Local Government Law News

Salmon P. Chase College of Law ◆ Kentucky Department for Local Government ◆ Northern Kentucky University

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Incompatibility of Office

"Conflict of interest" is a term people sometimes use to include the whole set of situations that may compromise a public servant's objective performance of official duties. For a portion of the whole, conflict of interest is the precise term to use. For another portion, the term to use is incompatibility of office.

That portion properly called conflict of interest itself has subdivisions. One is the direct financial interest, where a public servant stands to profit personally from his or her official action. This is the situation addressed in KRS 61.252, for example, which prohibits certain contracts between a city and a city officer or employee. Direct financial interests are usually easy to identify, and courts will find direct conflicts of interest to be disqualifying.[1]

A second subdivision is the indirect financial interest. Here some tie exists between the public servant and the matter under consideration. An example might be a local official, who is also an officer in a trade union, voting on a construction contract that may result in employment for members of the union. It is more difficult to decide what sorts of indirect financial interests warrant disqualification. One solution to this problem could be a provision in a city or county code of ethics imposing a duty to avoid even the appearance of impropriety.[2]

A third subdivision is the direct non-financial interest. Here, while the public servant may not personally profit from the situation, the interest is of particular and immediate importance to that official. A common example is nepotism, a matter that a local code of ethics must address.[3]

A fourth subdivision is the indirect non-financial interest. This arises when, for example, the public servant wishes to advance policies that benefit an organization of which he or she is a member.[4] An allegation of a conflict of this kind came up recently in Kenton County Circuit Court. The court said it was not appropriate to disqualify a local legislator in such an instance.[5]

Incompatibility of office applies to situations where the same individual holds more than one government office or employment. In a recent case, *LaGrange City Council v. Hall Brothers Company of Oldham County, Inc.*,[6] the outcome turned on the incompatibility of the offices of member of a city council and member of a county planning commission.

Absent a constitutional or statutory prohibition against holding plural offices, one person may hold more than one office at a time unless they are incompatible. Section 165 of the Kentucky Constitution provides:

> No person shall, at the same time, be a state officer or a deputy officer or member of the General Assembly, and an officer of any county, city, town, or other municipality, or an employee thereof; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities, except as may be otherwise provided in this Constitution; but a Notary Public, or an officer of the militia, shall not be ineligible to hold any other office mentioned.

KRS 61.080 sets out additional incompatible offices. Note that the provisions cover not only dual offices, but also a public office and a position of public employment or two positions of public employment. A person holding compatible offices must also remain alert to potential conflicts of interest of the kinds discussed earlier.

At common law a person could not hold incompatible offices. Common law incompatibility depends on the character and relation of the offices, not on the matter of physical ability to discharge the duties of both of them.[7] Incompatibility occurs in three instances: where one office is subordinate to the other; where the functions of the two offices are inherently inconsistent or repugnant;

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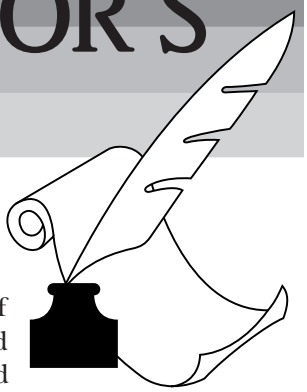
DIRECTOR'S DESK



All the states and the federal government have laws that require most agencies to hold meetings in public. Supporters of these "sunshine laws" believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government.

Experience with sunshine laws reveals that with those benefits come costs. A 1997 report pointed out:

> Among the reasons given for the inhibiting effect of public meetings on collective decision making are the following: concern that providing initial deliberative view publicly, without sufficient thought and information, may harm the public interest by irresponsibly introducing uncertainty or confusion to industry or the general public; a desire on the part of members to speak with a uniform voice on matters of particular importance or to develop negotiating strategies which might be thwarted if debated publicly; reluctance of an agency member to embarrass another agency member or to embarrass himself, through inadvertent, argumentative, or exaggerated statements; concern that an agency member's statements may be used against the agency in subsequent litigation, or misinterpreted or misunderstood by the public or the press, as for example, when the agency member is testing a position by "playing devil's advocate" or merely "thinking out loud"; and concerns that a members statements may affect financial markets.

Special Committee of the Administrative Conference, "Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act," 49 Administrative Law Review 421, 422 (1997). I hear similar concerns expressed by local officials as I travel across the state speaking about the Open Meetings Act.

