



COMMONWEALTH OF KENTUCKY  
**EXECUTIVE BRANCH ETHICS COMMISSION**  
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**EXECUTIVE DIRECTOR**

MISTY DUGGER JUDY  
**GENERAL COUNSEL**

#3 FOUNTAIN PLACE  
FRANKFORT, KY 40601  
(502) 564-7954  
FAX: (502)-564-2686

Executive Branch Ethics Commission  
**ADVISORY OPINION 16-05**  
July 18, 2016

**RE:** Is a conflict of interest attributed to the staff of the Personnel Board when the staff member serves as a Hearing Officer on an administrative proceeding in which one of the Personnel Board members has a conflict of interest because the Personnel Board member's spouse serves as the agency representative or a witness in the administrative hearing?

**DECISION:** No

This opinion is issued in response to your May 27, 2016 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the "Commission") on behalf of the Personnel Board ("Board"). This matter was reviewed at the July 18, 2016 meeting of the Commission and the following opinion is issued.

You have submitted information and the Commission has sought the input of the General Counsel for the Board, as well as the attorneys for the Appellants and Appellees in the administrative matter from which arose your question in formulating this proceeding opinion. The relevant facts are as follows: You serve as the Executive Director of the Board. One of the duties of the Board is to hear appeals from merit employees pursuant to KRS 18A.075. You are a trained and certified hearing officer by the Attorney General's Office and may serve as the hearing officer for the Board on these matters pursuant to KRS 18A.095(21), which states as follows:

An appeal to the board may be heard by the full board or one (1) or more of the following: Its executive director, its general counsel, any nonelected member of the board, or any hearing officer secured by the board pursuant to KRS 13B.030.

Typically, the Personnel Board contracts for hearing officer services with outside counsel; however, in 2015, due to budget considerations, you designated yourself to serve as hearing

**ADVISORY OPINION 16-05**

July 18, 2016

2 | Page

officer on the administrative proceeding *Emerson Adkins, et al. v. Energy and Environment Cabinet and Personnel Cabinet* (“Emerson Adkins”). This administrative proceeding involves 54 appeals which were consolidated under one matter.

The Board is a seven-member administrative Board. Five members are appointed by the Governor to staggered terms, subject to Senate confirmation, and two members are classified employees elected by other classified employees. KRS 18A.045(1). One of the current members elected to the Board, who is in his second term and has served on the Board for seven years, is married to the designated Appointing Authority of the General Administrative and Program Support (GAPS) for the Energy and Environment Cabinet (EEC) and the Public Protection Cabinet, who served as the Agency Representative for the EEC during the five days of the evidentiary hearing in the Emerson Adkins appeals, and who testified twice during the five days of hearing. On May 20, 2016, during the fifth day of evidentiary hearing, the attorney for the Emerson Adkins appellants stated on the record that the hearing officer should have revealed the nature of the Board member’s relation to the appointing authority for EEC prior to the beginning of the hearing. The Appellant’s attorney questioned the propriety of the staff of the Personnel Board serving as hearing officers when the members of the Board determine the staff members’ salaries. As such, the Appellants’ attorney indicated that the hearing officer should have disqualified himself from hearing the case, but did not make a motion for such a disqualification.

At a conference on May 23, 2016, you announced that you were going to cancel the remaining scheduled days of hearing and would seek an opinion of this Commission. You indicate that you subsequently entered an Interim Order withdrawing from further involvement as the hearing officer and requested the Board designate a new hearing officer.

As to conflicts of interest, you state that in the past, the Board has treated such conflicts as the conflict of the Board member who would recuse from any involvement in cases involving the Board member’s wife as an appointing authority or witness. You are requesting an advisory opinion as to whether the Commission considers KRS Chapter 11A to prohibit you from serving as a hearing officer under this scenario or to be involved in any capacity in a matter involving a Board member’s family member when the Board member has a conflict of interest.

The General Counsel for the Board provides the following information: The Board employs five full-time staff members, two of which are non-merit employees, the Executive Director and General Counsel, who are required to serve as hearing officers for the Board. KRS 18A.090. In the past, conflicts of contract hearing officers have been handled by the staff as they arise to ensure that those with individual conflicts do not handle matters in which the potential hearing officer has the conflict. The Executive Director and the General Counsel serve as hearing officers. In recent years, as a cost-saving measure for multi-day hearing as contract hearing officers may have difficulty performing such multi-day evidentiary hearings, which can be cost prohibitive to the Board.

**ADVISORY OPINION 16-05**

July 18, 2016

3 | Page

The counsel for the Personnel Cabinet provides the following information and position: The Board member in question works for the Personnel Cabinet. The Personnel Cabinet's position is that there is no ethical conflict for the Executive Director and General Counsel to serve as hearing officers or be involved in any capacity in those appeals involving the Board member's spouse. It has been a long standing policy for this particular Board member to recuse from any decisions pertaining to any appeal involving his spouse, pursuant to KRS 11A.030. Further, the Board member's role with respect to the salaries of the Executive Director and General Counsel does not create a conflict as the Board member is but one of seven individual members of the Board that would vote on such salaries.

The counsel for the EEC provides the following information and position: The Personnel Board website indicates that the Board member in question is a member of the Board. According to the minutes of the Board, this Board member abstained and recused himself on the record at Board meetings on all matters involving EEC due to "a personal relationship with a witness." In the year prior to the Emerson Atkins matter, the Board member had demonstrated his practice of abstaining and recusing from matters involving EEC on another administrative matter in which the Appellants' attorney served as counsel before the Board. Finally, if the staff of the Board has a conflict because one of its Board members has a conflict, then this same conflict could be attributed to a designated contract hearing officer, as the Board appoints them as well.

The Emerson Atkins Appellants counsel provides the following information and position: In his 23 years practicing before the Board, he has not experienced the Executive Director serving as a hearing officer and he was surprised by such. There were numerous occasions when he or his clients could have been apprised of the Board member's relationship with the party witness. He believes the Executive Director and the counsel for EEC have an ethical responsibility to inform him of such. He questions the Executive Director's motive in seeking an advisory opinion from the Commission. He believes the Commission has limited jurisdictional authority. He contends that the Executive Director has a conflict of interest because the Board member is involved in determining whether the Executive Director retains his job and the amount of salary he receives. The Appellants attorney contends that the Code of Judicial Conduct Canon 2(d), Canon 3(e)(1)(c), and Canon 4 apply. He further asks that the Commission work with the Kentucky Bar Association to address what he calls a miscarriage of justice. He does not believe that recusal by the Board member cures the conflict he perceives that arises from the Executive Director's involvement.

You independently sought an opinion from the Ethics Hotline of the Kentucky Bar Association ("KBA"). You have provided the Ethics Hotline opinion, which are confidential in nature, for review by the Commission. The opinion does not indicate whether any of the Rules of Professional Conduct pursuant to SCR 3.130 are implicated, but states that the KBA Hotline

**ADVISORY OPINION 16-05**

July 18, 2016

4 | Page

will defer to the Commission as it has primary jurisdiction over this issue and will not issue an opinion.

The Commission has jurisdiction over the Executive Director as a public servant pursuant to KRS 11A.010(9). The Executive Branch Code of Ethics (“Ethics Code”) provides a framework for determining how public servants should handle conflicts of interest. KRS 11A.005 provides the general standards of conduct of the Ethics Code:

- (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
  - (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.

The Ethics Code addresses conflicts of interest by prohibiting certain conduct on the part of public servants in KRS 11A.020(1), which states as follows:

- (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.

**ADVISORY OPINION 16-05**

July 18, 2016

5 | Page

- (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 considerations for public servants to follow when determining when to abstain from action on an official decision in which the public servant may have a conflict of interest:

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.

A public servant should follow the guidance in the Ethics Code for determining his or her own conflicts of interest; however, a public servant's conflicts of interest are individual, subjective, and unique to the public servant and should be reviewed on a case-by-case basis. 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 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

**ADVISORY OPINION 16-05**

July 18, 2016

6 | Page

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. However, in none of these opinions did the Commission state that the conflicts of interests of the managers carry forward to weigh on their subordinate employees.

KRS 13B.040 provides qualifications of hearing officer in matters before the Board:

- (1) A person who has served as an investigator or prosecutor in an administrative hearing or in its preadjudicative stage shall not serve as hearing officer or assist or advise a hearing officer in the same proceeding. This shall not be construed as preventing a person who has participated as a hearing officer in a determination of probable cause or other equivalent preliminary determination from serving as a hearing officer in the same proceeding.
- (2) (a) A hearing officer, agency head, or member of an agency head who is serving as a hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot afford a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing officer, agency head, or member of the agency head by filing an affidavit, upon discovery of facts establishing grounds for a disqualification, stating the particular grounds upon which he claims that a fair and impartial hearing cannot be accorded. A request for the disqualification of a hearing officer shall be answered by the agency head within sixty (60) days of its filing. The request for disqualification and the disposition of the request shall be a part of the official record of the proceeding. Requests for disqualification of a hearing officer shall be determined by the agency head. Requests for disqualification of a hearing officer who is a member of the agency head shall be determined by the majority of the remaining members of the agency head.  
(b) Grounds for disqualification of a hearing officer shall include, but shall not be limited to, the following:
  1. Serving as an investigator or prosecutor in the proceeding or the preadjudicative stages of the proceeding;
  2. Participating in an ex parte communication which would prejudice the proceedings;
  3. Having a pecuniary interest in the outcome of the proceeding; or
  4. Having a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding.

