



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 21-08
May 19, 2021

RE: Will the Executive Branch Ethics Commission reconsider Advisory Opinion 02-37 as it applies to members of the Kentucky Board of Education?

DECISION: Yes. The Executive Branch Ethics Commission voids Advisory Opinion 02-37.

This opinion is issued in response to your May 3, 2021, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 19, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1) and KRS 11A.030(5).

On behalf of the Kentucky Board of Education (KBE also referred to as "the Board" in Advisory Opinion 02-37), you request that the Commission reconsider Advisory Opinion 02-37. In Advisory Opinion 02-37, the Commission stated that a newly appointed member of the KBE may not provide professional development to an education cooperative (referred to as a "Co-op" in Advisory Opinion 02-37) under contract with the board member's employer, a public institution of higher education, and further recommended that the agreement that the KBE member had with the Co-op be revoked. Specifically, the Commission stated as follows:

In previous advisory opinions, the Commission has advised that employees should not provide services privately for entities that they are involved in regulating or doing business with as a part of their official duties. Because the Board regulates individual school districts, and the Co-op is generally comprised of individual school districts, the Commission believes that a regulatory relationship exists between the Board and the Co-op. Seeking to provide services for a Co-op may affect the independence of

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the employee in the execution of regulating the school districts which comprise the Co-op and thus a conflict may exist.

The Commission suggests that the agreement with the Co-op be revoked if achievable without an undue burden on the Board member and the Co-op. If an undue burden would result in the severing of the agreement, then the Board member may honor the agreement and provide the professional development session for the Co-op because the agreement with the Co-op was made prior to the Board member's appointment. In the future, however, the Board member should not seek to provide services for any local school districts or Co-ops regulated by the Board. Additionally, for a reasonable period of time, the Board member should abstain from any matters involving any of the local school districts that comprise the Co-op for which the presentation will be made.

In your request to revisit Advisory Opinion 02-37, you provide a detailed review of the provisions of KRS 11A.030 concerning conflicts of interest. You make a compelling argument that Advisory Opinion 02-37 sets a much more restrictive standard for members of the KBE than it has for public servants and members of other boards and commissions covered by the complete provisions of the Executive Branch Code of Ethics in similar circumstances. You further contend that Advisory Opinion 02-37 seems to draw no distinction between KBE members providing services to educational cooperatives in their private capacities versus doing so as part of their job duties for their employing public institution of higher education. For these reasons, the Commission agrees that Advisory Opinion 02-37 should be revisited.

You detail the facts in the current situation as follows:

A KBE member is also a faculty member in the College of Education at a public postsecondary institution. The work of the public postsecondary College of Education includes work on educator leadership training. Kentucky public school districts and educational cooperatives may (at their discretion) contact this College of Education Leadership Development Center to request training focused on strengthening educational leaders. Depending on the training requested, the KBE member may be assigned to provide said training as part of his/her duties as a faculty member at the public postsecondary institution. The school district or educational cooperative requesting services from the public university pays the university (a state agency) through its College of Education Leadership Development Center a fee for the training provided. The KBE member does not receive any additional compensation beyond his/her established salary as a university faculty member if assigned to provide training to the school district or educational cooperative.

Members of the KBE are considered to be "officers" pursuant to KRS 11A.010(7) and are covered by the full breadth of the provisions of the Executive Branch Code of Ethics, (the

Ethics Code). The Ethics Code provides provisions concerning conflicts of interest in KRS 11A.020(1), (2), and (3), as well as KRS 11A.030. It provides provisions concerning outside employment in KRS 11A.040(10), as well as provisions concerning providing outside employment for public education in KRS 11A.120. None of these provisions were reviewed or considered when the Commission issued Advisory Opinion 02-37, even though these statutory provisions were in place in 2002. As such, the Commission will perform such a review now while in the process of reconsidering this opinion. KRS 11A.120 provides that:

Nothing in KRS 11A.001 to 11A.110 shall prohibit or restrict a public servant from accepting outside employment in a state institution of higher education as long as the outside employment does not interfere or conflict with the public servant's state employment duties.

The question of whether to allow an public servant/officer to engage in outside employment is statutorily up to the appointing authority, in this case the Governor or the KBE, as provided in KRS 11A.040(10) and 9 KAR 1:050. These provisions guide state agencies on the process for reviewing a request for outside employment. The KBE board member is a public servant through his service on the KBE, as such his employment for the institution of higher education is considered to be outside employment for our purposes in this scenario. The Governor, through the appointment process, is aware of the current employment of his appointees and can determine whether the appointment on the KBE will create a conflict of interest that should be mitigated. The Ethics Code provides the following process for a public servant to request permission from their appointing authority to perform outside employment. KRS 11A.040 provides in pertinent part:

- (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.
 - (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.

(emphasis provided). 9 KAR 1:050 dictates the process for an appointing authority to determine whether to approve a request for outside employment:

Section 2. The appointing authority shall review the request and consider, including but not limited to, the following factors:

- (a) The degree of separation between the public servant's state duties and decisions concerning the outside employer. Example: whether the public servant is involved with the awarding of contracts to or regulation of the outside employer.
- (b) The public servant's level of supervisory or administrative authority, if any. Example: whether the public servant has ultimate responsibility for a decision concerning the outside employer, although he is not involved in the decision-making process.
- (c) Whether the outside employment will interfere or conflict with the public servant's state employment duties.
 - 1. A conflict shall exist if a public servant cannot carry out an appropriate course of action for his agency because of responsibilities his outside employment would require.
 - 2. A conflict shall exist if the outside employment will materially interfere with the public servant's independent judgment in considering alternatives or courses of action that reasonably should be pursued in his state employment.
- (d) The duration of the outside employment;
- (e) Whether the outside employment would create an appearance of conflict of interest with state duties; and
- (f) Whether the public servant is an auditor, inspector or other regulatory personnel of a division which is currently auditing, inspecting or reviewing or has scheduled an audit, inspection or review of the outside entity for which the public servant requests approval to work.

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;
- (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.

Advisory Opinion 02-37 seems to fall short of a consideration for any of the provisions concerning outside employment or the manner in which conflicts of interest are supposed to be handled in accordance with the Ethics Code. Decisions concerning whether members of the KBE can engage in outside employment, either through their outside employer or through providing services publicly or privately outside of their service for the KBE, are truly the decision of the appointing authority (the Governor or the KBE) and not the Executive Branch Ethics Commission. Even when a conflict of interest exists, the appointing authority has the statutory and regulatory authority to grant the public servant permission to engage in the outside employment when the conflicts can be mitigated. In the present scenario, when the outside

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employment is clearly within the public servant's job duties for the employing institution of public higher education, when the services provided will not result in the public servant receiving private compensation, and when the services are being provided to another public institution, such employment should not be limited.

KRS 11A.020(3) and KRS 11A.030 clearly do not provide that the educational cooperative contract with the institution of higher education be canceled. What those conflict of interest provisions provide is that the public servant merely abstain and recuse from an official decision that must be made by the KBE when conflicts of interest exist for individual members. That decision to recuse must be done on a case-by-case basis.

For all of these reasons, the Commission voids and rescinds Advisory Opinion 02-37. The members of the KBE may provide educational training services to school districts and education cooperatives if it is within their job duties for their public institution of higher education and as long as they abide by the recusal provisions in KRS 11A.020(3) when recusal is necessary due to a conflict of interest.

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Crittenden Roger (Jun 4, 2021 16:48 EDT)

By Chair: Judge Roger L. Crittenden (Ret.)

VOIDED: Advisory Opinion 02-37