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RECENT DEVELOPMENTS

Chase College of Law

Clinical Program

As part of its expanded mission, the Local Government Law Center coordinates a local government clinical program for law students. This innovative program provides law students with opportunities to apply classroom knowledge to real issues through internship assignments across the Commonwealth. Interns work with local government officials, attorneys, and state agencies throughout Kentucky. In addition to providing opportunities for students, the communities and agencies benefit from the extra legal assistance.

During the 2000 Spring Semester, students interned in the Attorney General's office, Senator David Williams' office, the Campbell County Attorney's office, and the Commonwealth Attorney's offices in Boone, Campbell, and Franklin counties. Students also interned with Supreme Court Justices Keller and Johnstone, with the Department of Public Advocacy, and with District and Circuit Court judges. The law students reviewed legislation, met with lobbyists, assisted with criminal trials, researched legal issues, and worked on other exciting projects.

Students in the clinical program receive course credit for their work, participating in a 14-hour classroom component as well. The course includes instruction on state and local government law, legislative issues, ethics, and specific legal issues. During the spring several experts addressed the class. They included Dr. Greg Davis, Medical Examiner, Kentucky Medical Examiner's Office, Campbell District Court Judge Karen Thomas, and Jackie Schultz of the Northern Kentucky Women's Crisis Center. Other guest lecturers were Mark Guilfoyle, former General Counsel and Secretary of the Cabinet for Governor Brereton Jones and Representative Jim Callahan.

Moot Court Teams

Chase student Shane Alonso was named "Best Oralist" at the National Women Law Students' Association Moot Court Competition. Ms. Alonso and team member Teresa Halcomb were second place winners in that competition.

The Chase Moot Court Team of Kathryn Roosa, Jimmy Hackbarth and Monica Dias made it to the final round of the University of Dayton's Cybercrimes National Moot Court Competition. The team earned

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KENTUCKY DECISIONS OF NOTE

KENTUCKY SUPREME COURT

Gift of Credit – Economic Development

A city purchased 580 acres of land at $1500 an acre, then used city tax monies to add streets and install utilities. The city then marketed the land as an industrial park, selling parcels for as little as its original purchase price. A competing developer argued that the state constitution prohibits the sale of municipal property to private companies at less than fair market value. Affirming that economic development is a valid public purpose, the court finds the city's actions proper. The development of an industrial park is not a lending of credit prohibited by the constitution. Neither is it prohibited by the Home Rule statutes as a conflict with state statute. The city's actions do not conflict with the Local Industrial Development Authority Act because the act is not the sole method of economic development available to the city. *Dannheiser v. City of Henderson*, 4 S.W.2d 522 (1999).

Campaign Advertising – Defamation and Invasion of Privacy

An incumbent mayor lost his bid for re-election and placed the blame on a paid political advertisement. He subsequently sued the newspaper in which the ad appeared and those who purchased it, alleging defamation and false light invasion of privacy. The paper's failure to investigate the accuracy of the statements in the ad was insufficient to establish actual malice. In addition, the allegedly defamatory statements were not definite or precise enough to brand as false. *Welch v. American Publishing Company of Kentucky*, 3 S.W.3d 724 (1999).

Judicial Ethics – Political Endorsements

Retired judges, who intended to accept future appointments as special judges, sought review of an ethics committee opinion prohibiting them from endorsing nonpartisan judicial candidates. The Chief Judge of the Kentucky Supreme Court appoints special judges in case of vacancy or conflict. The committee opinion treated as special judges all those retired judges who intended to accept future appointments. The court decided that, for purposes of the Kentucky Code of Judicial Conduct, a person is a special judge only while so serving. Therefore, only persons currently sitting as special judges must refrain from publicly endorsing judicial candidates. *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740 (1999).

Municipal Utilities – Exclusive Service Priorities

For fifty-four years a city utility commission and a rural electric cooperative honored an unwritten boundary and neither solicited the other's customers. The situation changed when a potential customer expressed interest in a large industrial site. Each utility claimed a superior right to supply the new customer. The court holds the right of the cooperative to be superior to that of the municipal utility. The legislature has never chosen to authorize exclusive service areas for municipally-owned electric utilities. Further, a city may acquire and operate a utility only to supply the city and its inhabitants, not to provide for-profit retail electric services. *Grayson Rural Electric Corporation v. City of Vanceburg*, 4 S.W.3d 526 (1999).

Utility Tax - Refund of Overpayment

A taxpayer sought a refund or credit of taxes paid in excess of the amount owed, but where no statutory authority for a refund existed. The court allowed a refund based on common law, finding the requirements of invalidity and involuntariness met in this case. The regulation was invalid because it enlarged the terms of the enabling act. The regulation was presumptively involuntary because the taxpayer faced mandatory sanctions for failure to pay the tax. *Inland Container Corporation v. Mason County,* 6 S.W.3d 374 (1999).

