



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 17-04
January 23, 2017

RE:

(1) May an attorney that represents the Justice and Public Safety Cabinet in appeals brought before the Kentucky Personnel Board (the "Board") still continue with such representation before the Board even though the individual has been offered a position as a member of the Board, but has not yet been sworn into the position?

(2) May an attorney that represents the Justice and Public Safety Cabinet in appeals brought before the Board serve as a member of the Board if that attorney abstains from adjudicating matters in which she has been involved?

DECISION:

(1) Yes, as long as the attorney abstains from participating as a member of the Board in adjudicating the matter before the Board.

(2) Yes, as long as the attorney abstains from participating as a member of the Board in adjudicating Cabinet appeals before the Board in which she has been involved.

This opinion is issued in response to your December 1, 2016 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") on your own behalf. This matter was reviewed at the January 23, 2017 meeting of the Commission and the following opinion is issued.

You submitted information to the Commission and the Commission staff sought the input of the Executive Director for the Kentucky Personnel Board (the "Board"), as well as the attorney for the Appellants in the administrative matter from which arose your question in formulating this opinion. The relevant facts are as follows: You serve as a staff counsel for the Kentucky State Police ("KSP") in the Justice and Public Safety Cabinet ("Cabinet"). You have represented the KSP on personnel appeals brought before the Board.

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One of the duties of the Board is to hear appeals from merit employees pursuant to KRS 18A.075. KRS 18A.095(21), states that

An appeal to the board may be heard by the full board or one (1) or more of the following: Its executive director, its general counsel, any nonelected member of the board, or any hearing officer secured by the board pursuant to KRS 13B.030.

The Board is a seven-member administrative Board. Five members are appointed by the Governor to staggered terms, subject to Senate confirmation, and two members are classified employees elected by other classified employees. KRS 18A.045(1). In the interests of full disclosure, in 2014, the staff of the Executive Branch Ethics Commission conducted the counting of the votes for the elected members as an independent third-party as required by KRS 18A.0551(5). The Commission has been requested to conduct the vote counting in 2018 as well.

One of the current members elected to the Board in 2014 was promoted to a non-classified position and, thus, can no longer serve as an elected member. As such, the Board is responsible for filling the vacant position until the term expires when new elections will be held in 2018. KRS 18A.060 dictates that vacancies of the elected board members are to be filled as follows:

- (1) If an elected member of the board vacates his seat for any reason other than the normal expiration of his term, the cabinet shall provide written notification of the vacancy to all classified employees within fifteen (15) days of the vacancy.
- (2) Classified employees wishing to fill the vacancy shall notify the cabinet within ten (10) days of the cabinet's notification of the vacancy.
- (3) A majority of the remaining members of the board shall make the appointment to fill the vacancy from the list of those employees who have notified the board under subsection (2) of this section.

You applied through this process to be selected by the Board to fill the remainder of the unexpired term. On November 18, 2016, you interviewed for the vacant position with the Board. Later that afternoon, the Board's Executive Director, Mark Sipek, called you and advised that the Board had selected you for the position. During your interview, you made the Board aware that you represent the KSP in personnel actions and that the Cabinet was taking steps to fully consolidate the KSP legal office within the Cabinet's legal office framework. You did this to ensure that the Board was fully aware that if selected you would be recusing from all discussions about appeals before the Board arising out of the Cabinet. Your intention has been to leave the room entirely while the Board discusses Cabinet's appeals.

Board appeals are conducted almost exclusively before hearing officers. The hearing officer then issues findings of facts and recommendations for review by the Board. Only if the

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Board requires, or if counsel requests, would you have to argue any KSP matters before the Board in person. Mr. Sipek indicated to you, which has been confirmed by the staff of the Ethics Commission, that the Board considered the issue of whether you could represent the KSP in appeals while also serving on the Board before it selected you.

On November 22, 2016, counsel for the appellants in an ongoing matter before the Board against KSP has insisted that KSP replace you before allowing the appeal to continue. The hearing on the matter was originally scheduled for hearing on December 5 and 6, but has been delayed pending the issuance of this Advisory Opinion. This counsel has since asked that you not represent KSP on any matters before the Board. At present, you are the only counsel at KSP with experience defending KRS Chapter 18A appeals. As such, if you are unable to represent the KSP, you will be forced to turn down your appointment to the Board.

