



COMMONWEALTH OF KENTUCKY  
**EXECUTIVE BRANCH ETHICS COMMISSION**  
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Executive Branch Ethics Commission

**ADVISORY OPINION 13-02**

March 18, 2013

**RE:** Obligation of public servants to refuse to comply with orders of such a nature that anyone of ordinary sense and understanding would recognize as being contrary to the Executive Branch Code of Ethics and the need to report such misconduct to the Executive Branch Ethics Commission.

This opinion is issued by the Executive Branch Ethics Commission (the "Commission") upon its own motion. As a result of several recent investigations, the Commission wishes to advise public servants regarding their duty to maintain and uphold the integrity of the Executive Branch of state government. This matter was reviewed at the March 18, 2013, meeting of the Commission and the following opinion is issued.

As previously contemplated in Advisory Opinion 07-11, public servants, which include all constitutional officers and all merit and non-merit employees in the Executive Branch of state government, are faced with many types of ethical dilemmas on a regular basis that involve situations where doing the "right thing" may be a significant personal cost to the employee. But being ethical means doing the right thing for the benefit of the entire state regardless of the expectation that it may come at personal cost to the individual. Elected officials and employees must always consider which decision or course of action serves the interests of the Commonwealth as a whole, or which action better promotes public confidence in the integrity of government, and conduct themselves accordingly. This policy is established within the Executive Branch Code of Ethics (the "Code of Ethics") in KRS 11A.005 and KRS 11A.020(1)-(3), as follow:

KRS 11A.005:

(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;

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(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) 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.

It is the opinion of the Commission that these statutory provisions obligate public servants to refuse to comply with orders of such a nature that anyone of ordinary sense and understanding would recognize as being contrary to the Code of Ethics.

During recent investigations conducted by the Commission, staff of the Commission all too frequently heard the excuse from public servants that they were “just following orders,” or words to that effect, to explain their involvement in, or enablement of, conduct that was clearly contrary to the Code of Ethics. This is not an acceptable excuse. Such behavior, even under orders, undermines the public confidence in the integrity of its government and public servants. Further, under the Code of Ethics, when a public servant “follows orders” that enable an elected official or other superior to misuse his official position to further his personal or private interests or influence his own agency in derogation of the state at large, the public servant himself could in fact be using his own official position to give the elected official or superior a privilege or an advantage in derogation of the public interest at large. Therefore, such action on the part of the public servant could, in and of itself, be in violation of KRS 11A.020(1).

While the Commission acknowledges that sometimes an order given by an elected official or other superior may fall within a grey area, where it is unclear whether the underlying conduct would violate the Code of Ethics, recent investigations uncovered conduct that anyone of ordinary sense and understanding should have recognized as being unethical. It is in these instances that the Commission believes public servants, whether merit or non-merit, have an obligation under the Code of Ethics to refuse to comply. Public service is a public trust and all public servants must do their part to work for the benefit of the people of the Commonwealth and not for the benefit of the elected officials or others under whose supervision they work.

The Commission recognizes that disobeying the orders of an elected official or other superior is not without personal risk for the subordinate. When faced with such a situation, or when compelled to comply with an order that the public servant knows to be unethical or that will result in an outcome that is contrary to the provisions of the Code of Ethics, the Commission encourages the public servant to promptly and accurately report such conduct to the Commission. Public servants who knowingly turn a blind eye to unethical conduct are only contributing to the unethical environment within their agency.

Reports to the Commission can be made in a confidential manner to the Commission staff at any time. A public servant who makes a good-faith report of a violation of this chapter shall

be protected from reprisal pursuant to the provisions of KRS 61.102, which states in relevant part:

(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of . . . the Executive Branch Ethics Commission . . . any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

(2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

The Commission is only able to address misconduct when it is aware that misconduct has occurred. The timely reporting by public servants of potential violations of the Code of Ethics is crucial to the work of the Commission. Unethical environments within state agencies should not be tolerated by public servants, but rather the conduct that is creating the unethical environment should be reported to the Commission so that those guilty of misconduct are held accountable and situations that are contrary to good government are not allowed to continue indefinitely without consequence.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

A handwritten signature in black ink, appearing to read 'W. David Denton', written over a horizontal line.

By Chair: W. David Denton