KENTUCKY COURT OF APPEALS

Public Employees – Dismissal

An equipment operator held a commercial driver's license and, in the course of his employment, drove a truck and other heavy equipment classified as commercial. His employer instituted a "zero tolerance" drug and alcohol testing policy that covered this employee. When randomly selected for a drug test, he tested positive. Following administrative appeals the Kentucky Personnel Board upheld dismissal of the employee for cause. The

employee challenged that determination claiming the evidence against him was not competent to establish a positive test. The fact finder might have chosen to believe the employee. However, there was substantial evidence in the record to support the board's determination. *Mollette v. Kentucky Personnel Board,* 997 S.W.2d 492 (1999).

Noise Control Ordinance – Federal Preemption

A truck driver, cited for violation of a city noise control ordinance, alleged that various federal statutes preempted the ordinance. The ordinance made it unlawful to use vehicles for commercial hauling between dusk and daylight if the associated noise disturbed residential neighborhoods. The ordinance conflicts with the "reasonable access" provisions of the Surface Transportation Assistance Act and with provisions of the federal Noise Control Act. *Keck v. Commonwealth*, 998 S.W.2d 13 (1999).

United States Supreme Court

Sovereign Immunity – Age Discrimination in Employment Act

Petitioners sued their state employers under the Age Discrimination in Employment Act (ADEA). They sought money damages for the alleged discrimination. The court held that the ADEA was not an appropriate exercise by Congress of its authority under the Fourteenth Amendment. The court reasoned that the requirements imposed by the ADEA on state and local governments are disproportionate to any conceived unconstitutional conduct targeted by the act. Consequently, states retain their Eleventh Amendment sovereign immunity from such suits. *Kimel v. Florida Board of Regents,* ___ U.S. ___ (decided January 11, 2000).

Federalism – Drivers Privacy Protection Act

South Carolina and several other states challenged the Drivers Privacy Protection Act of 1994 (DPPA), contending that it violated principles of federalism. The act regulates the disclosure and resale of personal information contained in the records of state motor vehicle departments. The court found that information to be a "thing in interstate commerce." From this it followed that it was a proper subject of Congress's authority to regulate under the Constitution's Commerce Clause (Art. I, § 8, cl. 3). The court rejected contentions that the act violated the Tenth Amendment. It found that the DPPA did not commandeer state officials to assist in the enforcement of federal statutes regulating private individuals. Instead, the law regulates states as owners of the information that flows in interstate commerce. *Reno v. Condon,* ___ U.S. ___ (decided January 12, 2000).

Ordinances – Nude Dancing Ban Constitutional

Erie, Pennsylvania enacted an ordinance making it a summary offense knowingly or intentionally to appear in public in a state of nudity. The operator of an establishment featuring totally nude erotic dancing by women sought an injunction against enforcement of the ordinance. The court held that the ordinance was a content-neutral regulation that satisfied the test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). *Erie v. Pap's A.M.,* ___ U. S. ___ (decided March 29, 2000).

United States Court of Appeals (6th Cir.)

Nonprofit Corporations – Local Control

A private, nonprofit corporation, operating mental health and mental retardation facilities pursuant to contract, is not a political subdivision of the state for purposes of the National Labor Relations Act. It was neither formed by the state not administered by persons who are responsible to public officials. Only after the formation of the corporation was it recognized by the state as the regional mental health-mental retardation board. The fact that it is subject to state oversight does not mean that the administrators are responsible to public officials. No elected official controls the composition of the board. *Kentucky River Community Care, Inc. v. National Labor Relations Board,* 193 F.3d 444 (1999).

Public Employees – Constructive Discharge for Political Affiliation

Public employees continue to enjoy First Amendment freedoms of political belief and association, except where party affiliation is an appropriate requirement for the effective performance of the public office involved. Members of rival factions of the same party are similarly protected. When the newly elected county judge/executive did not renominate them, allegedly in retaliation for not supporting his campaign, nineteen former county employees sued. *Hoard v. Sizemore,* 198 F.3d 205 (1999).

Civil Rights -Title VII - Retaliatory Harassment

A clerical/secretarial employee of a county road department brought *quid pro quo* and hostile environment sexual harassment claims. The court takes the occasion to decide that retaliatory harassment by a supervisor can be actionable in a Title VII case. To prove a prima facie

case of retaliation, a plaintiff must prove (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. After affirming dismissal of the direct Title VII and Kentucky Civil Rights Act claims, the court remands for determination of the retaliation claims. *Morris v. Oldham County Fiscal Court,* 201 F.3d 784 (2000).

