

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-31

October 16, 2003

RE: May Kentucky Heritage Council employee serve as member of Board of Trustees for the Pine Mountain Settlement School?

DECISION: Yes, provided the employee has no involvement with the entity, as part of his official position.

This opinion is issued in response to your July 30, 2003 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the October 16, 2003, meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Pine Mountain Settlement School (the "School") has asked for an employee of the Kentucky Heritage Council (the "Council") to serve as a member of the Board of Trustees at the School. The Council is considering two employees to provide this service --either the Executive Director, or the Program Manager of the Site Development Program. Although the Council's regulatory functions over the School are minimal, the Council has funded preservation activities through the School and may fund preservation projects with the School in the future.

From your review of advisory opinions, you say it appears that an employee can avoid a conflict in funding situations by recusing himself and others under his supervision from involvement in decisions affecting funding. However, you are concerned there may be an appearance of a conflict of interest for this employee, and ask for the Commission's advice. You ask, as well, if it would make a difference if the employee were a non-voting trustee for the School.

KRS 11A.020(3) and KRS 11A.030 provide:

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-31

October 16, 2003

Page Two

KRS 11A.020(3):

(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:

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 Commission has addressed similar issues in previous advisory opinions. In Advisory Opinion 01-22, the Commission stated it was permissible for an employee to serve on the board of trustees of a private college so long as the college did not participate in programs under the employee's supervision and provided that neither the employee nor anyone under his supervision was involved in the licensing of the college. The Commission also advised the employee to abstain as a trustee from any matters before the board of trustees involving his

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-31

October 16, 2003

Page Three

official state duties. Additionally, Advisory Opinion 99-22 states that an employee may serve on the board of a private entity that receives funding from the state agency for which the employee works, provided the employee has no involvement with the private entity as part of his official duty.

In light of the past and possible future funding relationship between the Council and the School, service by a Council employee on the School's Board of Trustees could create a possible conflict of interest between the employee's official duties for the Council and his private interest as a trustee for the School. This potential for conflict can be alleviated for all concerned so long as the employee and anyone under his supervision abstains from any official Council involvement regarding the School. Additionally, the employee should also abstain, as a School trustee, from any involvement with matters dealing with the Council.

As to the concern you have regarding an appearance of a conflict, the Commission believes that proper abstention by the employee from any official Council involvement with School-related matters will serve to avoid any real or perceived conflict of interest. Unlike the situation in Advisory Opinion 01-29, where the Commission advised that a perception of impropriety should be avoided, this scenario does not appear to present a situation wherein a Council employee's service as a trustee for the School will automatically lead to a perception of a conflict of interest. However, if the School decides, in the future, to request funding from the Council, it may not be feasible for either of the employees being considered for the Board of Trustees to abstain from such involvement. If not, the employee would need to resign the position on the Board of Trustees in order to avoid a possible conflict.

Finally, you ask if it would make a difference for this analysis if the employee were to serve as a non-voting trustee for the School. A non-voting member could still take part in any and all discussions of School business; this would still give rise to possible conflicts on matters involving the Council. Thus, even as a non-voting member of the School's Board of Trustees, the employee should abstain as part of his official position from matters involving the School.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.