

Executive Branch Ethics Commission
ADVISORY OPINION 12-02
March 19, 2012

- RE:**
1. May the Executive Director of the Kentucky Horse Racing Commission, or his wife, remain involved in the horse racing industry in Kentucky?
 2. May the Executive Director of the Kentucky Horse Racing Commission, or his wife, remain involved in activities in Kentucky either not related to the horse racing industry or not involving licensees of the Kentucky Horse Racing Commission?
 3. May the Executive Director of the Kentucky Horse Racing Commission, or his wife, remain involved in the horse racing industry outside of Kentucky?

- DECISION:**
1. No, such involvement would create conflicts of interest.
 2. Yes, so long as conflicts of interest are avoided.
 3. Yes, so long as conflicts of interest are avoided.

This opinion is issued in response to your March 7, 2012, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The request was reviewed at the March 19, 2012, meeting of the Commission and the following opinion is issued.

You have been appointed as the Executive Director of the Kentucky Horse Racing Commission ("KHRC"), effective April 1, 2012. You state that you have been a licensed thoroughbred race horse trainer since 1974. You are the sole owner of a stables that is a thoroughbred boarding, breaking, training, and racing facility, with operations in Kentucky, Florida, and New York. The stables is operated by you and your wife. Your wife has been a licensed trainer for a number of years as well.

In addition to the stables, you state that your wife is the sole member and manager of a limited liability company. Through this LLC, she provides equine insurance services to clients

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and holds a license from the Kentucky Department of Insurance. She primarily provides insurance coverage for non-racing thoroughbreds, like broodmares.

You add that you and your wife also advise prospective purchasers of thoroughbreds at horse sales in Kentucky.

In your letter, you state that you do not plan to seek a license as a trainer in Kentucky during your tenure as Executive Director of the KHRC. However, you do seek an opinion on the appropriateness of the following activities:

1. Whether your wife can hold a KHRC license as a trainer and train horses in Kentucky at a location under the jurisdiction of the KHRC for your stables. While the horses would be trained in Kentucky, they would not be raced in Kentucky;
2. Whether your stables can continue to provide boarding, breaking, and training services to clients who are KHRC licensees;
3. Whether your stables can continue to provide boarding, breaking, and training services to clients who are not KHRC licensees;
4. Whether it is appropriate for your stables to provide boarding, breaking, and training services for horses that may race in Kentucky in the future;
5. Whether your wife can train and race horses as a trainer at race tracks located outside of Kentucky;
6. Whether you can continue to hold a trainer's license in jurisdictions other than Kentucky while serving as Executive Director; and
7. Whether you and your wife can advise prospective buyers of thoroughbred race horses at horse sales in Kentucky for remuneration whether those horses race in Kentucky in the future or not. Whether you and your wife can provide these services through your stables, or as individuals.

According to your letter, the KHRC has jurisdiction over all pari-mutuel horse racing in the Commonwealth pursuant to KRS 230.215. Part of the duties of the KHRC includes licensing and regulating all participants in horse racing, including trainers. According to KRS 230.310(1), "No person required to be licensed by this section may participate in any activity required to be licensed on association grounds during a race meeting without a valid license therefor." The KHRC enforces its regulations through penalties that include fines, license suspensions, and license revocations. *See* 810 KAR 1:028.

In addition to race meetings, participants are required to obtain a license in order to enter "restricted areas" of race tracks at any time. *See* 810 KAR 1:025, Section 20. "Restricted area" is defined as "a portion of association grounds to which access is limited to licensees whose occupation or participation requires access, and to those individuals accompanying a licensee as permitted by the association." *See* 810 KAR 1:025, Section 1(2). Restricted areas would include

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the backside or stabling area of a race track and the race track surface.

KRS 230.225 creates and establishes the general responsibilities of the KHRC. Pursuant to KRS 230.225(5), those responsibilities include:

- (a) Developing and implementing programs designed to ensure the safety and well-being of horses, jockeys, and drivers;
- (b) Developing programs and procedures that will aggressively fulfill its oversight and regulatory role on such matters as medical practices and integrity issues;
- (c) Recommending tax incentives and implementing incentive programs to ensure the strength and growth of the equine industry;
- (d) Designing and implementing programs that strengthen the ties between Kentucky's horse industry and the state's universities, with the goal of significantly increasing the economic impact of the horse industry on Kentucky's economy, improving research for the purpose of promoting the enhanced health and welfare of the horse, and other related industry issues; and
- (e) Developing and supporting programs which ensure that Kentucky remains in the forefront of equine research.

KRS 230.230 provides the duties of the KHRC Executive Director. Specifically, KRS 230.230(1) provides as follows:

- (a) Be responsible for the day-to-day operations of the racing commission;
- (b) Set up appropriate organizational structures and personnel policies for approval by the racing commission;
- (c) Appoint all staff;
- (d) Prepare annual reports of the racing commission's program of work;
- (e) Carry out policy and program directives of the racing commission;
- (f) Prepare and submit to the racing commission for its approval the proposed biennial budget of the racing commission; and
- (g) Perform all other duties and responsibilities assigned by law.

In addition to these duties, the Executive Director is also charged with keeping full records of all proceedings before the KHRC, entering into agreements with various entities and bodies to implement the duties and responsibilities of the KHRC, and employing, dismissing, and taking personnel action concerning KHRC employees.

According to your letter, 810 KAR 1:008, Section 2, establishes the qualifications necessary to hold a trainer's license, and Section 3 provides the general duties and

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responsibilities of a licensed trainer. Most trainers stable and train their horses at either a licensed race track or a training center and routinely access what would be considered “restricted areas” of a race track. Trainers are responsible for every aspect of the care and activities of the horses they train. *See* 810 KAR 1:008, Section 3. Trainers also employ stable workers, veterinarians, farriers, and other professionals to provide care and support to horses in training. All of these and any other individual who accesses the backside or stabling area are required to be licensed. A licensed trainer may train his own horses or train horses owned by another person. The KHRC does not regulate the terms of any agreement between the owner and trainer.

KRS 11A.020 provides in pertinent part:

(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.

* * * *

(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.

The Commission has considered similar questions in the past. In Advisory Opinion 01-17, the Commission concluded that it would be a conflict of interest for a division director to lease land to an entity that it was the director’s responsibility to regulate. Due to the concern that the director was in a position to, potentially, use his position to give an advantage to his lessee, the Commission in essence said the director could not do business with the entity while being involved in its regulation. Similarly, in Advisory Opinion 02-13, the Commission determined that an education consultant employed by the Kentucky Board of Nursing could not accept

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employment by a college or university for which his state job required him to make recommendations regarding whether certain programs at those schools met the requirements of the Board of Nursing, which regulated those programs. Even though the consultant did not have any regulatory responsibilities over the particular program for which he wished to teach, the Commission concluded that being hired and compensated by a college or university he was responsible for regulating created a conflict for the consultant.

In Advisory Opinion 09-08, the Commission reviewed whether the Commissioner of the Department for Fish and Wildlife Resources could be self-employed as an independent contractor with a land development company. The Commission concluded that a conflict would not exist solely because of the proposed self-employment, but reminded the Commissioner that in his capacity as Commissioner of the Department, he would be considered to be directly involved in all matters coming before his agency and that a conflict would immediately occur if the land company for which he worked or any of his private clients became involved in any matters before his agency. The Commissioner was also cautioned to be very careful not to use any knowledge he gained in his public position to benefit private clients. This advisory opinion followed Advisory Opinion 07-22, which concerned the same Commissioner's proposal to create a private environmental consulting business to engage in, among other activities, advising on environmental permitting and compliance, providing technical guidance and implementation, and advising in conservation real estate ventures. In Advisory Opinion 07-22 the Commission indicated certain limitations would be necessary to make sure the Commissioner's activities as an environmental consultant did not run afoul of the provisions of KRS Chapter 11A. The Commissioner was advised that he could not accept clients who sought grants from his Department, who competed with his Department for grants administered privately, who sought to do business with, who were regulated by, or who had matters pending before, his Department. The acceptance of any such clients would create an immediate conflict of interest for the Commissioner under the Code of Ethics.

And finally, in Advisory Opinion 08-16, the Commission found that while a member of the Kentucky Board of Respiratory Care could also serve as an officer for a professional organization for respiratory therapists, the Board member would be precluded from participating in practically all matters coming before the Board due to the fact that so many of the issues considered by the Board involved either the professional organization directly or one of its members.

Further, the Commission has reviewed similar questions regarding the spouse of a public servant. In Advisory Opinion 96-53, the Commission concluded that an employee could accept a position as a director over a division that regulated the bank where his spouse worked as long as the employee was not involved in any matters concerning that bank. In Advisory Opinion 96-17, the Commission concluded that employment of an employee's fiancé or spouse by a company regulated by the division for which the employee wished to work would create a conflict unless

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the employee abstained from decisions relating to that company.

More recently, in Advisory Opinion 07-35, the Commission found that a spouse's employment with a law firm representing regulated utilities before the Public Service Commission did not necessarily create a conflict of interest for a PSC Commissioner but that a decision to abstain would have to be made on a case by case basis. In Advisory Opinion 07-46, the Commission determined that a potential Cabinet Secretary would need to refrain from any decisions relative to her cabinet's contract with the company at which her husband was employed.

The first step in determining whether a conflict of interest would exist for you as Executive Director of the KHRC is to determine whether your role with the KHRC in the licensing and regulatory process of an industry in which you, your wife, or businesses owned by you and your wife, are involved, would be considered "using" or "attempting to use" your influence in a matter that represents a substantial conflict between your personal interests and your duties in the public interest. Your involvement in issues directly affecting you, your wife, or any businesses owned by you or your wife, would clearly create a conflict for you as you would have a vested interest in those matters. That conflict, in turn, would impinge upon your duty in the public interest. Any involvement by you or your wife, or by any businesses owned by you or your wife, in an industry that is regulated by your own agency creates a situation wherein you could be, on behalf of the KHRC, making recommendations or carrying out policy or program directives having either a direct or indirect effect on the business interests of you and your wife. Although not all issues coming before the KHRC would necessarily impact the business interests of you and your wife if you remain involved in the horse racing industry in Kentucky, it seems likely that many of them would. In fact, depending upon the degree of your continued involvement in the Kentucky horse racing industry, it could be difficult to envision a scenario where a conflict of interest was not present.

As Executive Director of the KHRC, if either you or your wife remain active in the horse racing industry in Kentucky, you would be required to abstain, in writing, from any involvement in all matters relating to your interests in the industry. This would obviously include decisions which directly impact the business interests of you or your wife, such as your wife's trainer license or your stables' business activities, but may also include issues that, for example, might favor the interests of one group within the industry over those of another. It is the Commission's opinion, therefore, that as long as you or your spouse, either individually or through businesses you own, remain active in the horse racing industry in Kentucky, you will encounter conflicts under KRS Chapter 11A.

Pursuant to KRS 11A.010(18), as Executive Director of the KHRC you would be considered to be "directly involved" in any matter that you or anyone under your supervision at the KHRC worked on personally, or in other words, you would be considered directly involved in any matter in which the KHRC was involved. Thus conflicts could arise at the onset of your

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employment if you or your spouse are still involved in the horse racing industry in Kentucky, and would continue as long as that remained the case. In most cases a conflict can be dealt with through abstention and disclosure of the public servant's personal or private interest; however, here it appears as a practical matter if you or your wife remain involved in the industry you regulate, that abstention and disclosure could be required so frequently that you would be precluded from being involved with most matters coming before the KHRC.

With this in mind, the Commission will address the specific scenarios about which you inquired. You have stated that you would not seek a trainer's license in Kentucky while you serve as the Executive Director of the KHRC. The Commission commends you for taking this proactive approach to eliminate potential conflicts of interest.

You ask whether your wife can hold a KHRC license as a trainer and train horses in Kentucky at a location under the jurisdiction of the KHRC for your stables. While the horses would be trained in Kentucky, they would not be raced in Kentucky. It is the Commission's opinion that if your wife was to hold a KHRC license as a trainer and train horses for your stables at a location under the jurisdiction of the KHRC, a substantial conflict of interest would exist for you.

You next ask whether your stables can continue to provide boarding, breaking, and training services to clients who are KHRC licensees. The Commission believes that providing services to licensees of the KHRC through a business you own would create conflicts of interest for you.

You inquire as to whether your stables can continue to provide boarding, breaking, and training services to clients who are not KHRC licensees. The Commission does not foresee this scenario creating any conflicts of interest for you. If a conflict arose from these activities, you would need to abstain as appropriate.

You ask whether it is appropriate for your stables to provide boarding, breaking, and training services for horses that may race in Kentucky in the future. Assuming you could not foresee that a horse would race in Kentucky in the future, then your stables could conduct these activities so long as you abstained as appropriate should any conflict develop in the future as a result of these activities.

Next you ask whether your wife can train and race horses as a trainer at race tracks located outside of Kentucky. So long as this activity did not require her to have a license issued by the KHRC, the Commission does not foresee this creating any conflicts of interest for you. Again, should conflicts develop due to your wife's activities you would need to abstain appropriately.

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You also want to know whether you can continue to hold a trainer's license in jurisdictions other than Kentucky while serving as Executive Director of the KHRC. It is the Commission's opinion that there would be no inherent conflict in doing so, but advises that working as a trainer in other jurisdictions could be considered "outside employment" as that term is used in the Code of Ethics. Pursuant to KRS 11A.040(10), you are required to receive the approval of your "appointing authority" before accepting outside employment.

In your final scenario, you ask whether you and your wife can advise prospective buyers of thoroughbred race horses at horse sales in Kentucky for remuneration whether those horses race in Kentucky in the future or not, and you ask whether you can provide these services through your stables, or as individuals. It is the Commission's opinion that the involvement of you or your wife in horse sales in Kentucky, either directly or through your stables, would not in general create an actual conflict of interest, but will require that you exercise a heightened awareness of the Executive Branch Code of Ethics in order to avoid creating a conflict or the appearance of impropriety.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Ronald L. Green

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