Freedom of Information – Accident Reports

In 1996 a number of attorneys and chiropractors challenged two statutes, one restricting access to police accident reports and the other allowing custodians of public records to charge commercial users a reasonable fee. The district court permanently enjoined enforcement of the statutes. The Court of Appeals subsequently affirmed in part and reversed in part. After the United States Supreme Court granted certiorari, it vacated and remanded the matter for consideration in light of *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 129 S.Ct. 483 (1999). Upon reconsideration the Court of Appeals vacates the injunction, rejecting the argument that KRS 189.635 is unconstitutional on its face. The court remands the matter back to the district court for consideration of the claim that the statute is unconstitutional as applied. *Amelkin v. City of Louisville*, 205 F.3d 293 (2000).

U. S. District Court (E. D. Ky.; W. D. Ky.)

Redevelopment Districts – Takings - Arbitrariness

Residents of an area designated by the city as a redevelopment district claimed that their properties had been subjected to reverse eminent domain. They also claimed that the designation denied them substantive due process and that the action was arbitrary. Finding no substantial evidence of blight, the court holds this application of a statute intended for heavily populated urban areas with high crime, poverty, and disease to be arbitrary. *Henn v. City of Highland Heights,* 69 F.Supp.2d 908. (E.D. Ky. 1999)

Director Desk *continued from page 2*

The report noted other effects, too. Agencies hold fewer meetings. Agency staff members meet instead, and agency members later rubber stamp staff decisions. Agencies make decisions through written approvals without discussion. Agencies hold seriatim one-on-one meetings among members. Those techniques frustrate one purpose of multi-member agencies, which is to have public policy discussed and decided by persons with diverse viewpoints.

Kentucky's Open Meetings Act addresses one of those techniques, the series of less-than-quorum meetings. In this issue we present part of a recent decision of the Attorney General that discusses the ban on such meetings. Affirming the General Assembly's statement of policy "that the formation of public policy is public business and shall not be conducted in secret," the decision reads the ban broadly. Implicitly, the costs the Special Committee identified are costs that the General Assembly has decided Kentucky public officials must accept and bear.

Recent Developments *continued from page 2*

second place in the competition and tied for "Best Brief." Professor Kamilla Mazanec was the faculty advisor.

The Chase Moot Court Team of Brock Denton and Trigg Mitchell won "Best Brief" at the National Tax Moot Court Competition sponsored by the State University of New York Buffalo School of Law. This is the second consecutive year that Chase has won the "Best Brief" award. The team of Eric Hamilton and Jack Steele also participated in the competition. Professor Ljubomir Nacev is the Tax Moot Court Advisor.

Chase Students Rene Heinrich and Tad Thomas were runners-up in the First Annual Kentucky Trial Advocacy Competition. Chase students Gary Payne and Todd Myers were also semi-finalists in the competition. The Trial Advocacy Team, in its first year, also participated in the American Trial Lawyers' Association Student Trial Advocacy Competition in Nashville, Tennessee. The Chase team finished among the top ten schools after the three preliminary rounds. Professor Kathleen Gormley Hughes, Assistant Director of the Local Government Law Center, is the faculty advisor.

Opinions of the Attorney General

Less-than-Quorum Meetings Under the Open Meetings Act

Open meetings laws in the several states are similar in their general outlines, although they differ in their details. One such detail concerns meetings in series of less than a quorum of a public body. Kentucky is one of a very few states whose open meetings act expressly forbids a public body from holding a series of less-than-quorum meeting in order to avoid the requirements of the act.* In a few other states, courts infer a similar prohibition from their acts.**

Recently the Attorney General had a rare opportunity to address the subject. The relevant portions of 00-OMD-63 appear below. The decision takes an expansive view of the prohibition on a series of less-than-quorum meetings. That view lead the affected public agency, Kenton County, to appeal the decision to the Circuit Court. The county ultimately dropped the appeal, however, after reaching an agreement with the party who complained to the Attorney General.

Situations like the one that gave rise to the opinion occur far more commonly than the number of decisions interpreting KRS 61.810(2) would suggest. Rarely are such discussions intentionally "for the purpose of avoiding the requirements of" the Open Meetings Act. Allegations of a violation of the provision are more likely to result from officials' inattention. Given the potential for consequences adverse to a local government and to its officials, the decision sounds a cautionary note. – Ed.

00-OMD-63

February 21, 2000

In re: Terry Whittaker / Kenton County Fiscal Court

Open Meetings Decision

The question presented in this appeal is whether the Kenton County Fiscal Court violated the Open Meetings Act through activities it engaged in over a period of time extending from September 14, 1999 to December 6, 1999. For the reasons that follow, we find that the Kenton County Fiscal Court's activities constituted violations of the Act.

On December 16, 1999, Terry Whittaker submitted an open meetings complaint to Kenton County Judge/Executive Richard L. Murgatroyd in which she alleged that the Kenton County Fiscal Court had committed a number of open meetings violations. Those violations and the fiscal court's responses, prepared by Kenton County Attorney Garry L. Edmondson, are summarized below:

1. At a December 6, 1999, press conference, Judge Murgatroyd stated that he had conducted a series of meetings with each of the individual members of the fiscal court for the purpose of discussing "newly received information regarding the Elsmere jail site." Judge Murgatroyd indicated that after these meetings the fiscal court "reached a unanimous decision."

   Ms. Whittaker questioned the Kenton County Fiscal Court's failure to give notice of these closed sessions, arguing that they constituted a series of less than quorum meetings for the purpose of avoiding the requirements of the Open Meetings Act.

   As a means of remedying this violation, Ms. Whittaker suggested that the fiscal court discuss at its next meeting, and in open session, the matters discussed in this series of less than quorum meetings. In addition she requested that the fiscal court cease conducting less than quorum meetings.

Kenton County Attorney Edmondson responded:

> Judge/Executive Murgatroyd merely provided new information to the individual Fiscal Court members. He advised them that based upon his new findings, he was going to hold a press conference and make certain recommendations to the court. He did not seek their vote or support concerning his decision. They were advised that they could attend the press conference or not and they could vote at the next regular meeting as they chose. He did not have such discussion to avoid the Open Meetings Law.

> Relying on OAG 80-426, Mr. Edmondson maintained that KRS 61.810 does not prohibit an elected official from discussing an issue with another elected official "outside of a public meeting, they merely may not make a collective decision without complying with the law."
>
> * * *

Dissatisfied with [the response], Ms. Whittaker initiated this open meetings appeal. Based on our review of her complaint and the fiscal court's responses, we find that the record is sufficient to support her claim that the Kenton county Fiscal Court violated the Open Meetings Act . . .. An analysis of each of the alleged violations follows.

1. Series of less than quorum meetings held prior to December 6 press conference

Ms. Whittaker alleges, and Mr. Edmondson does not refute, that at his December 6 press conference, Judge Murgatroyd commented that he had conducted separate meetings with each of the members of the fiscal court to discuss "newly received information regarding the Elsmere jail site." The fiscal court defends these meetings on the basis of OAG 80-246, arguing that the opinion recognizes the right of elected officials to discuss public business outside of a public forum so long as no collective decision is reached. Mr. Edmondson opines that it was not Judge Murgatroyd's intention to avoid the requirements of the Open Meetings Act.[1]

We find that KRS 61.810(2), enacted in 1992, places restrictions on the rights of public officials to engage in discussions of the public's business in any forum other than a public forum. KRS 61.810(2) specifically provides:

> (2) Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

Acknowledging the difficulties associated with determining the subjective intent of the participants in a series of less than quorum meetings, this office concluded, in 94-OMD-106, that the fiscal court violated the Open Meetings Act when its members met individually or in small groups to discuss public business. At page 3 of that decision, we reasoned that KRS 61.810(2) "represented an attempt by the General Assembly to prohibit a public agency from getting together with less than a quorum of its members to discuss issues of public concern outside the coverage and applicability of the Open Meetings Act." To the extent that OAG 80-426 is inconsistent with this view, it has been statutorily superceded and is hereby modified.

While we again acknowledge our inability to determine the subjective intent of the participants, it is apparent that the matters discussed in this series of less than quorum meetings, namely newly received information concerning the Elsmere jail site, influenced their ultimate decision in some manner, and were therefore the public's business. It is also apparent that the public was deprived of an opportunity to observe their discussion of these matter in contravention of the principle, codified at KRS 61.800, that "the formation of public policy is public business and shall not be conducted in secret . . .." We are not persuaded that this series of less than quorum meetings at which public business was discussed did not violate the Open Meetings Act even if no collective decision was reached. KRS 61.810(2) prohibits *all* less than quorum meetings where the members attending one or more of the meetings collectively constitute at least a quorum, and not just those which culminate in a collective decision.

This position comports with the views expressed by the drafters of the Open Meetings Act in the preamble to the statute:

> [T]he people, in delegating authority, do not give their public servants the right to decide what is good for the public to know and what is not good for them to know; the people insist on remaining informed so they may retain control over the instruments they have created.

1974 HB 100, Preamble. Although there is no empirical means by which this office can determine the members' intentions, we find that the fiscal court's actions otherwise fall within the zone of prohibited conduct described in KRS 61.810(2).

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* KRS 61.810(2) (set out in full in the opinion that follows). Cf. Texas Government Code § 551.143.

** See, e.g., Booth Newspapers v. University of Michigan Board of Regents, 481 N.W.2d 778 (Mich. Ct. App. 1992); affirmed 507 N.W.2d 422 (Mich. 1993).

1. Whether a collective decision was reached as a result of this series of less than quorum meetings is an issue of fact which we are unable to resolve. We do, however, note that in this December 6 press release, Judge Murgatroyd stated that we [sic] had "spoken with each of the Commissioners individually concerning this issue and *collectively we agree* that this is the appropriate action to take at this time." (Emphasis added.)

* * *

Summaries of Selected Formal Opinions of the Attorney General

OAG 99-6

Subject: Promotion of a relative by a school superintendent

Syllabus: Promoting a teacher to assistant principal constitutes a promotion and that promotion is prohibited by the statutory restrictions on promoting relatives.

Synopsis: Where the job of an assistant principal involves greater discretion and responsibility than the job of a teacher, moving from teacher to assistant principal is a promotion even if the latter receives a lower salary and works fewer days. Despite changes brought about by KERA, ultimate responsibility for promotions rests with the superintendent. Under KRS 160.380(2)(e) the superintendent may not promote a relative.

OAG 99-7

Subject: Implementation of KRS 161.5464 by the Kentucky Teachers' Retirement System

Syllabus: Members of the Kentucky Teachers' Retirement system who purchase service credits pursuant to KRS 161.5465 are entitled to medical insurance benefits, if otherwise qualified may purchase such service credits if not retiring. They may pay for such service credits either by lump sum payment or installment payment.

Synopsis: The Kentucky Teachers' Retirement System must provide medical benefits to a retiree even if the service credits entitling the member for retirement were obtained by purchase. The system may not restrict the purchase of service credits only to those members who are retiring nor prohibit members from paying for such credits in installment payments.

OAG 99-8

Subject: Authority of the Kentucky Lottery Corporation to operate video lottery terminals

Syllabus: The Kentucky Constitution does not authorize the General Assembly to permit the Kentucky Lottery Corporation to operate video lottery terminals; therefore, such authority must be established by constitutional amendment.

Synopsis: The lottery amendment in section 226 of the Constitution is a limited exception to a broad constitutional prohibition and should be interpreted narrowly. The history of the 1988 amendment indicates that the Kentucky state lottery would encompass only traditional games.

OAG 99-9

Subject: Validity of proposed motor fuel marketing act

Syllabus: The proposed Kentucky Fair Competition Act of 2000, which would regulate motor fuel marketing, violates § 2 of the Kentucky Constitution and raises Federal law issues of validity under the Sherman Antitrust Act.

Synopsis: Section 2 of the Kentucky Constitution states, "Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." Legislation that attempts to prevent the sale of products below cost violates this precept.

OAG 99-10

Subject: Authority of the City of Louisville to enact an ordinance regulating concealable firearms

Syllabus: Louisville Ordinance 135.05 is invalid under KRS 82.082, because KRS 65.870 expressly prohibits this legislation.

Synopsis: An ordinance, to be a valid exercise of a city's home rule authority, must not conflict with a constitutional provision or statute. A power or function is in conflict with a statute if the statute expressly prohibits the exercise or if there is a comprehensive scheme of legislation on the same general subject. Here there is the former.

OAG 00-01

Subject: Definition of "political party"

Syllabus: The Reform Party of Kentucky currently is not entitled to conduct a presidential primary pursuant to the provisions of KRS 118.551 *et seq.*

Synopsis: To be a political party qualified to conduct a presidential primary, a group must meet the requirements in both KRS 118.015(1) and KRS 118.551. Each sets a threshold for access based on the percentage of votes the party's candidates received in prior elections. The Reform Party does not meet the threshold.

OAG 00-02

Subject: Whether the payment of teacher bonuses is a permissible use for school rewards under KRS 158.6455

Syllabus: Under KRS 158.6455, it is permissible to use school reward money to pay teacher bonuses.

