



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 16-06
July 18, 2016

RE: Does a conflict of interest exist for the staff of the Personnel Board when the staff member serves as a Hearing Officer on an administrative proceeding involving an agency for which one of the elected Personnel Board members works?

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, along with your companion request that is being addressed through Advisory Opinion 16-05, was reviewed at the July 18, 2016 meeting of the Commission and the following opinion is issued.

You and the General Counsel for the Board have submitted information for review by the Commission. The relevant facts are as follows: 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 duties of the Board is to hear appeals from merit employees pursuant to KRS 18A.075. The Executive Director and General Counsel are trained and certified as hearing officers by the Attorney General's Office. The General Counsel shall serve as a hearing officer for the Board pursuant to KRS 18A.090(2). Furthermore, KRS 18A.095(21) provides 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.

One of the current members elected to the Board also serves as the appointing authority designee for the Kentucky State Police ("KSP"). She may be involved in her state employment

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with making decisions that may ultimately lead to an employee filing an appeal before the Board. This Board member has a practice of abstaining from adjudicating matters involving the KSP. The Board presently has ten (10) matters pending before the Board involving KSP employees.

You are requesting an advisory opinion as to whether the Commission considers KRS Chapter 11A to prohibit the Executive Director and the General Counsel from serving as hearing officers under this scenario or to be involved in any capacity in a matter involving an agency for which a Board member works. You have also sought an additional opinion concerning a similar issue, which the Commission is addressing in Advisory Opinion 16-05.

The General Counsel for the Board provides the following information to assist the Commission in its review: 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 and KRS 18A.095(21). Historically, the Executive Director and the General Counsel serve as hearing officers. Further, when an emergency arises with a contract hearing officer or as a cost-saving measure for multi-day hearings as contract hearing officers may have difficulty performing such multi-day evidentiary hearings, which can be cost-prohibitive to the Board.

You have 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 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 and the General Counsel as public servants 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:

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- (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.
- (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;

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- (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 KRS 11A.030 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 questions regarding conflicts of interest in the past. Yet, the Commission has never stated that the conflicts of interests of a manager or superior should carry forward to weigh on a subordinate employee or cause that employee to be forced to abstain.

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 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). The elected Board member, who is also a public servant pursuant to KRS 11A.010(9)(h) by nature of her employment with the KSP, could have a conflict in relation to matters involving the KSP if, as the appointing authority designee, she was involved in the decision-making concerning the subject matter of the employee's appeal before the Board. Indeed, she may be a party representative or a witness in the matter. 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), as well as may be necessary pursuant to KRS Chapter 13B. However, if the Board member was not the appointing authority designee or had not made decision concerning the employee appealing before the Board, she may not have to abstain. Again, each matter should be reviewed on a case-by-case basis to determine whether a present scenario necessitates abstention pursuant to KRS 11A.030.

However, it does not follow that the Board member's conflicts then carry over to the Executive Director and the General Counsel as the hearing officers for the Board. KRS 11A.030 provides a series of questions of the public servant to answer to determine whether or not his or her personal interests would interfere with his or her 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 his or her manager's or supervisor's conflicts.

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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 and General Counsel have conflicts merely because one of the Board members has a conflict in adjudicating the matter.

It is appropriate and efficient for your agency for the Executive Director and the General Counsel to serve as the hearing officers for the Board as well as being a statutory mandate pursuant to KRS 18A.090 and KRS 18A.095(21). Yet, KRS 13B.040 provides for the process by which a party is to challenge the qualifications or impartiality of a hearing officer; if a party wishes to challenge the Executive Director or the General Counsel, they may do so pursuant to this process.

Nevertheless, 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.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton