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Executive Branch Ethics Commission
ADVISORY OPINION 08-21
July 11, 2008

RE: 1. May a Vice Chairman of the Public Service Commission ("PSC" actively practice law, serving as a Bankruptcy Trustee, remaining an equity partner in a law firm, and subsequently being affiliated with a law firm in an "as counsel" role?

2. Is a period of six months a reasonable period of time for the Vice Chairman of the PSC to abstain in a matter pending before the PSC in which the Vice Chairman formerly represented one of the parties in the matter?

3. Does past membership in the Sierra Club require a Vice Chairman of the PSC to abstain in cases in which the Sierra Club intervenes as a party?

DECISION: 1. Yes, with limitations and subject to the approval of his appointing authority.
2. Yes, unless the agency requires a longer period of time.
3. No.

This opinion is issued in response to your June 23, 2008 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the July 11, 2008 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows:

You were appointed as Vice Chairman of the PSC on June 16, 2008. The PSC is the state agency charged under KRS Chapter 278 with regulating the intrastate rates and services of over 1500 utility companies throughout the state of Kentucky. The mission of the PSC is to foster the provision of safe and reliable utility service at a reasonable price to customers while providing for the financial stability of those utilities by setting fair and just rates, and supporting their operational competence by overseeing regulated activities. The PSC performs its regulatory functions through written orders following procedures outlined in KRS Chapter 278 and administrative regulations. PSC commissioners are primarily responsible for reviewing and

deciding utility rate cases filed with the PSC, promulgating utility regulations, and developing utility policy. The commissioners work with PSC staff to conduct investigations, hold hearings and public meetings, and review testimony, exhibits and briefs filed by utilities and other parties that appear before the PSC. As Vice Chairman, you have the additional responsibility of filling in for the Chairman in his absence.

You are currently an equity partner in a law firm, and you plan to remain an equity partner in the law firm until December 31, 2008 because disengaging prior to that date would have negative tax implications. You are no longer taking part in the management of the firm. After December 31, 2008, you plan to remain "of counsel" for the law firm. As of the date of your appointment to the PSC, you will no longer receive compensation from your law firm for any future representation of jurisdictional utilities by the law firm.

In your private law practice, you have personally represented three utilities regulated by the PSC, but your representation did not involve issues relating to or arising from the PSC's jurisdiction. You agree to abstain from any cases involving any client of your law firm for a period of six months. If the event that your law firm ever represents a party in a matter before the PSC, you will abstain.

Several of your clients have requested that you remain as counsel in matters in which they engaged your law firm until the matters may be concluded. You seek to remain as Bankruptcy Trustee for approximately seventy-five bankruptcy estates. Additionally, you intend to represent new clients in legal matters not related to the PSC.

You became a member of the Sierra Club in December of 2007. The Sierra Club frequently seeks to intervene in cases before the PSC. You resigned your membership in the Sierra Club when you learned that you would be appointed to the PSC.

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:
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> (a) A public servant be independent and impartial;
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> (b) Government policy and decisions be made through the established processes of government;
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> (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.

KRS 11A.020 (1)- (3) 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.

(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:

> 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:
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> (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
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> (2) The effect of his participation on public confidence in the integrity of the executive branch;
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> (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.040 (10) provides:

> (10) Without the approval of his appointing authority, a public servant shall not accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds.
>
> (a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.
>
> (b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

(c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

First, you ask whether the Vice Chairman of the PSC may actively practice law, serve as a Bankruptcy Trustee, remain an equity partner in a law firm, and subsequently be affiliated with a law firm in an "as counsel" role.

Continuing your affiliation with your previous law firm as an equity partner until December 31, 2008 and thereafter in the role as "of counsel" could create a potential conflict of interest between your private interests and your duties in the public interest. In the event that you are involved as part of your official duty in any matters that may affect the clients of the law firm, then a conflict of interest would exist. Due to your ongoing and future relationship with the law firm, you are required to abstain from participating in any matters in which another member of your law firm or a client of the law firm is involved. You should abstain from participating in matters before the PSC involving a client of the law firm for a reasonable period of time.

You may represent clients in legal matters not related to your official duties, unless prohibited by a policy of the PSC. Your position as Bankruptcy Trustee could potentially create a conflict of interest with your official duties, if the Bankruptcy Trustee has any discretion in prioritizing payments to utilities regulated by the PSC. Otherwise, that role would be permitted unless prohibited by a statute or policy relating specifically to employees of the PSC. However, pursuant to KRS 11A.040(10), please be advised that as long as you remain employed by your law firm, such outside employment is subject to approval by your appointing authority, who in your case would be the Governor.

Second, you ask whether a period of six months is a reasonable period of time for the Vice Chairman of the PSC to abstain in matters pending before the PSC in which the Vice Chairman formerly represented one of the parties in the matter.

As discussed above, in the event that the law firm continues to represent a client in PSC matters, then a conflict of interest would exist requiring you to abstain from participating in the matter.

There is no direct prohibition in the Executive Branch Code of Ethics limiting the work that a state employee who is also an attorney may perform due to prior representation of clients, however, the previous representation may cause an appearance of a conflict if the employee immediately becomes involved in matters regarding the former client. The Commission believes that in order to avoid any real or perceived conflicts of interest, you should abstain for a reasonable period of time from any matters involving a client of yours or your law firm.

For such abstention, you should follow the guidance laid out in KRS 11A.030 and the requirements set forth in KRS 11A.020(3) above. The Commission believes six months is a reasonable period of time, however, the agency may implement a more restrictive policy. The Vice Chairman may also want to consider requesting an opinion from the Kentucky Bar Association, which may be more restrictive regarding the attorney-client relationship than discussed herein.

Your third question is whether your past membership in the Sierra Club requires you to abstain in cases in which the Sierra Club intervenes as a party. You were a member of the Sierra Club for approximately six months and you did not serve in a leadership role in the organization. Considering the factors in KRS 11A.030, the Commission does not believe that you are required to abstain in matters before the PSC in which the Sierra Club intervenes as a party.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb