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EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 22-03
January 19, 2022

RE: Are Commonwealth's Attorneys and their employees subject to the provisions of KRS Chapter 11A?

DECISION: Yes, the Commonwealth's Attorneys are considered to be public servants as defined in KRS 11A.010(9) and officers as defined in KRS 11A.010(7). The employees of the Commonwealth's Attorneys are public servants as defined by KRS 11A.010(9).

This opinion is issued by the Executive Branch Ethics Commission ("Ethics Commission") upon its own initiative. This matter was reviewed at the January 19, 2022 meeting of the Ethics Commission and the following opinion is issued pursuant to KRS 11A.110(1). The opinion revisits the matters discussed in Advisory Opinions 93-7 and 06-3.

Through this opinion, the Ethics Commission is addressing a twenty-nine (29) year divergence about the interpretation of the term public servant as it applies to Commonwealth Attorneys. Again, in its attempt to properly interpret KRS Chapter 11A, the Ethics Commission revisits the issue of whether Commonwealth's Attorneys, and their staffs, are subject to the Executive Branch Code of Ethics ("the Ethics Code").

KRS 11A.010 provides the following definitions:

(7) "Officer" means:

(a) All major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, executive directors, executive assistants, policy advisors,

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special assistants, administrative coordinators, executive advisors, staff assistants, and division directors;

(9) "Public servant" means:

- (a) The Governor;
- (b) The Lieutenant Governor;
- (c) The Secretary of State;
- (d) The Attorney General;
- (e) The Treasurer;
- (f) The Commissioner of Agriculture;
- (g) The Auditor of Public Accounts;
- (h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees; and
- (i) Any person who, through any contractual arrangement with an agency, is employed to perform a function of a position within an executive branch agency on a full-time, nonseasonal basis.

KRS 11A.015 provides that an agency may be exempt from KRS Chapter 11A if other laws exempt it. It provides in pertinent part:

An agency that is directed by statute to adopt a code of ethics shall be exempt from KRS Chapter 11A upon the effective date of an Act of the General Assembly creating the agency's code of ethics or upon the effective date of an administrative regulation that creates the agency's code of ethics.

KRS 15.733 concerning the disqualification of prosecuting attorney and the appointment of a special prosecutor in certain situations has been propounded to be an exception to the application of KRS Chapter 11A by opponents to the application of KRS Chapter 11A on Commonwealth's Attorneys and their staffs. KRS 15.733 provides as follows:

- (1) For the purposes of this section the following words or phrases shall have the meaning indicated:
 - (a) "Proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
 - (b) "Fiduciary" includes such relationships as executor, administrator, conservator, trustee, and guardian;
 - (c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
 - 1. Ownership in a mutual or common investment fund that holds securities, or a proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest,

- or ownership of government securities is a "financial interest" only if the outcome of the proceeding could substantially affect the value of the interest;
2. An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization.
- (2) Any prosecuting attorney shall disqualify himself in any proceeding in which he or his spouse, or a member of his immediate family either individually or as a fiduciary:
 - (a) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (b) Is acting as a lawyer in the proceeding;
 - (c) Is known by the prosecuting attorney to have an interest that could be substantially affected by the outcome of the proceeding;
 - (d) Is to the prosecuting attorney's knowledge likely to be a material witness in the proceeding;
 - (e) Has served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy;
 - (f) Has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
 - (3) Any prosecuting attorney may be disqualified by the court in which the proceeding is presently pending, upon a showing of actual prejudice.
 - (4) In the event that a prosecuting attorney is disqualified, he shall certify such fact in writing to the Attorney General who may direct another Commonwealth's Attorney or county attorney or an assistant attorney general as a special prosecutor to represent the Commonwealth in that proceeding.