It is appropriate and efficient for your agency for you to serve as the hearing officer for the Board as well as being a statutory mandate pursuant to KRS 18A.095(21). KRS 13B.040 provides for the process by which a party is to challenge a hearing officer, which would have ultimately lead to a decision by the agency head, in the matter the Board, on the merits of the

**ADVISORY OPINION 16-05**

July 18, 2016

7 | Page

challenge; however, the Emerson Atkins appellants did not avail themselves of this process. Thus, we are left with your request for review of this matter under mandates of the Ethics Code. While you are serving as a hearing officer, you also maintain a responsibility to follow the Ethics Code as a public servant. As such, it is appropriate for you to seek an opinion from the Commission when questions concerning conflicts of interest arise. KRS 11A.030(5).

The first step in determining whether a conflict of interest would exist for *you* while serving as the hearing officer is to determine whether *your* role in the hearing process over which your Board member's spouse is a party witness would be considered as influencing matters that represent a substantial conflict between *your* personal interests and *your* duties in the public interest under KRS 11A.020(1)(a). It is clear that the elected Board member, who is also a public servant pursuant to KRS 11A.010(9)(h), would have a conflict, or at least a potential appearance of a conflict, in relation to matters involving his spouse as a party or witness in that it would be difficult for him to render an independent or impartial decision as a part of the Board to determine whether his wife served as a credible witness or made a valid decision on behalf of her agency. Therefore, it is appropriate for the Board member to abstain or recuse from such matters pursuant to KRS 11A.030 and KRS 11A.020(3).

However, it does not follow that the Board member's conflicts then carry over to you as the hearing officer for the Board. KRS 11A.030 provides guidance for public servants to follow to determine their own personal conflicts and provides a series of questions of the public servant to answer to determine whether or not their personal interests would interfere with their ability to make an independent and impartial decision or whether it is necessary for the public servant to abstain. However, these questions do not indicate that a public servant's conflicts can arise from their manager's or supervisor's conflicts.

Indeed, the Board's statutory scheme works into the framework of the process the inherent personal interest that can be brought by the elected board members, by their very position being employees of state agencies under the preview of the Personnel Board. As such, KRS 18A.095(21) prohibits these elected Board members from serving as hearing officers for the Board, which appears to be how the General Assembly intended to avoid the built in perceived bias. Furthermore, the statutory framework establishes that the Executive Director or the General Counsel could serve as a hearing officer in matters involving the very agencies for which the elected board members work as employees. However, although it's the practice for these Board members to recuse, nothing in KRS Chapter 18A directly requires them to recuse in matters involving their own agencies. Therefore, it does not follow that the Executive Director has a conflict merely because one of his Board members has a conflict in adjudicating the matter.

Finally, even though this Board member has the additional issue of being married to a witness in a matter and should follow the dictates of KRS 11A.030 to recuse from participation due to his own personal conflicts, this does not lead to a conflict of interest on the part of the

Executive Branch Ethics Commission

**ADVISORY OPINION 16-05**

July 18, 2016

8 | Page

Executive Director merely because the Board hires the Executive Director and sets his salary. Therefore, pursuant to KRS 11A.020(3), you are not required to abstain from the Emerson Atkins administrative hearing for this reason, but should recuse if you have any conflicts of interest of your own.

In order to dissuade any further confusion, the Commission recommends that the Board, in the interest of full disclosure, instruct all designated hearing officers, whether it be the Executive Director, General Counsel, or a contract hearing officer, to inform all parties at the outset of an administrative proceeding whether a board member will be abstaining and recusing from the adjudication of the matter due to a conflict of interest. Nevertheless, the fact that this disclosure did not occur at the beginning of the Emerson Adkins administrative hearing does not violate KRS 11A.020(3) because the only notice that is required by the Ethics Code is that disclosure that is given to one's own superior in writing, which would be accomplished when the Board member disclosed his conflict on the record before the Personnel Board.

As to whether the Judicial Code of Conduct or the Rules of Professional Responsibility apply, those questions must be answered by the Judicial Conduct Commission and the KBA Ethics Committee.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**



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By Chair: W. David Denton

Attachments: Advisory Opinion 96-53  
Advisory Opinion 96-17  
Advisory Opinion 07-35  
Advisory Opinion 07-46