, he should have removed himself and his office from the merit system investigation of the Governor upon the Governor's announcement for candidacy.

Sincerely

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: John A. Webb