Synopsis: Although amended in 1998 to delete certain provisions, KRS 158.6455 does not prohibit using school reward money to pay teacher bonuses. The bonuses are permissible under the Kentucky Constitution because they are for school purposes.

OAG 00-03

Subject: Authority of the General Assembly under section 60 of the Kentucky Constitution to enact a statute authorizing local referenda on local school curriculum

Syllabus: Section 60 of the Kentucky Constitution permits the General Assembly to enact a statute authorizing local referenda on local school curriculum.

Synopsis: Section 60 of the Kentucky Constitution generally prohibits the use of initiative and referendum. Referenda on matters pertaining to common schools are exceptions to that general rule. The General Assembly may enact legislation permitting referenda on matters pertaining to public schools, but it must satisfy equal protection requirements and may not amount to special legislation.

The Attorney General provides written opinions to public officers concerning their official duties. The opinions reflect the construction of the law that the Attorney General believes the courts would give if faced with similar facts. The opinions are advisory only and are not binding on the recipient. Although they do not have the force of law, they are persuasive and may be cited in court. If you would like a copy of the full text of a summarized opinion, please contact the Local Government Law Center.

Summaries of Selected Open Records Decisions

99-ORD-208

The Open Records Act applies to a private nonprofit corporation if it receives twenty-five percent or more of its funds from state or local authority. On the facts of the appeal, the Attorney General decides that a particular volunteer fire department does not meet that threshold and is not a public agency for purposes of the act.

99-ORD-219

A planning commission denied a request for a copy of an opinion it received from an ethics board concerning a commission member. The Attorney General determined that public interest in disclosure outweighs any privacy interest of the member. The disclosure of the member's personal finances and business relationships would not constitute an unwarranted invasion of personal privacy. State law contemplates that opinions of ethics boards will be open to the public. A local ordinance to the contrary is impermissible.

99-ORD-222

An agency held in abeyance its response to an open records request until the requester disclosed whether the request was for a commercial or non-commercial purpose. The decision reaffirms that an agency may require a generalized statement of the intended use of the public record if necessary to aid in the determination of the appropriate fee. It was proper to inquire as to the purpose of the request, and it was proper to wait until the agency got the answer.

00-ORD-5

A school district asserted that a settlement agreement with a former employee was not a record. The district further asserted that, if it were a record, it would be exempt from disclosure as an unwarranted invasion of personal privacy. The Attorney General rejects the district's first argument because of the expansive definition of a record in state law. The Attorney General rejects the second argument because the settlement agreement contains nothing of a personal nature sufficient to overcome the presumption of openness. A confidentiality clause in the settlement agreement is not enough to justify nondisclosure.

00-ORD-8

In response to a request for electronically stored records, a fiscal court printed and mailed hard copies to the requester rather than allowing access to its computers. The Attorney General finds that this did not abridge the requester's right of inspection. The Attorney General cautions, however, that the decision is not a blanket prohibition on access to agency computers. "Clearly,"

reads the decision, "occasions may arise when use of the agency's computers is the only way to meaningfully exercise the right of on-site inspection."

00-ORD-72

An agency may deny a records request where "the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency." The decision discusses the agency's burden to sustain the refusal by clear and convincing evidence and finds the agency failed to meet that burden.

00-ORD-75

In response to a request characterized as overbroad and burdensome, a county judge/executive agreed to make responsive records available for inspection. However, the judge/executive refused to mail copies of those records. The Attorney General decided that because the records sought were not precisely described, they were not "readily available within the public agency." Therefore, the judge/executive properly discharged her duties by notifying requester where the records were located and agreeing to make them available for inspection.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

Summaries of Selected Open Meetings Decisions

99-OMD-213

The procedures for calling a special meeting are exacting. The Attorney General reviews those procedures and finds the fiscal court did not fully comply. The decision to hold the special meeting other than at a county government center is acceptable provided the meeting place is convenient to the public.

99-OMD-221

A fiscal court went into closed session for the purpose of personnel discussions. In the closed session the fiscal court reviewed an employee's claim for reimbursement. The law allows a closed session for discussions leading to appointment, discipline, or dismissal of an individual employee, not for personnel discussions generally. The Attorney General decides that the discussion of a reimbursement claim does not fit within the law's narrow exception.

00-OMD-64

A city commission went into closed session for the stated purpose of discussing the future acquisition or sale of real property. The Attorney General concludes that the commission properly relied on the statutory exception because at the time of the closed session the purchase and sale was still under negotiation and subject to commission approval. The Attorney General declined to elaborate on how much specificity is required in the notice before a closed session.

