COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

http://ethics.ky.gov/

GWEN R. PINSON
CHAIR

RONALD L. GREEN
VICE-CHAIR

NICK CAMBRON

ANGELA LOGAN EDWARDS

JEANIE OWEN MILLER

JOHN R. STEFFEN
EXECUTIVE DIRECTOR

#3 FOUNTAIN PLACE
FRANKFORT, KY 40601
(502) 564-7954
FAX: (502) 564-2686

DANA COX NICKLES
GENERAL COUNSEL

Executive Branch Ethics Commission
ADVISORY OPINION 09-28
September 18, 2009

RE: 1. May a member of the Council on Postsecondary Education be President of a private postsecondary institution licensed by the Council and continue to serve on the Council?

2. May the Chair of the Council on Postsecondary Education be President of a private postsecondary institution licensed by the Council and continue to serve as Chair of the Council?

DECISION: 1. Yes.
2. Yes.

This opinion is issued in response to your August 20, 2009 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 18, 2009 meeting of the Commission and the following opinion is issued.

You seek the advisory opinion on behalf of the Council on Postsecondary Education ("Council"), the Chair of which has recently been appointed President of a private, non-profit postsecondary education institution. You yourself are the President of the Council.

You provide the relevant facts as follows:

KRS 164.011(1) creates the Council. Of the members of the Council, 13 are appointed by the Governor from lists provided by the Governor's Postsecondary Nominating Committee and two are appointed from lists of candidates nominated by special groups, the faculty trustees and regents and the student trustees and regents at the state-supported postsecondary education institutions. The state's Commissioner of Education also serves on the Council. The general powers and duties for the Council are contained in KRS 164.020. Of the 36 individual responsibilities for the Council enumerated therein, two relate to private, non-profit institutions. KRS 164.020(13) gives the Council special responsibility to avoid duplication of services and programs in the state postsecondary system and to promote cooperation between the state postsecondary system and private postsecondary institutions, and to receive an annual report

from the Association of Independent Kentucky Colleges and Universities ("AIKCU") stating the condition of independent institutions and listing opportunities for more collaboration between the state and independent institutions. KRS 164.020(23) requires that the Council establish a receiver institution for student records if an institution, public or private, discontinues operation.

The primary statutes regulating the licensing of private, non-profit institutions are KRS 164.945, 164.946, and 164.947. In particular, KRS 164.947(1) assigns responsibility for licensing as follows:

> The Council on Postsecondary Education by regulation shall adopt standards and procedures for the licensing of colleges. . .

"College" as the term is used therein is defined in KRS 164.945(1)(a) to include both public and private postsecondary educational facilities or institutions. You indicate that the Council has chosen to exercise its power over licensing by delegating authority, by regulation, to the President of the Council to make decisions on the licensing of new institutions, and additions of new academic programs. 13 KAR 1:020 *Private College Licensing* gives the President of the Council the authority to implement the standards set forth in the administrative regulation.

Your letter indicates that a Council member recently became the chief executive officer, or President, of a private institution licensed by the Council. The issue you present is whether an individual can be an employee of an institution licensed by the Council while also serving as a member of the Council. Further, you ask whether a person who is employed by an institution licensed by the Council may serve not only as a member of the Council, but as an officer of the Council. The Council member in question is, in fact, the Council's current Chair.

You state that your agency understands that there is a potential for future conflict, but since day-to-day responsibility for licensing of the private institutions is delegated by regulation to the President, you believe any conflict can be addressed by open disclosure and recusal. You state that the institution at which the Council member is President does not receive a direct state appropriation and that while students there are the beneficiaries of state financial aid programs, the Council does not administer the distribution of funds under these programs. According to your letter, interaction between the private, non-profit institutions and the Council is limited mainly to receiving the annual report from the AIKCU, and the general review of data concerning the enrollment, graduation, and retention rates at the institutions.

As President of the Council, you review and pass on all new academic program requests of the private non-profit institutions, and review substantive changes in ownership and in the operation of the institutions licensed by the Council. Each academic program at each institution is considered part of its license—a substantive change in an academic program, or newly proposed program, will result in a review by Council staff, and a decision by you whether to extend the

license of the institution. These decisions are not subject to Council approval or consideration. When a licensing issue arises with the aforementioned Council member's institution, it is the Commission's understanding that your intention is to limit your contact with the Council member and that the Council member will recuse himself from the issue. You state that since matters relating to student financial aid that do come under consideration by the Council generally affect all institutions equally, you do not see a need for the Council member's recusal on discussions involving student financial aid guidelines.

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:
>
> (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.

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:

(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.

As a member of the Council, the individual in question is considered to be an "officer" as that term is defined in KRS 11A.010(7). The Commission advised in Advisory Opinion 00-43 that a state officer may serve on the board of a non-profit corporation, as long as the state officer has no involvement with matters related to the non-profit corporation as part of his official duty and abstains from such matters in writing. Similarly, in Advisory Opinion 04-3, the Commission advised that a state officer may serve on a board or commission, provided that he or she abstains from official action with respect to that particular entity. While the matter now before the Commission is somewhat different from those discussed in these opinions in that the individual in question is no longer merely a member of the board of the private, non-profit postsecondary education institution as he once was, but is now its President, the Commission believes that it is possible to negate potential conflicts that arise by means of recusal as proposed in your letter. While the fact that he is the President of the institution is more likely to create a conflict for the member of the Council than if he was, for example, merely a member of its faculty, due to the rather limited involvement that the Council has with private institutions, as compared to public institutions, it is not unreasonable to consider recusal, when appropriate, to be a viable solution. In reaching this conclusion, the Commission takes into account the fact that 13 KAR 1:020 delegates to the President of the Council complete authority over private college licensing matters, which includes licensure application procedures, license renewal and supplementary application procedures, annual reports, license expirations, standards for licensure, and consumer complaints.

The Commission recognizes, nonetheless, that the President of the Council is technically employed by the members of the Council. This fact serves to emphasize why the Council member in question must take great care to not involve himself at all in any matters that directly involve his private institution or that would affect his institution differently than any other similarly situated private postsecondary institution. He should clearly abstain from all such matters in writing. Additionally, the Commission believes that it would be appropriate for the Council member to avoid any matters in his role as President of the private institution that directly involve the Council out of concern for any undue influence he could, however unintentionally, exert on behalf of the college on another member of the Council or on a member of the Council's staff due to his dual role. In other words, the Council member, as President of the private institution, should delegate someone else to be the primary point of contact between his college and the Council.

Regarding whether the Council member may continue to serve as Chair while serving as President of the private postsecondary institution, the Commission has reviewed the relevant statutes, regulations, and Council bylaws and concludes that it would be appropriate for him to

do so. However, because of the additional powers and duties involved in serving as Chair, the Commission urges the Council member to have a heightened awareness of his ethical obligations while serving in that capacity.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson