

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 00-29
Amends Advisory Opinion 98-39
June 23, 2000

RE: May employee lease apartment at the agency by which she is employed?

DECISION: Yes, provided employee is not involved in the supervision of employees who handle the billing or collection of rent from tenants.

This opinion is in response to your April 25, 2000, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the June 23, 2000, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. An employee of the Department of Military Affairs, Bluegrass Station Division ("Bluegrass Station"), who serves as an Administration Section Supervisor, wishes to lease a one-bedroom apartment at Bluegrass Station. All apartments for lease by Bluegrass Station are advertised and available to the general public. Such lease agreements are between the Finance and Administration Cabinet (the "Cabinet") and a lessee, with the base lease rates established by the Cabinet; however, Bluegrass Station does have flexibility in setting the lease rates above the base amount.

The employee states that she has not received an advantage or benefit over the general public or other tenants. The apartment that the employee wishes to lease will be rented at a per square foot rate that is greater than twelve of the two bedroom apartments that Bluegrass Station leases. Although a wait list is maintained by Bluegrass Station for any person interested in an apartment, no one else was on the one-bedroom wait list at the time the lease agreement was drawn up for the apartment in question. Thus, the employee has not used her position to get an advantage over the general public.

The employee's job responsibilities for Bluegrass Station do not involve setting rates for any leaseable property. You state that Bluegrass Station's organizational structure contains checks and balances to ensure that invoicing/billing and collecting are separate and performed by different individuals. The employee's position does not involve collection. You ask whether the employee may lease an apartment at Bluegrass Station.

KRS 11A020(1)(d) and 11A.040(4) provide:

1) No public servant, by himself or through others, shall knowingly

...

(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.

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

(a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or

(b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or

(c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises; or

(d) Purchases from a state agency that are available on the same terms to the general public or that are made at public auction.

In Advisory Opinion 98-39, the Commission concluded that although an employee was leasing land from a state agency, rather than the state agency leasing land from the employee, the law still prohibited the employee from bidding on or contracting with the state agency by which he was employed. However, the Commission concluded that the employee was not prohibited from contracting with the Cabinet, rather than the employee's agency, provided he had no involvement in matters regarding the land or lease as part of his official duty and provided the lease was competitively bid.

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The Commission wishes to reconsider its interpretation in Advisory Opinion 98-39. The Commission believes that subsection (d) of KRS 11A.040(4) allows an employee to purchase or "lease" items from the state agency by which he is employed, provided the employee does not use his position to obtain an advantage over the general public and provided the employee is not in a position that would create a conflict of interest for the employee to purchase or lease the item.

Thus, it appears that because the apartment lease is available on the same terms to the general public, and because the employee does not appear to have used her position to obtain any advantage over the general public, she may lease the apartment from Bluegrass Station provided the employee's position does not create a conflict of interest for her to lease the apartment. The Commission believes that if the employee is involved, or supervises anyone who is involved, in the billing, collection of, or any matters regarding the rent from tenants, a conflict of interest will exist if the employee leases the apartment at Bluegrass Station, regardless as to whether the lease is with Bluegrass Station or with the Cabinet. If the employee is not involved, and does not supervise anyone who is involved, in any matters regarding the apartment, and no other conflict exists, then she may lease the apartment from either the Cabinet or Bluegrass Station.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Bertie Oldham Salyer, M.A., A.M.E.

Enclosure: Advisory Opinion 98-39