

Executive Branch Ethics Commission

ADVISORY OPINION 07-45

December 14, 2007

RE: Does employment of Cabinet Secretary pose a conflict pursuant to KRS Chapter 11A?

DECISION: No, provided the Cabinet Secretary refrains from involvement in certain matters.

This opinion is issued in response to your December 5, 2007 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 14, 2007 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. The recently elected Governor has offered the non-merit position of Secretary of the Cabinet for Environmental and Public Protection (the "Cabinet") to an individual from Maysville. The Cabinet oversees various departments and offices, including the Office of Financial Institutions.

The individual offered the Cabinet Secretary position serves on the board of a bank corporation, but will be resigning that position upon acceptance of employment with the state. He owns stock in the bank corporation, which is publicly held, but his ownership interest is less than five percent (5%) of the company. He also has existing loans with two other local banks. The potential Cabinet Secretary serves as a board member of the Hayswood Foundation and the Kentucky Gateway Museum Center, both non-profit organizations, but plans to resign from the Hayswood Foundation. His term with the Museum Center expires on December 31, 2007.

Further, the potential Cabinet Secretary and the Governor, along with several other individuals, have owned an oil well in Western Kentucky for many years. They each receive approximately \$260 per year in royalties from the oil well. If the potential Cabinet Secretary resigns from the board of the bank corporation and refrains from any matters regarding those banks with which he has loans, you ask whether his employment as Cabinet Secretary would pose a conflict under KRS Chapter 11A.

KRS 11A.020(1) provides:

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

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- (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.

Based on many previously issued advisory opinions including Advisory Opinion 07-44 (a copy of which is enclosed), the Commission believes that since the candidate for Cabinet Secretary will not be retaining his position as board member on the bank corporation, he is not prohibited from accepting the position as Secretary of the Environmental and Public Protection Cabinet as long as he abstains at least for a reasonable amount of time from any matters pertaining to the bank corporation.

Although he does retain some ownership in the bank corporation, given that his ownership is less than a 5% interest, he still may be employed by the Cabinet that oversees bank corporations within the Commonwealth. Advisory Opinion 00-20 (a copy of which is enclosed) prohibits an employee from owning more than five percent (5%) of a corporation that is regulated by the state agency for which an employee works or heads, unless neither the employee, nor anyone under his supervision, is directly involved in any matters of the corporation, or unless the interest is purchased exclusively through participation in a publicly traded mutual fund where the purchasing and selling decisions are completely out of the control of the employee or his spouse. Thus, the Commission cautions the potential employee to ascertain that his ownership interest never rises above 5% during his tenure as Cabinet Secretary.

Further, if the potential Cabinet Secretary wishes to avoid even an appearance of a conflict of interest, the Commission encourages him to abstain from matters regarding the bank corporation throughout his state tenure or, if he prefers, deposit his ownership in a blind trust where an unrelated party would serve as the trustee who would be given complete discretion to manage the trust, including the power to dispose of and acquire trust assets without consulting or notifying the public servant.

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Concerning the future Cabinet Secretary's lending relationship with several local banks, the Commission looks to Advisory Opinion 94-54 (a copy which is enclosed), which provides that if all financial institutions are subject to review by an employee, such as the Commissioner of the Department of Financial Institutions, the employee is not required to refinance a loan elsewhere, but must abstain from official decisions concerning the financial institution with which he has a private lending relationship, and disclose his abstention pursuant to KRS 11A.020(3), provided above. Similarly, the Commission believes that since all state-chartered banks are regulated by the Cabinet, the future Cabinet Secretary does not have to divest himself of the loans, but should abstain from any involvement in the regulation of the local banks and disclose his abstention pursuant to KRS 11A.020(3) above.

The potential Cabinet Secretary's termination from the board of the Hayswood Foundation and his term expiration on the board of the Museum Center will serve to remove any potential for conflict with those non-profit organizations. Further, the Commission cautions the potential employee not to have any involvement as part of his official position in any matter that could be construed as a conflict between his private interest and his duties in the public interest, or could give him an advantage or a financial gain, relating to his investment in the oil well.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Vice Chair: E. Patrick Moores

Enclosures: Advisory Opinion 07-44
Advisory Opinion 00-20
Advisory Opinion 94-54