

Executive Branch Ethics Commission

ADVISORY OPINION 07-35

December 14, 2007

RE: Does spouse's employment create conflict of interest for Public Service Commission commissioner?

DECISION: Not necessarily, however, the commissioner should review KRS 11A.030 in determining whether to abstain in each case involving the law firm of spouse.

This opinion is issued in response to your September 18, 2007, request for an Advisory Opinion from the Executive Branch Ethics Commission ("Commission"). This matter was reviewed at the October 19 and December 14, 2007, meetings of the Commission and the following opinion is issued.

You serve as a commissioner for the Public Service Commission ("PSC"), the state agency charged under KRS Chapter 278 with regulating the intrastate rates and services of over 1500 utility companies throughout the state of Kentucky. The mission of the PSC is to foster the provision of safe and reliable utility service at a reasonable price to customers while providing for the financial stability of those utilities by setting fair and just rates, and supporting their operational competence by overseeing regulated activities. The PSC performs its regulatory functions through written orders following procedures outlined in KRS Chapter 278 and administrative regulations. PSC commissioners are primarily responsible for reviewing and deciding utility rate cases filed with the PSC, promulgating utility regulations, and developing utility policy. The commissioners work with PSC staff to conduct investigations, hold hearings and public meetings, and review testimony, exhibits and briefs filed by utilities and other parties that appear before the PSC.

You indicate that your spouse is an attorney licensed to practice law in Kentucky. He is not employed by, or directly involved with, any utility companies that the PSC regulates. Furthermore, he has never represented any utility companies before the PSC and he has never practiced utility law. Your spouse is an associate attorney in a large Kentucky law firm employing approximately 148 attorneys. The law firm and its predecessors for many years have represented parties involved in proceedings before the PSC and the firm is currently involved, and will continue to be involved, in these matters. You state that because your spouse is an associate with the firm and not a member, he receives a set yearly salary and does not receive a direct and specific apportionment of fees or other financial benefit generated from matters the

law firm has with the PSC. The law firm is compensated on an hourly basis for the legal services it provides to its utility clients, and not by any contingency fee arrangement, so that its fees are not affected by the outcome of the cases it has before the PSC. The law firm has provided you with a letter stating that it will take steps to prevent any conflicts or the appearance of a conflict, including the following:

- 1) Your spouse will not participate, nor seek to participate in any matters in which one or more of the firm's clients is involved in proceedings before the PSC, of any matters which are likely to become matters for consideration by the PSC.
- 2) Your spouse will not communicate with other firm lawyers about PSC matters, nor have access to any documents or electronic information pertaining to PSC matters.
- 3) Every firm lawyer will be instructed on these screening procedures, and
- 4) Any violation of these screening procedures will be brought to the immediate attention of the firm's management.

You seek guidance from the Commission concerning whether your spouse's employment creates a conflict of interest that necessitates your abstention from all matters before the PSC in which the law firm represents one of the parties. Pending a decision by the Commission, you have voluntarily chosen to abstain from voting or ruling on any matters in which the law firm is representing one of the parties.

Pursuant to KRS 11A.030, in determining whether to abstain from action on an official decision because of a possible conflict of interest, you have noted that 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.

Further, KRS 11A.020(1)(a) through (d) provide:

- (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.

In Advisory Opinion 98-1 (a copy of which is enclosed), the Commission concluded that the State Highway Engineer should abstain from involvement in matters concerning the firm or firms by which his son was employed. However in Advisory Opinion 03-1 (a copy of which is enclosed), the Commission determined that attorneys employed by the Kentucky Real Estate Commission could be involved in the mediation of cases involving a real estate firm with which their mothers were associated, since their mothers were independent contractors of the firm and not employees of the firm, and so long as the attorneys were not directly involved in any cases involving their mothers.

Pursuant to KRS 11A.020(1) above, the issue that needs to be resolved by this opinion is whether your involvement, in cases where the law firm employing your spouse represents one of the parties, would be considered to be using or attempting to use your influence in a matter that is a substantial conflict between you personal interest and your duties in the private interest, and whether your involvement in such cases would be an attempt to influence the PSC in derogation of the state at large, or to give you or a family member a financial gain or an advantage in any way.

You have acknowledged that while co-workers of your spouse do appear before the PSC as representatives for utilities, your spouse does not practice utility law or represent clients before the PSC, nor does he directly benefit from the outcome of cases before the PSC. Further, neither your spouse, nor his co-workers, are actual employees of a utility, but rather are independent contractors of the utilities. Thus, the law firm is neither regulated by nor does any business directly with the PSC. The law firm also has stated that it plans to screen your spouse from any involvement in PSC matters. Although your involvement in cases where the law firm employing your spouse represents one of the parties has some potential for conflict between your private interest of the success of your spouse's employer and your duty in the public interest for the

PSC, for the reasons detailed above the Commission believes that the potential for conflict that exists is far removed and is not substantial. Nor does the Commission believe that your involvement in such cases necessarily would be in derogation of the state at large or an attempt to give yourself or a family member a financial gain. Thus, KRS 11A.020(1) does not automatically prohibit your involvement in such cases.

Albeit the Commission believes that KRS 11A.020(1) does not always require you to abstain from involvement in cases involving your spouse's law firm, it does believe that you should, pursuant to KRS 11A.030, review said provisions for each case that involves in some way your spouse's law firm when considering whether you should be engaged in any action on such cases. Moreover, the Commission believes you should always advise all interested parties of your spouse's place of employment when a matter comes before the PSC with which the law firm may be involved, and that this disclosure should be made in writing and entered into the record. Should any interested party have a concern with your involvement in the matter based on your husband's employment, while you may believe that abstention is not required, you may want to recuse yourself from that matter as your participation in the case may have an effect on the public confidence in the integrity of the PSC. Other times when you should be guided by KRS 11A.030 and consider rescuing yourself in a case before the PSC would be when a decision is made by the three member PSC that is not unanimous, and thus your participation is likely to have a significant effect on the disposition of the matter.

Furthermore, if your spouse were ever to become involved with the law firm in matters before your agency, or begin to directly benefit from decisions involving the law firm made by your agency, then it would certainly be appropriate for you to recuse yourself from such matters as well. Any abstention should be documented in the manner provided in KRS 11A.020(3), which states:

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.

The Commission cautions you also to take great care not to discuss with your spouse any matters involving cases before the PSC with which his law firm is involved.

Executive Branch Ethics Commission

By Vice Chair: E. Patrick Moores

Enclosures: Advisory Opinion 98-1
Advisory Opinion 03-1