00-OMD-80

The board of a community college called an emergency meeting to discussion changing the name of the college. It justified the emergency on the basis that the change required legislative action and the deadline for filing bills was at hand. The Attorney General holds that the circumstances did not warrant an emergency meeting. Agencies may invoke the exception only on the rarest of occasions and then only under conditions such as natural disaster or civil unrest.

Under KRS 61.846 the Attorney General reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

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or where the occupancy of both offices is detrimental to the public interest.[8] In first instance "you cannot be your own boss," a situation usually easy to see. The latter instances are not as easy. One must analyze the duties of the two offices to see whether there is an incompatibility. An easy example might be the inconsistency of holding both the office of auditor and the office of director of finance.

In *LaGrange City Council,* the Court of Appeals found the offices of planning commission member and city council member incompatible under both KRS 61.080(5)(g) and the common law. LaGrange is a city of the fourth class, and the statute makes membership on the legislative body of a city of the fourth class incompatible with any other public office. The statute works a similar result in cities of the first class[9] and second class,[10] but not in cities of the third, fifth, and sixth classes.

The common law works a similar result in cities of all classes. In reaching its conclusion that they were also incompatible under the common law, the court analyzed the functions of the two offices. The court noted that the city council, while not directly supervisory of the planning commission, has the power to review and override the commission's recommendations. Further, the court noted, in rezoning cases both the planning commission and the city council function in an adjudicatory role. The court held that to permit the same person to exercise decision-making authority in one capacity, and then review the same matter in another capacity, offended notions of fundamental fairness.[11]

The court went on to say that abstaining in matters that will go from the planning commission to the city council is no solution. If the commission member must always abstain, his membership on the city council substantially interferes with the performance of his planning commission duties. If the commission member does not abstain, his subsequent participation and vote on the same matter before the city council violates the due process rights of zoning applicants.[12] This confirmed the court in its conclusion that the offices were incompatible.

Initially, the court noted its agreement with the analysis in Attorney General Opinions 66-586 and 71-204.[13] However, the result in the case suggests that this agreement extends only to the conclusion that the General Assembly intended the membership of planning commissions to consist in part of elected officials. The court did not go as far as did the Attorney General in Opinion 66-586 to conclude that elected officials can serve without any incompatibility arising. The Attorney General took the position that an elected official also serving on the planning commission did so *ex officio.* In the view of the Attorney General, that person held one office, not two. This approach overcomes the prohibition against dual office holding in KRS 61.080, but it leaves open the question the court reached - functional incompatibility.

While recognizing that the General Assembly intended membership of planning commissions to include elected officials, the Court of Appeals did not read KRS Chapter 100 to relax the common law restriction. Practicality sometimes requires legislatures to take that approach. For example, *ex officio* membership of elected officers on boards and commissions may be the only effective means of coordinating official policies. In addition, plural office holding may be the only reasonable way of conducting government business in very small municipalities.[14] However, examples of such relaxation in KRS are rare. Further, the extent to which Kentucky local governments might use their home rule power to address incompatibility remains largely unexplored.

1. *But see* McCloud v. City of Cadiz, 548 S.W.2d 158 (Ky. Ct. App. 1977) (interest is not sufficient to disqualify the officer if the opportunity for self-benefit is a mere possibility or is so remote or collateral that it cannot be reasonably calculated to affect his judgment or conduct in the making of the contract or in its performance).
2. *See generally* KRS 65.003.
3. *See* KRS 65.003(3)(c).
4. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1956).
5. Kristina Goetz, *Opponents of Genesis Museum End Battle,* Cincinnati Enquirer, March 5, 2000 at C1. *See* Fiser v. City of Knoxville, 584 S.W.2d 659 (Tenn. App. 1979).
6. LaGrange City Council v. Hall Brothers Company of Oldham County, Inc., 3 S.W.3d 765 (Ky. Ct. App. 1999).
7. *Id.* at 769, citing Polley v. Fortenberry, 268 Ky. 369, 105 S.W.2d 143, 144-45 (1937) and Barkley v. Stockdell, 252 Ky. 1, 66 S.W.2d 43, 44 (1933). Of course, offices are incompatible if it is physically impossible to perform the duties of both. Osborne M. Reynolds, Jr., *Local Government Law,* 248 (1982).
8. LaGrange City Council, 3 S.W.3d at 769-770.
9. KRS 61.080(5)(e).
10. KRS 61.080(5)(f).
11. LaGrange City Council, 3 S.W.3d at 771.
12. *Id.*
13. *Id.* at 768.
14. William D. Valente and David J. McCarthy, *Local Government Law,* 899-900 (1992).

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