



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

JUDGE ROGER L. CRITTENDEN (RET.)
CHAIR

SEN. DAVID K. KAREM (RET.)
VICE CHAIR

CRIT LUAllen
JUSTICE DANIEL J. VENTERS (RET.)
DAVID S. SAMFORD

CAPITAL COMPLEX EAST
1025 CAPITAL CENTER DRIVE, SUITE #104
FRANKFORT, KY 40601
(502) 564-7954
FAX: (502)-695-5939
[HTTPS://ETHICS.KY.GOV/](https://ethics.ky.gov/)

KATHRYN H. GABHART
EXECUTIVE DIRECTOR

STEVEN T. PULLIAM
GENERAL COUNSEL

SUCHETA MEENA MOHANTY
DEPUTY GENERAL COUNSEL

Executive Branch Ethics Commission
ADVISORY OPINION 21-10
September 30, 2021

RE: The Kentucky Personnel Board asks the Executive Branch Ethics Commission to revisit Advisory Opinion 93-21 in light of the proposal to amend 101 KAR 1:365, upon which Advisory Opinion 93-21 was originally based.

DECISION: The Executive Branch Ethics Commission revisits Advisory Opinion 93-21 and issues the following guidance allowing for a public servant to use state time and resources for the limited purpose of engaging in communications with the staff of the Kentucky Personnel Board and appellee state agencies with the written permission of the public servant's employing agency appointing authority.

This opinion is issued in response to your August 11, 2021, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 30, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

On behalf of the Kentucky Personnel Board (KPB), you request that the Commission revisit the guidance provided in Advisory Opinion 93-21 in light of the proposed amendment to the administrative regulation 101 KAR 1:365 that the KPB has proposed and filed with the Regulations Compiler at the Legislative Research Commission.

In Advisory Opinion 93-21, the Commission stated that a public servant would violate KRS 11A.020(1)(d) if a public servant used state time, equipment, or resources to prepare a grievance, appeal, or complaint involving the state agency for which they were employed. Specifically, the Commission stated as follows:

Executive Branch Ethics Commission

ADVISORY OPINION 21-10

September 30, 2021

Page 2 of 4

The Commission believes that to use state time or state equipment and supplies to pursue a grievance, appeal, or complaint is to use one's official position to secure "treatment" for the state employee and, further, that such use of one's official position is in derogation of the public interest at large.

The Commission further stated that such conduct could be in violation of KRS 11A.020(2):

In a situation in which a state employee is appearing before the state Personnel Board, the activities described above could lead the general public to conclude the state employee is using his official position to further his professional or private interests. The Commission has been informed that the above opinion is consistent with existing Department of Personnel [now presently named the Kentucky Personnel Cabinet] policy and the employee handbook.

(emphasis added). The administrative regulation upon which the above-emphasized language was derived is 101 KAR 1:365. This administrative regulation concerns the appeal and hearing procedures before the Kentucky Personnel Board was first effective in 1989 and has been amended several times since its first effective date. The current iteration has been in effect since 1997. Section 3(6) presently states as follows in regards to the filing procedures that public servants must follow in filing an appeal of an agency action before the KPB:

- (6) A state employee shall not use state time, equipment, materials, or personnel in pursuing an appeal.

This language in line with the Commission's own advisory opinions and administrative regulations contained in 9 KAR 1:025.

However, the KPB is requesting that the Commission now revisit Advisory Opinion 93-21 in light of the proposed amendment to 101 KAR 1:365 that will change Section 3(6) as follows:

- (5)(6) A state employee shall not use state time, equipment, materials, or personnel in pursuing an appeal without the advance written permission of an appointing authority in their employing Agency.

You have indicated through verbal discussions with the Commission's Executive Director that the purpose of this proposed amendment is to ensure that a public servant who has a matter pending before the KPB may, with the written permission of their employing agency, engage in communications with the staff of KPB and appellee state agencies about the pending appeal by use of their state email, state phone, or other state resources. This amendment will assist the KPB in communicating with public servants, who do not have their own resources to support

such communications, concerning the scheduling of status conferences, the scheduling of administrative hearings, and other logistics. The Commission's Executive Director has discussed this proposal with you and the counsel for the Personnel Cabinet. This proposal was further discussed at the most recent meeting of the KPB in which the counsel for the Personnel Cabinet supported the proposed language with the stipulation that the Commission determined to revisit Advisory Opinion 93-21 to allow for the accommodation that would be established under the revised language to 101 KAR 1:365.

As such, the Commission will conduct the following review. The Ethics Code prohibits 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.

9 KAR 1:025 provides considerations for public servants to follow when considering whether their conduct could violate these provisions:

Section 2. If a public servant engages in any of the following conduct, the commission may conduct an investigation in accordance with KRS 11A.080 of the conduct as a possible violation of KRS 11A.020 or KRS 11A.030:

- (3) A public servant uses state time, equipment, personnel, facilities, or other state resources for private business purposes;
- (4) A public servant uses state time, equipment, personnel, facilities, or other state resources for political campaign purposes;
- (5) A public servant uses state time, equipment, personnel, facilities, or other state resources for personal, prurient interests;

Pursuant to KRS 18A.075(3), the KBP must

Hear appeals from applicants for positions for which examinations are being or have been conducted, from eligibles on examination registers, from unclassified employees who have been dismissed, demoted, suspended, or reduced in pay or grade for cause, and from officers or employees serving under the personnel systems created by this chapter, as provided by 1986 Acts Ch. 494;

Pursuant to KRS 18A.095, some state employees have rights to file appeals before the KBP concerning certain official decisions of their agencies in relation to employment and employee discipline. These state employees are referred to as appellants before the KBP. KBP then carries responsibilities under these statutes to engage in communications with the appellants and with the agencies for which they work that is also a party to the matter. Appellee state agencies also must engage in communications with the appellants.

The Commission determines that the proposed amendment to 101 KAR 1:365 is acceptable for the limited purpose of assisting the KBP staff and appellee state agencies to engage in communications with appellants for logistical purposes. The use of state resources by a public servant, with the written permission of the public servant's employing agency appointing authority, to communicate with the staff of the KBP would not *per se* violate the provisions of KRS 11A.020(1) or (2) for this limited purpose. The limited use of state resources for this stated purpose would not be in derogation of the public interest, but in support of the public interest to ensure that the KBP will not be limited in its functioning and statutorily mandated mission.

As such, for all of the reasons stated above, the Executive Branch Ethics Commission determines that Advisory Opinion 93-21 is still in effect with exception of the provisions that will be established upon the effective date of the amendment to 101 KAR 1:365. The new amendment will allow a public servant to receive communications from and engage in limited communications with the staff of the Kentucky Personnel Board and appellee state agencies within the confines of the written permission granted by their employing agency appointing authority.

EXECUTIVE BRANCH ETHICS COMMISSION



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

ATTACHMENTS:
Advisory Opinion 93-21
101 KAR 1:365