The question that the Ethics Commission is addressing through this opinion is whether the Commonwealth's Attorneys and their employees are public servants and whether the Commonwealth's Attorneys are officers. Furthermore, the Ethics Commission is addressing whether KRS 15.733 provides a statutory mandate that Commonwealth's Attorneys and their staffs fall under a separate code of ethics from the code established in KRS Chapter 11A and KRS 11A.015 applies. What follows is a complete history of the issues presented:

The Executive Branch Code of Ethics was enacted in 1992. In 1993, the Ethics Commission issued Advisory Opinion 93-7, in which it determined that neither Commonwealth's Attorneys nor county attorneys were subject to the Ethics Code based on the fact that they are elected only by voters of a county or local district, and are not, in most of their duties, "accountable to the executive branch of state government." However, the Ethics Commission found that at least as the analysis applied to Commonwealth's Attorneys the 1993 opinion was unfounded and in 2006 issued Advisory Opinion 06-3. In this opinion, the Ethics Commission reversed the earlier opinion regarding Commonwealth's Attorneys and determined

that the Ethics Code applied to Commonwealth's Attorneys because they fit within the definition of "public servant" in KRS 11A.010(9) and "officer" in KRS 11A.010(7). However, in 2009, then sitting Pike County Commonwealth's Attorney Rick Bartley challenged the Ethics Commission's advisory opinion in Pike Circuit Court. The Pike Court sided with Mr. Bartley and concluded that the Ethics Code did not apply to Commonwealth's Attorneys. The Ethics Commission decided to not challenge this opinion on appeal.

Since 2009, case law has developed and statutory changes have occurred to further bolster and support the Ethics Commission's 2006 opinion that the Ethics Code must indeed apply to Commonwealth's Attorneys and their staffs. This opinion is issued to provide notice to the Commonwealth's Attorneys and their staffs that the Executive Branch Code of Ethics enacted in KRS Chapter 11A applies to them and their employees and that the Ethics Commission will enforce its provisions as such.

The following is a review of the statutory and case law support for the Ethics Commission's conclusion that Commonwealth's Attorneys and their staffs are subject to KRS Chapter 11A. As early as 1948, the courts supported the proposition that a Commonwealth's Attorney was a "state officer, vested with sovereign power." Miller v. Robertson, Ky. 208 S.W. 2d 977 (1948). KRS 15.010 provides that the Attorney General is the "head of the Department of Law," which is included in KRS 12.020 under the Cabinet of General Government. KRS 69.010 determines that the Commonwealth's Attorney shall attend to all civil cases and proceedings in which the Commonwealth is interested in the circuit courts of his judicial circuit. KRS 69.040 states that each Commonwealth's Attorney shall investigate and inquire into the condition of all unsatisfied judgments in his district in favor of the Commonwealth. He shall take all necessary steps by motion, action or otherwise to collect the unsatisfied judgments and cause them to be paid into the State Treasury. KRS 69.013 determines the duties of the Commonwealth's Attorney to act as a special prosecutor and perform services outside of the assigned judicial circuit:

Each regular Commonwealth's attorney shall be, ex officio, a special prosecutor of the Commonwealth, and as such shall perform such duties and render such services, at such time and places, coextensive with the Commonwealth as may be required by the Attorney General. The duties and services may include, but are not limited to, prosecution of or participation in action outside of his judicial circuit when directed by the Attorney General and assisting the Attorney General in preparation and presentation of the Commonwealth's position in the appeal of criminal cases.

KRS 15.755 provides that Commonwealth's Attorneys and their staffs shall be paid out of the state treasury and sets the minimum salaries to be paid out of the treasury. KRS 15.700 created the unified and integrated prosecutor system:

It is hereby declared to be the policy of this Commonwealth to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the Commonwealth, in order to maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth. To this end, a unified and integrated prosecutor system is hereby established with the Attorney General as chief prosecutor of the Commonwealth.

KRS 15.705 created the Prosecutors Advisory Council (PAC), the budget for the Commonwealth's Attorneys, the guidebook of uniform standards, and dictates to Commonwealth's Attorneys how many employees they can hire. KRS 15.715(4) provides that if the office of Commonwealth Attorney becomes vacant, the Attorney General or his designee fulfills duties until the Governor fills the office or an election is held to fill the office. See also Ky. Const. Sec. 152.

Scores of Attorney General opinions have supported the proposition that Commonwealth Attorneys are Executive Branch officials. In OAG 77-487, the Attorney General opined:

The commonwealth's attorney is a state officer. See KRS 69.010, 69.013, 64.510. They prosecute for the Commonwealth and are paid out of the state treasury. See also KRS 15.755 (subsections 1, 3, 4, 5, 6, and 7 become effective January 1, 1978) relating to the compensation of commonwealth's attorney.

In OAG 78-708, the Attorney General reviewed a question concerning whether detectives appointed by the Commonwealth's Attorneys were state officers, "the fact that they are appointed by the commonwealth attorney when authorized by the council under KRS 15.760 would make them state officers." OAG 78-753 stated "[t]here is no doubt that . . . commonwealth attorneys are state officers."

When reviewing the issue of whether the county attorney becomes a state official when conducting duties for the Commonwealth, the Attorney General opined that the county attorney maintains his or her county officer status, the inference being that prosecutorial duties are a state function. See OAG 80-341 (a county attorney, even when conducting prosecutorial duties on behalf of the commonwealth, remains a county officer; therefore, the prohibition from maintaining dual county/state offices does not apply); and OAG 92-162 (County Attorney does not lose his status as a county officer merely because he is appointed by the Attorney General as interim Commonwealth Attorney until a replacement Commonwealth Attorney can be appointed by the Governor).

In 1993, KRS Chapter 11A was established to apply to all Executive Branch officials unless a specific statutory exception is enacted pursuant to KRS 11A.015. In 1994, KRS 65.003

was enacted to require local code of ethics for city, county, and consolidated local governments and specifically lists the officials to which the law applies “mayor, county-judge/executive, members of the governing body, county clerk, county attorney, sheriff, jailer, coroner, surveyor, and constable but does not include members of any school board.” KRS 65.003 does not list Property Valuation Administrators or Commonwealth’s Attorneys in the list of county officials to which it applies.

In Advisory Opinion 97-10, the Ethics Commission reviewed 93-7 and OAG 80-341. The Ethics Commission cited a statement from the Personnel Cabinet that stated that assistant Commonwealth’s Attorneys are state employees. The Ethics Commission concluded that “commonwealth and county attorneys, elected by the voters of a county or local district, are not accountable to the executive branch of state government, and thus are not subject to the Executive Branch Code of Ethics’ prohibition against holding state contracts.”

In 1998, KRS 15.010 was amended to include the “Prosecutors Advisory Council Services Division” as under the Department of Law. In 2003, in *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003), the Supreme Court stated, “[i]t is manifest that the prosecution of crime is an executive function and that ‘the duty of the executive department is to enforce the criminal laws.’”

In 2005, the Ethics Commission gave notice to the Commonwealth Attorneys that it was considering the advisory opinion that would eventually be issued in Advisory Opinion 06-3 (originally numbered Advisory Opinion 05-03. Commonwealth Attorney Linda Tally Smith requested Attorney General Greg Stumbo to review the issue resulting in the issuance of OAG 05-009. This opinion stated that Commonwealth’s Attorneys are not covered by the Ethics Code because they are not specifically enumerated in the definition of public servant listed in KRS 11A.010(9). OAG 05-009 argued that the Ethics Commission would be attempting to rewrite the Ethics Code if it exercises jurisdiction over the Commonwealth’s Attorneys. The opinion also argued that KRS Chapter 15 provided sufficient ethical considerations for the Commonwealth’s Attorneys and that the PAC sufficiently exercises ethical powers over the Commonwealth’s Attorneys when it comes to prosecutorial discretion.

Nevertheless, the Ethics Commission disagreed with the Attorney General’s opinion and in 2006, the Ethics Commission revisited Advisory Opinion 93-7 and issued Advisory Opinion 06-03. After a two-year contemplation and review process, the Ethics Commission revisited and reversed its earlier opinions on the Commonwealth Attorneys. The Ethics Commission cited the creation of the Unified Prosecutorial System (“UPS”) under the Attorney General as the chief prosecutor of the Commonwealth. The Prosecutors Advisory Council (“PAC”) was established in KRS 15.705 to administer the UPS and is administratively attached to the Office of the Attorney General (“OAG”). The compensation of each Commonwealth’s Attorney and his staff is paid out of the State Treasury, pursuant to KRS 15.755. The Commonwealth’s Attorneys serve in their official capacities within their judicial circuits as criminal prosecutors only, so they

have no duties outside of those that fall within the mission of the UPS. The Commonwealth's Attorneys and their staffs receive state benefits.

The Ethics Commission stated that the Commonwealth's Attorneys are not included in KRS 65.003. Thus, it does not appear that the Commonwealth's Attorneys are elected officials of a "city" or "county," but rather are elected officials of the "state," within the executive branch. This situation is similar to that of the Property Valuation Administrators ("PVAs"), who also are not listed in KRS 65.003, but rather are elected "state" employees of the Revenue Cabinet. Much as the PVAs are under the direction, instruction, and supervision of the Revenue Cabinet pursuant to KRS 132.420, the Commonwealth's Attorneys are under the general supervision of the OAG through the UPS pursuant to KRS 15.700. Employees of agencies administratively attached to the OAG, just as employees of the Revenue Cabinet, are considered to be state officials/employees within the executive branch of state government.

The Ethics Commission recognized the application of KRS 15.733 as providing guidance for Commonwealth's Attorneys as to when a prosecuting attorney must disqualify himself from prosecuting a case on the basis of a conflict of interest. The Ethics Commission believed that such specific statutory guidance in this area complements the provisions in KRS Chapter 11A, but did not supersede KRS Chapter 11A because KRS 15.733 does not cover the many other possible conflicts of interest, and other ethical concerns, that may exist for Commonwealth's Attorneys and their staffs. Further, the specific guidance in KRS 15.733 applies only to prosecuting attorneys and not to other employees of the UPS.

As discussed previously in this opinion, in 2009, Bartley v. Executive Branch Ethics Commission, Pike Circuit Court, Division No. 1, Action No. 07-CI-995, the Pike Circuit Court found that the Ethics Commission did not have jurisdiction over Commonwealth's Attorneys due to the doctrine of contemporaneous construction:

where an administrative agency is restricted to any long-standing construction of the provisions of the statutes it has made previously. Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight." (quoting GTE v. Revenue Cabinet, Ky. 889 S.W.2d 788 (1994)). Merely correcting a prior incorrect interpretation is not sufficient justification to change an interpretation. See Revenue Cabinet v. Humana, Inc., Ky. App., 998 S.W.2d 494 at 495 (1998). The Pike Circuit Court further stated the commonwealth's attorneys and their employees "are more akin to local, city or county officials than they are to the state officials set for in the definition." Further, the Pike Circuit opined that "state agencies should give more deference to Attorney General Opinions than was accorded by the Commission in this instance."

The Ethics Commission decided not to appeal the Pike Circuit Court decision. However, at the very same meeting the Ethics Commission decided to appeal the Franklin Circuit Court's similar opinion on the PVA jurisdictional issue. The path of the PVA jurisdictional issue was latter determined to be in favor of application of the Ethics Code to PVA's as documented below. The case law that has ensued since 2009 weighs in favor of enforcement of the Ethics Code to Commonwealth's Attorneys and their staff. A review of this recent case law follows:

In 2010, Conway v. Thompson, Ky., 300 S.W.3d 152 (2010), the Supreme Court enunciated that the office of Commonwealth Attorney is part of the Executive Branch:

Interestingly, although elected independently of the Governor, the Attorney General is also a member of the Executive Branch. *See* 7A C.J.S. *Attorney General* § 29 (2009) ("The attorney general's office is a branch of the executive department of state government and not a legislative or judicial branch of the government."). So the Franklin Circuit Court case brought by the Attorney General against Thompson and the DOC is an intra-Executive Branch dispute. In that same vein, even though also elected independently of the Governor, since the Commonwealth's Attorney is "the chief prosecutor in the circuit court," Commonwealth v. Euster, 237 Ky. 162, 35 S.W.2d 1, 2 (1931), and "[i]t is manifest that the prosecution of crime is an executive function[.]" Flynt, 105 S.W.3d at 424, **then Montgomery is also a member of the Executive Branch.** Accordingly, Montgomery's Pulaski Circuit Court action against Thompson and the DOC is also an intra-Executive Branch dispute.

(Emphasis added). This opinion was issued four months after the opinion was issued in Bartley by the Pike Circuit Court.

Meanwhile, The Ethics Commission pursued its litigation of the jurisdictional matter with the PVA's. In 2010, the Court of Appeals issued a ruling in Executive Branch Ethics Commission v. Atkinson, Ky. App. 339 S.W.3d 472 (2010), in which the court held that Property Valuation Administrators are covered by KRS Chapter 11A. The Court of Appeals based its reasoning on the following:

- KRS 132.370 classified PVAs as "state officials";
- PVAs and their employees are paid out of the state treasury and receive state employee benefits;
- Caselaw recognized PVAs as "state officers serving both the Commonwealth and their respective counties";
- Although they were locally elected, they were "aided by and answerable to the Department of Revenue and obliged to comply with the Department's rules, regulation,

direction, instruction, and supervision.” The Court envisioned a “team effort” with the Department of Revenue as the “team leader”; and

- Finally, the PVAs exclusion from any local code of conduct by KRS 65.003 “reflects an implicit intent on behalf of the General Assembly for the Executive Branch Code of Ethics to apply to the PVAs.”

This same reasoning can also be applied to the Commonwealth’s Attorneys. This case was also cited in Jerrell v. McCracken County Fiscal Court, 2013 WL 645935 (2013) and Carroll v. Reed, Ky. App., 425 S.W.3d 921 (2014), supporting the notion that if a locally elected officer is not listed in KRS 65.003, that officer may be bound by the Executive Branch Ethics Code.

The definition of public servant is unambiguous and includes all Executive Branch employees unless specifically statutorily exempted as provided in KRS 11A.015. “All employees of the Executive Branch” is an expansive category and the statutes are clear that Commonwealth’s Attorneys are not part of the Judicial or Legislative Branches nor are they considered to be county or local officials as provided in KRS 65.003.

To be precise, a Commonwealth’s Attorney is an *executive* constitutional officer and thus one of all the employees in the Executive Branch who is a public servant subject to KRS 11A.010 (9)(h). “The power to charge persons with crimes and to prosecute those charges belongs to the executive department.” Ky. Const. § 81 (Governor to see that laws are faithfully executed). In addition to falling within the definition of a public servant, a Commonwealth’s Attorney also falls within the definition of an “officer” under KRS 11A.010. While Commonwealth’s Attorneys are not specifically listed within the definition of officer, they clearly perform the functions of major management personnel in the executive branch. KRS 15.725(1) (Commonwealth’s Attorney to prosecute all criminal violations tried in circuit court). *Cf. United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) (“Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”); Hoskins v. Maricle, Ky., 150 S.W.3d 1, 12 (2004).

To explain how a Commonwealth’s Attorney is major management of the Executive Branch, one only need to review the power and authority of a Commonwealth’s Attorney. Each Commonwealth’s Attorney submits a proposed budget for his or her office to PAC to be included in the total budget of the UPS and submitted as part of the budget of the OAG pursuant to KRS 15.750. Commonwealth’s Attorneys also make important managerial decisions in conjunction with PAC regarding the number of assistant Commonwealth’s Attorney positions; and the number of stenographic, secretarial, clerical, investigative and other personnel positions. KRS 15.760. Further, Commonwealth’s Attorneys are authorized to employ victim advocates to counsel and assist crime victims.

A Commonwealth’s Attorney exercises a level of managerial discretion that exceeds that of a general counsel and is not subject to the direction of the Governor’s chief executive officers

or even the courts. “Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.” Hoskins at 20 (2004), citing Newman v. United States, 382 F.2d 479, 480 (D.C.Cir.1967). The level of prosecutorial discretion enjoyed by each Commonwealth’s Attorney is in no way diminished by the existence of the UPS. No person or entity has the authority to direct a Commonwealth’s Attorney to undertake or dismiss a proceeding.

Indeed, the Attorney General is not even authorized to *attempt* to supersede or intervene in place of a Commonwealth’s Attorney without the vote of five members of the nine member PAC. That action is only authorized under the extraordinary circumstances of incapacity, refusal without sufficient grounds, inability, conflict of interest of the local prosecutor, or his failure to act in a certain case or cases. KRS § 15.715 and KRS 15.705.

Given the facts described above, it is reasonable to conclude that Commonwealth’s Attorneys are major management personnel of the executive branch and therefore officers as defined by KRS 11A.010(7). It is not necessary that Commonwealth’s Attorneys be specifically named in KRS 11A.010(7) in order to fall within the class of individuals subject to the provisions of that statute in the same manner that Property Valuation Administrators are not specifically named, but have been found to be state officials covered by the definition. See Atkinson. This reasoning is supported by KRS 446.080 in that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.”

OAG 05-009 assertion that Commonwealth’s Attorneys are not subject to the provisions of KRS Chapter 11A because they are subject to KRS 15.733 is not well reasoned. KRS 15.733 only provides guidelines for when a prosecuting attorney should disqualify himself in proceedings in which he or his spouse, or a member of his immediate family, is a party to the proceeding, a lawyer in the proceeding, has an interest in the outcome, likely to be a material witness, rendered a legal opinion in the matter in controversy, or has a financial interest in the outcome. Vacant from this statute is any presentment by the General Assembly that KRS 15.733 was enacted to be an exception to KRS Chapter 11A. Indeed, KRS 15.733 was last amended in 1982, prior to the effective date of KRS Chapter 11A. The General Assembly has made not statutory mandate directing the Commonwealth’s Attorneys or PAC to adopt a code of ethics that would allow the Commonwealth’s Attorneys to be exempt from KRS Chapter 11A as provided in KRS 11A.015. Indeed, nothing in KRS 15.733 indicates that it supersedes the application of KRS Chapter 11A from its enforcement on Commonwealth’s Attorneys and the employees of PAC and only addresses a specific scenario in which disqualification applies to a prosecuting attorney.

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Furthermore, OAG 05-009 opined that the ethical rules imposed by the Kentucky Supreme Court's Rules of Professional Conduct would predispose the application of the Ethics Code on Commonwealth's Attorneys. The legislature did not spare other government attorneys from the provisions of KRS Chapter 11A and those persons are subject to the ethics rules governing attorneys as well. As such, the Rules of Professional Conduct are not a code of ethics meant to exempt government attorneys from the application of KRS Chapter 11A as determined by KRS 11A.015.

After much contemplation, the Ethics Commission has determined to move forward with this advisory opinion to finally answer the question concerning the Commonwealth's Attorneys. In Revenue Cabinet v. Humana, Inc., Ky. App., 998 S.W.2d 494 at 495 (1998), the Court stated that a state agency's act of "[m]erely correcting a prior incorrect interpretation is not sufficient justification to change an interpretation." However, Revenue Cabinet v. Humana opinion was distinguished by St. Luke Hospitals, Inc. v. Commonwealth, Ky. App., 186 S.W. 3d 746, 752 (2005), in which the Court of Appeals stated:

"It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them." In re Appeal of Hughes Coleman, 60 S.W.3d 540, 543 (Ky.2001). "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute." Id. "Consequently, while the agency may reexamine its prior decisions and depart from its precedents, it must explicitly and rationally justify such a change of position."

The statutes of the Commonwealth and the case law supports the conclusion that Commonwealth's Attorneys are Executive Branch officials and are major management officials pursuant to KRS 11A.010(7) and are public servants as defined in KRS 11A.010(9). Along those same lines, the employees of the Commonwealth's Attorneys are public servants under KRS 11A.010(9). The case law issued since the OAG 05-009 and the 2009 Pike Circuit Court's ruling, specifically Executive Branch Ethics Commission v. Atkinson, Ky. App. 339 S.W.3d 472 (2010), supports the Ethics Commission reexamining its own precedents and explains the Ethics Commission's departure from them.

The Ethics Commission recognizes that KRS 15.733 provides guidance for Commonwealth's Attorneys as to when a prosecuting attorney must disqualify himself from prosecuting a case on the basis of a conflict of interest. However, KRS 15.733 was not enacted to supersede or exempt the Commonwealth's Attorneys from the application of KRS Chapter 11A and does not serve as its own code of conduct as contemplated in KRS 11A.015. KRS 15.733 can only be interpreted to complement the provisions in KRS Chapter 11A but does not cover the many other possible conflicts of interest, and other ethical considerations contained in

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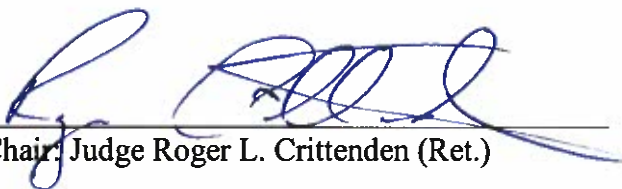
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KRS Chapter 11A. Further, the specific guidance in KRS 15.733 applies only to prosecuting attorneys and not to other employees of the UPS.

This opinion is issued to give the Commonwealth's Attorneys who served in office during the 2021 calendar year sufficient notice to file their 2021 ANNUAL Statement of Financial Disclosure that is required to be filed by April 15, 2022, in accordance with KRS 11A.050 by all officers as defined by KRS 11A.010(7). The opinion will be mailed to all serving Commonwealth's Attorneys. The Ethics Commission offers its services to the Commonwealth's Attorneys to provide training to the employees of the various offices of Commonwealth's Attorneys to ensure the compliance with KRS Chapter 11A.

EXECUTIVE BRANCH ETHICS COMMISSION



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