

Executive Branch Ethics Commission
ADVISORY OPINION 08-20
September 26, 2008

- RE:**
1. May the Chairman of the Public Service Commission (“PSC”) actively practice law if he does not represent clients regulated by the PSC?
 2. Is a period of six months a reasonable period of time for the Chairman of the PSC to abstain in a matter pending before the PSC in which the Chairman formerly represented one of the parties in the matter; and in a matter in which his former law firm represents a party?
 3. May the Chairman serve on boards of certain charitable and civic organizations that are not regulated by the PSC?

- DECISION:**
1. Yes, with limitations.
 2. Yes, unless the agency requires a longer period of time.
 3. Yes.

This opinion is issued in response to your June 20, 2008 request for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”). This matter was reviewed at the July 11, 2008 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows:

You were appointed as Chairman of the PSC on June 1, 2008. The PSC is the state agency charged under KRS Chapter 278 with regulating the intrastate rates and services of over 1500 utility companies throughout the state of Kentucky. The mission of the PSC is to foster the provision of safe and reliable utility service at a reasonable price to customers while providing for the financial stability of those utilities by setting fair and just rates, and supporting their operational competence by overseeing regulated activities. The PSC performs its regulatory functions through written orders following procedures outlined in KRS Chapter 278 and administrative regulations. PSC commissioners are primarily responsible for reviewing and deciding utility rate cases filed with the PSC, promulgating utility regulations, and developing

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utility policy. The commissioners work with PSC staff to conduct investigations, hold hearings and public meetings, and review testimony, exhibits and briefs filed by utilities and other parties that appear before the PSC. As Chairman of the PSC, you have the additional responsibility of serving as the chief executive officer of the Commission under KRS 278.050(2).

Immediately prior to your appointment as Chairman of the PSC, you were of counsel for a law firm. As of the date of your appointment to the PSC, you will no longer receive compensation from your law firm. You would like to continue to engage in the practice of law on your own time in order to complete matters that were pending on the date of your appointment. You plan to continue representing clients individually, and the representation will not be affiliated with your former law firm.

You also previously served as Mayor of Louisville, County Judge Executive of Jefferson County, and Attorney General of the Commonwealth of Kentucky. You have not personally been involved in any cases before the PSC since your term as Attorney General from 1983 to 1988.

In your law practice, you have personally represented telecom utilities and one other utility regulated by the PSC. Your representation of these entities was not related to issues regulated by the PSC. Your former law firm has occasionally represented parties in matters before the PSC, but is not currently representing any party in a PSC proceeding.

You serve on the board of directors for twelve civic and charitable organizations, and you do not receive compensation for your service. None of these organizations has ever appeared as a party to a Commission proceeding and none are regulated utilities. The organizations do not receive a preferential utility rate pursuant to KRS 278.170. Some of the organizations may have been given gifts or other financial support by regulated utilities or their affiliates.

KRS 11A.005 provides:

- 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;
 - (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

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(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) - (3) provides:

(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.

KRS 11A.030 provides:

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.

KRS 11A.040 (10) provides:

(10) Without the approval of his appointing authority, a public servant shall not accept outside employment from any person or business that does business with or is regulated by the state agency for which the public servant works or which he supervises, unless the outside employer's relationship with the state agency is limited to the receipt of entitlement funds.

(a) The appointing authority shall review administrative regulations established under KRS Chapter 11A when deciding whether to approve outside employment for a public servant.

(b) The appointing authority shall not approve outside employment for a public servant if the public servant is involved in decision-making or recommendations concerning the person or business from which the public servant seeks outside employment or compensation.

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(c) The appointing authority, if applicable, shall file quarterly with the Executive Branch Ethics Commission a list of all employees who have been approved for outside employment along with the name of the outside employer of each.

First, you ask whether you may continue to represent clients that you represented at your prior law firm, if you represent the clients individually on your own time using non-state resources. You state that the clients are not regulated by the PSC nor would your representation of these clients involve matters relating to regulated utilities. As long as this remains the case, it is the opinion of the Commission that you may continue to personally represent these clients in legal matters. However, such representation must not be prohibited by a statute or policy of the PSC, and you must continue to assure no conflict of interest arises in relation to your state employment. It should also be noted that while outside employment generally requires the approval of your appointing authority pursuant to KRS 11A.040(10), above, since the situation you describe would be considered self-employment, no such approval is required, unless your appointing authority, who in your case would be the Governor, has a stricter policy in place.

Second, you ask whether a period of six months is a reasonable period of time for the Chairman of the PSC to abstain in matters pending before the PSC in which you formerly represented a party in the matter as well as in matters in which your former law firm represents a party. There is no direct prohibition in the Executive Branch Code of Ethics limiting the work that a state employee who is also an attorney may perform due to prior representation of clients, however, the previous representation may cause an appearance of a conflict if the employee immediately becomes involved in matters regarding representation of the former client by the attorney or the attorney's law firm.

The Commission believes that in order to avoid any real or perceived conflicts of interest, you should abstain for a reasonable period of time from any matters involving a former client of yours or your law firm. While the Commission believes that six (6) months is a reasonable period of time, you may want to evaluate these decisions on a case-by-case basis in accordance with the guidance laid out in KRS 11A.030, above, and the requirements set forth in KRS 11A.020(3), also above. You should also comply with any policies adopted by the agency.

Moreover, the Commission recognizes that your duty to your clients as their former attorney may be broader than any duties imposed by KRS Chapter 11A. For this reason, you may also want to consider requesting an opinion from the Kentucky Bar Association, which may be more restrictive regarding the attorney-client relationship than discussed herein.

Your third question is whether you may continue to serve on boards of certain charitable and civic organizations that are not regulated by the PSC. The Commission has previously held in a number of Advisory Opinions, including Advisory Opinions 04-3, 00-43, and 99-22, that a public servant could serve on the board of directors of an organization so long as he had no involvement with the entity as part of his official duty. In the event that a conflict arises between

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your official duties and your service on a Board for an organization, then you should recuse yourself from any involvement in the matter before the PSC and file a written abstention in accordance with KRS 11A.020(3).

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

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