The elected Board members have a long standing history of abstaining from adjudicating matters before the Board in which they may have an interest as it relates to their employing agency. Your predecessor to the Board served as the appointing authority designee for the KSP before her promotion to a non-merit position. She recused from KSP matters because she was often involved in her state employment with making decisions that may ultimately lead to an employee filing an appeal before the Board. The other elected member to the Board is married to the designated Appointing Authority of another cabinet. He always recuses from matters involving appeals in which his wife participated in decision-making role before the Board. The Commission issued Advisory Opinions 16-05 and 16-06 addressing conflicts of interest relating to the elected Board members. These opinions are attached.

You sought an opinion from the Ethics Hotline of the Kentucky Bar Association (“KBA”). Although confidential in nature, you provided the Ethics Hotline opinion for review by the Commission. The opinion indicates that you had received a letter from the Ethics Commission, which you explained to the Commission’s staff was incorrect in that you merely read to the Ethics Hotline attorney an email from Commission’s Executive Director suggesting you follow KRS 11A.030 in recusing as a Board member and also seek an Ethics Hotline opinion.

You asked the same questions of the Ethics Hotline as you are asking the Commission. As to your first question, the Ethics Hotline opinion indicates that you will “not violate the Rules of Professional Conduct by continuing your current representation of the Justice Cabinet in the matter pending before the Board” in light of the fact that you have yet to assume any position on the Board. As respects your second question, the Ethics Hotline opinion indicates that no Rule of Professional Conduct would prohibit the situation. Ultimately, the Ethics Hotline opinion indicates that the Rules of Professional Conduct do “not address simultaneous representation of an agency before the adjudicative body of which the lawyer is also a member with recusal in the represented agency matters.”

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The Counsel for the appellants in the matter you have pending before the Board, moved to continue the hearing pending the selection of a new attorney to represent the KSP, even though you had yet to be sworn-in or assume any duties on the Board. The Counsel believes that your selection “causes a conflict of interest or, at a minimum, the appearance of a conflict of interest.” [Motion for Notification of Counsel for Appellee at 2]. He believes that since you will be a member of the Board, “it makes any representation by [you] before the Board inappropriate because the Board selected [you] to be a member.” [Id]. He further contends that you “will be reviewing cases of the hearing officers and [you] should not try cases before the Board that [you are] a member of even though [you] can recuse from consideration of an appeal.” [Id]. In replying to your response to his motion, the counsel drew a distinction between you being elected to the Board by other merit employees and you being selected to the Board by the members of the Board. He further argued:

Appellee’s counsel’s representation before the Board while a member of the Board is further questionable since she would be filing exceptions to a hearing officer’s decision or a response to exceptions by an employee of her Department who has been disciplined by the Department. She would also be subject to having to make oral argument before the Board. Thus, she is making various arguments in support of her employing Department before the Board of which she is a member as a result of the Board’s appointment. . . . She would be advocating to the body which appointed her and in which she has clearly a favorable relationship with as well as being involved in the decision-making process during the same Board meeting which she argued before and filed exceptions.

[Reply to Appellee Department of State Police Response to Motion for Notification and Motion to Continue Hearing at 2]. The Counsel proceeds to argue that you would have an unfair advantage in that you could learn the mind of the Board in making decisions. Further, Counsel indicates that your appointment and contemporaneously serving as counsel for KSP would raise questions of impartiality. Finally, he indicates that common sense should dictate that you be prohibited from taking the position on the Board. The Motion and Reply of Counsel was reviewed by the Commission.

The Hearing Officer in the matter has scheduled a prehearing conference on January 30 pending the issuance of this Advisory Opinion. The Board continues to operate without your participation as a Board member, yet you may not miss more than three meetings of the Board or forfeit your seat. KRS 18A.080(3). However, this may not apply because you have yet to be sworn in.

