COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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JEANIE OWEN MILLER

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

DANA COX NICKLES
GENERAL COUNSEL

Executive Branch Ethics Commission
ADVISORY OPINION 09-7
January 23, 2009

RE: May the Governor's Chief of Staff sell his interest in an office condominium to his co-owner, a registered executive and legislative branch lobbyist?

DECISION: Yes, within certain guidelines.

This opinion is issued in response to your January 9, 2009, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The matter was reviewed at the January 23, 2009, meeting of the Commission and the following opinion is issued. You seek advice from the Commission regarding whether the Governor's Chief of Staff may proceed with the proposed sale of an office condominium to his co-owners, a registered executive and legislative branch lobbyist and his wife, and seek advice as to how best to accomplish the divesture.

According to your letter, upon becoming Chief of Staff to the Governor, the Chief of Staff wrote to the Commission and advised that his wife was employed by a computer company and that she sold computers to schools in Kentucky and Virginia. While the computer company did not have a contract with the Governor's Office or the Education Cabinet, but rather with the Department of Education on behalf of local school districts which are not under the control or direction of the Governor, the Chief of Staff fully disclosed to both the Governor and this Commission, in writing, the nature of his wife's employment, advising that he would abstain from any matters relating to education and computer and computer service contracts. You accurately state that the Commission was satisfied with this approach and sought no further information or discussion.

You further state, again accurately, that the Chief of Staff filed his Statement of Financial Disclosure with the Commission identifying his ownership in a certain business along with three pieces of real property, including an office condominium where his wife worked.

According to your letter, this business had existed since 2006 (at a time the Chief of Staff was in the private sector) to build and sell a single piece of property and was dissolved on January 5, 2009, following the sale of that property. You state that the partners in that business,

as identified in its filing with the Secretary of State's Office, in addition to the Chief of Staff, were a registered executive and legislative branch lobbyist and an employee of state government. (You add that this transaction will be properly noted in the Chief of Staff's next Financial Disclosure Statement).

You indicate that the office condominium is the Chief of Staff's wife's place of employment, purchased preconstruction in 2005, well before the Chief of Staff came to work for the Governor. The Chief of Staff and his wife jointly own the office condominium with the above-mentioned lobbyist and his wife. According to your letter, while the Chief of Staff complied with the law in disclosing his sources of income and real estate, in order to avoid even the appearance of a potential conflict, the Chief of Staff and his wife would like to divest themselves of the office condominium and propose to sell their shares to their co-owners, after which the Chief of Staff's wife would not rent or conduct her business in the office condominium. The Chief of Staff and his wife seek the Commission's advice as to how to accomplish this transfer without violating the letter or the spirit of the ethics laws, specifically asking:

1) *Is there any reason the Chief of Staff and his wife cannot proceed with the proposed sale?*

2) *Assuming there is no reason not to go forward with the divestures, the Chief of Staff and his wife would want to obtain an independent real estate appraisal. What would be the best way to select the appraiser so as to avoid any perception of conflict? What would be the best way to accomplish the divesture?*

KRS 11A.020(1) states:

> 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.

KRS 11A.020(3) further states:

> 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.

While KRS 11A.030 provides the following guidance:

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.

The ownership of the office condominium with the lobbyist is not in and of itself a conflict of interest. A conflict would only arise if the Chief of Staff, because of that common interest, took some action in his official capacity to further his own interest or that of his business partner. To avoid such a conflict, the Chief of Staff should follow the guidance provided in KRS 11A.030 and abstain from any official decision involving either that piece of property or his lobbyist co-owner.

To address the questions posed to the Commission, the Chief of Staff and his wife are not prohibited by the Code from selling their ownership in the office condominium to the lobbyist and his wife assuming, as we must, that the sale is bona fide, does not carry with it any promise of favoritism or privilege, and that all reporting requirements are met. The method of selecting

a real estate appraiser so as to avoid any perception of conflict is outside of the Commission's scope. Further, as in all circumstances, the most expedient way to avoid any perception of conflict is to make the transaction completely transparent and open to public scrutiny.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

Gwen R. Pinson

By Chair: Gwen R. Pinson