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The Commission has jurisdiction over you as a public servant pursuant to KRS 11A.010(9). The Executive Branch Code of Ethics (“Ethics Code”) provides a framework for determining how public servants should handle conflicts of interest. Generally speaking, the Ethics Code provisions do not apply to board and commission members, but certain provisions have been applied through the Governor’s Executive Orders 2008-454 and 2016-377. Nevertheless, you will be serving as a public servant in both your roles as an attorney for KSP and as an elected/selected member of the Board by virtue of your merit status.

KRS 11A.005 provides the general standards of conduct of the Ethics Code:

- (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.

The Ethics Code addresses conflicts of interest by prohibiting certain conduct on the part of public servants in KRS 11A.020(1), which states as follows:

- (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

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- (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.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

KRS 11A.030 provides considerations for public servants to follow when determining when to abstain from action on an official decision in which the public servant may have a conflict of interest:

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.

A public servant should follow the guidance in the Ethics Code for determining his or her own conflicts of interest; however, a public servant's conflicts of interest are individual, subjective, and unique to the public servant and should be reviewed on a case-by-case basis. Your scenario is unique and offers new challenges for the Commission. As such, it is appropriate for you to seek an opinion from the Commission when questions concerning conflicts of interest arise. KRS 11A.030(5).

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The first step is determining whether a conflict of interest exists and how best can that conflict of interest be mitigated. It is clear that you as being appointed to an elected Board member seat would have a conflict in relation to matters involving your participation as a representative for your agency on matters before the Board. Therefore, it is proper for you as a Board member to abstain or recuse from such decision-making by operation of KRS 11A.030 and KRS 11A.020(3).

However, it does not follow that, even after you abstain as a Board member, you would also be required to abstain from serving as counsel for KSP before the Board on matters in which you are recused as a Board member. KRS 11A.030 provides guidance for public servants to follow to determine their own personal conflicts and provides a series of questions of the public servant to answer to determine whether or not their personal interests would interfere with their ability to make an independent and impartial decision or whether it is necessary for the public servant to abstain.

In this scenario, these questions would guide you to withdraw from the Board's decision-making in KSP matters or Cabinet matters in which you are involved. However, these questions do not indicate that you must also recuse from serving as counsel for KSP on matters before the Board because in this role you are adversarial. You are not in the decision-making role on behalf of your agency, but only defending the decisions of your agency. There is no requirement that you be independent and impartial while serving in a defensive role. This role is the antithesis of independent and impartial. Further, nothing in the Ethics Code prohibits you from drawing on your experiences or knowledge you learn during the course of your public service either as an attorney for a state agency before the Board or as a member of the Board.

Indeed, the Board's statutory scheme works into the framework of the process the inherent personal interest that can be brought by the elected board members, by their very position being employees of state agencies under the purview of the Personnel Board. As such, KRS 18A.095(21) prohibits these elected Board members from serving as hearing officers for the Board, which appears to be how the General Assembly intended to avoid the built in perceived bias. Furthermore, the statutory framework establishes that the Executive Director or the General Counsel could serve as a hearing officer in matters involving the very agencies for which the elected board members work as employees. Although it is the practice for these Board members to recuse, nothing in KRS Chapter 18A directly requires them to recuse in matters involving their own agencies. Thus, it does not follow that you have a conflict merely because you are an adversary before the Board on which you serve, as long as you are recused from serving in that adjudicatory role as a Board member on those particular matters.

In order to dissuade any further confusion, the Commission recommended in Advisory Opinions 16-05 and 16-06 as they relate to the Board, that the Board instruct all designated hearing officers to inform all parties at the outset of an administrative proceeding whether a

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board member will be abstaining and recusing from the adjudication of the matter due to a conflict of interest. In your present administrative proceeding before the Board and any future matters, the hearing officer should inform all parties that you are serving as a Board member, but will be abstaining from adjudicating the matter as a Board member. Nevertheless, this is merely a suggestion because KRS 11A.020(3) only requires the notice of abstaining be given to one's own superior in writing, which would be accomplished when you as a Board member disclose your conflict on the record before the Board.

In the end, the recusal as a Board member resolves the conflict as it relates to the Ethics Code. As to whether the Judicial Code of Conduct or the Rules of Professional Responsibility apply to require your recusal as an attorney, those questions must be answered by the Judicial Conduct Commission and the KBA Ethics Committee and not by this Commission.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton