

Local Government Law News

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REVOLVING DOOR PROVISIONS IN GOVERNMENT ETHICS CODES

According to a report prepared for the United States Senate, public confidence in government has been weakened by the widespread conviction that government officials use their offices for personal gain, especially after leaving the government.¹ The concern is that former officials use the information, influence, and access acquired during government service for improper or unfair advantage in later dealings with government. Reflecting this concern, codes of ethics for government officers and employees often contain restrictions on post-government employment.²

For city and county officials in Kentucky, applicable codes of ethics derive from KRS 65.003. It directs the respective governing body to adopt a code of ethics and specifies the general content of the code. Each code of ethics must contain standards of conduct, financial disclosure requirements, a nepotism policy, and enforcement provisions.

Although a code of ethics must contain standards of conduct, KRS 65.003(3)(a) leaves it to each local government to decide what standards to include. It is common to see provisions addressed to general conduct, off-duty or outside employment while in government service, receiving and giving gifts, disclosure of confidential information, conflicts of interest, use of government equipment, and political activities or solicitation, as well as to employment after government service.³ No local government code of ethics, however, necessarily addresses each topic, and no two local government codes of ethics necessary address the same topic in the same way.⁴

The differences reflect the adage that, when adopting a code of ethics, a government must be mindful of its needs. The code of ethics must reflect the size and nature of the particular government and the sophistication of its officers, employees, and constituents.⁵ A provision that is right for a state or its larger local governments with full-time employees may not work in smaller governments dependent on part-time employees and volunteers. In addition to reflecting a local government's needs, a code must also be understandable to those who have to obey it. Where possible the code should have bright line rules. Where that is not possible, it must afford public servants easy access to guidance on its provisions and quick answers to ethics questions. That is an important reason underlying the requirement of KRS 65.003(3)(d) to designate a person or group to issue opinions in response to inquiries relating the code.

The two most common elements of post-employment restrictions are a waiting period and a subject-matter restriction. The former prohibits a person from accepting employment or compensation from persons or organizations that did business with or were subject to regulation by an individual's government employer until a certain time elapses. In the Executive Branch Code of Ethics (KRS Chapter 11A),

for example, that period is typically six months (KRS 11A.040(6)). However, a one-year waiting period is quite common and a two-year waiting period is not unusual. The subject matter restriction imposes an even longer waiting period as to matters in which the individual was directly involved during government employment. Using the Executive Branch Code of Ethics again as an example, that period is one year (KRS 11A.040(8)).

Across the country at the local government level, the advisory opinions of ethics officers or ethics commissions and their decisions in enforcement proceedings are not readily available. At the state government level, however, they are. In Kentucky, for example, see *Advisory Opinions*, Kentucky Executive Branch Ethics Board (EBEC), <http://www.state.ky.us/agencies/ethics/ADVOPIN.HTM>.⁶ The board administers the Executive Branch Code of Ethics applicable to state government officers and employees. Many of the advisory opinions of the board concern the post-employment restrictions in its ethics code. The survey of those opinions that follows may help inform local ethics boards and ethics officers as well as those public servants facing analogous situations arising under local government codes of ethics.

Summaries of selected revolving door decisions of the Kentucky Executive Branch Ethics Board

Appearing before one's old agency

The Director of Technical Operations for the Office of the Petroleum Storage Tank Environmental Assurance Fund sought employment outside state government. The Fund reimburses eligible underground storage tank facility owners for the cost of corrective action clean-up in the event of a fuel release into the environment. In effect, the Fund regulates consultants and contractors because it reviews their work for payment of claims to owners and because they must be certified by the Fund. By accepting the contemplated employment, the individual would be returning to his former profession.

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DIRECTOR'S DESK

\$34.8 billion. That is the size of the budget deficit California faces, a deficit larger than the entire budget of every state except New York. By one measure, however, California is not as bad off as some other states. Expressed as a percentage of spending, California's deficit (30%) is not as large as Alaska's (46%) or Oregon's (31%). In comparison, Kentucky's projected deficit is about 5.8% of spending, placing it 38th on a list compiled by stateline.org. Legislatures have responded in a variety of ways to close their budget gaps. Some cut spending (26 states), some tapped a variety of state funds (23 states), some used tobacco settlement funds (16 states), some increased taxes (16 states), some tapped rainy day funds (12 states), and some raised fees (10 states). The Kentucky General Assembly, however, was unable to respond.

The governor moved quickly to take control of the situation, issuing Executive Order 2002-727 (June 26, 2002). Citing sections 69 and 81 of the Kentucky Constitution, which respectively vest supreme executive power in the governor and charge him to take care faithfully to execute the laws, he declared a state of emergency. The failure of the General Assembly to enact a budget, the order said, "poses a direct and serious imminent risk of harm to the preservation of order, the administration of justice and the protection of the public health and property, all of which are fundamental purposes of government." Accordingly, the governor adopted a plan for the continued operation of state government. A lawsuit by the state treasurer seeking a declaration that the plan is permissible and necessary remains undecided. To some the budget impasse might seem to have had little impact beyond a slight reduction in the state's credit rating.

For local governments, budget gaps at the state level are serious business. Local governments in Kentucky, as in other states, are critically dependent on state aid. Census Bureau statistics show that in 1999-2000 Kentucky cities and counties received \$2.9 billion in transfers from state government, the third largest source of local funds. (Local taxes produced \$4.5 billion and transfers from the federal government produced \$3.2 billion.) When the states face a budget crisis, one of the first things they cut is aid to local governments, as is happening around the country right now. Unable these days to look to Washington for relief, local gov-

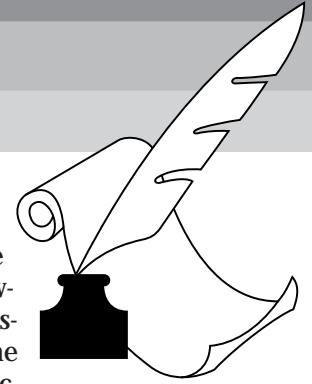
ernments must make up that revenue or cut services. The problem is even more acute for special purpose local governments such as school districts. In Kentucky in the same period, total elementary-secondary education revenue was \$4.3 billion of which \$0.4 billion was federal, \$2.6 billion was state, and \$1.2 billion was local.

States and local governments are often hesitant to raise taxes for fear that doing so will negatively affect prospects for economic growth. The relationship between higher taxes, public spending, and economic growth continues to be the subject of heated debate at all levels of government. One group studying the issue is The Public Policy Institute of New York State, Inc. One of its publications, called "Just the Facts," compares the states using 48 different measures of taxes, spending, jobs, and other key indicators of growth potential.

In terms of private sector job growth, Kentucky ranked 25th. Its growth rate of 1.6% was below the 2.2% national average. In manufacturing employment, Kentucky ranked 39th. Manufacturing jobs in Kentucky declined 1.6% compared with a 0.1% decline for the nation as a whole. Per capita personal income is well below the national average (41st) and the poverty rate is slightly above the national average (19th).

Other statistics reflect prospects for attracting new industries to enhance job growth and replace lost manufacturing employment. Kentucky ranks 41st in the number of households with computers, 44th in expenditures for university research and development, and 46th in the proportion of science and engineering graduate students in the population. An educated workforce being essential to attracting new industries, Kentucky ranks 27th in public school expenditures per pupil and 30th in public school graduation rate.

In terms of taxes and spending, Kentucky fares better. State and local taxes per capita are lower than all but nine other states, and state and local expenditures are lower than all but six. These contribute significantly to a cost of doing business that is the seventh lowest in the country. You can see the whole report at <http://www.ppiny.org/Reports/jtf/contents.htm>.



He could, therefore, accept the employment immediately upon his resignation from the state. However, for six months, he could not work on any matters in which he was directly involved during the last six months of his state tenure. That includes work on facilities pertaining to claims that he reviewed as part of his official duty for the Fund. He could, however, work on other matters of a facility that he reviewed, provided it did not involve work relating to a claim during the last three years of his state employment. Advisory Opinion 00-35.

Consulting

The Director of Curriculum Development in the Kentucky Department of Education, recently retired, was asked to do some consulting work in another state. The potential employer was a company that was a subcontractor of the company that held the testing contract for Kentucky. The subcontractor worked with committees of Kentucky teachers to develop test questions for the state-administered test to students. The division in which the former employee worked was responsible for identifying state teachers' committees and reviewing test items and other materials for quality assurance. The former employee could accept the consultancy because the work was not related to the Kentucky subcontract. Advisory Opinion 99-18.

The staff assistant to the Secretary of Labor retired, and persons and organizations doing business with the Labor Cabinet inquired about the retiree's interest in employment as a consultant. The individual would perform much the same administrative role provided as a state employee. Because the former employee was not an "officer" as defined in KRS 11A.010(7), the individual could accept employment with, or compensation from, any person or business immediately upon retirement from state government. However, for one year the individual could not represent a person or business before the state in matters in which he had direct involvement during the last three years of his state tenure. Advisory Opinion 99-48.

A Rates and Tariffs Branch Manager employed by the Kentucky Public Service Commission wanted to open a consulting business to prepare rate studies for utilities to file with the PSC. He hoped to obtain unrelated employment elsewhere in state government until his private business was operating in the black. He could operate the consulting business immediately upon the termination or transfer from the PSC, provided the new position within state government did not present a conflict with the private business. He could not, however, represent a client privately against the PSC while still employed by the state. Representation of a client privately against another state agency might give the appearance of a conflict of interest and might be considered an attempt to influence a public agency in derogation of the state at large. After leaving state service, the one-year waiting period would apply to representing any person or business before the PSC in matters in which the individual was directly involved. Advisory Opinion 98-17.

Contracting with the former agency

When the director of the Victims' Advocacy Division resigned, a "special attorney" agreed to be the acting director. Although employed only part-time and never appointed director, this attorney was a public officer subject to the ethics code. Consequently, the attorney had to wait six months upon termination of employment before obtaining a personal ser-

vice contract with the Office of the Attorney General. Advisory Opinion 00-11.

The Deputy Commissioner for Adult Institutions with the Department of Corrections in the Justice Cabinet planned to retire and was exploring various job opportunities available after retirement. One possibility was with a company that contracts for private prison operations. While a job offer was pending, the prospective employer purchased a private corrections company that held a contract with the Department of Corrections for the operation of three minimum-security facilities. Neither the individual's office nor the Department of Corrections participated in the negotiations for the purchase, and neither had prior knowledge that this purchase would occur. However, while with the Department of Corrections the individual was directly involved with the purchased company. The individual could accept employment with the company as long as he had no direct official involvement with the company during the last thirty-six months of state tenure. Direct involvement with a company that was purchased by the company with which one seeks employment does not prohibit one from seeking such employment. Advisory Opinion 98-25.

Returning to the practice of law

A retiring General Counsel of the Department of Insurance was previously the Executive Director of the Kentucky Health Purchasing Alliance (KHPA). KHPA had numerous lawsuits pending against it, although it no longer existed as a state agency. The retiring General Counsel's expertise with KHPA's operations in coordinating the Attorney General's effort to defend against these lawsuits was critical to the Commonwealth. The former General Counsel was allowed to take a part-time, interim, Attorney III (non-officer) position with the Department. This made it possible to wait only six months after resigning before contracting with the former state agency. It was not necessary to wait an additional six months required of officers. However, if as an Attorney III, the attorney performed the same duties that she performed as the General Counsel, in substance she was still an officer and would have wait six months after her resignation as an Attorney III before contracting with the Department. Advisory Opinion 00-57.

The chief hearing officer for the Administrative Hearings Branch, Cabinet for Health Services resigned to become of counsel to a law firm. He wanted to represent clients in administrative proceedings before the Cabinet for Health Services. While a hearing officer, he conducted hearings on particular matters in which he had to make a recommended or final decision for the Cabinet. Some of those entities sought his legal representation. An employee is prohibited from representing individuals in matters in which the employee was directly involved while working as a public servant. As chief hearing officer, the former employee was directly involved in all matters in the Administrative Hearings Branch. He could immediately represent clients before the Administrative Hearings Branch provided he did not represent persons or entities that had matters before the Administrative Hearings Branch during the last three years of employment. Advisory Opinion 99-39.

Lobbying

When the Director of Intergovernmental Relations within the Office of the Governor left his employment with state government, he planned to form a lobbying firm to engage

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DECISIONS OF NOTE

KENTUCKY SUPREME COURT



Public Servants - County Merit Boards

An employee of a county correctional department appealed his termination to the county merit board. The board held a hearing and recommended reinstatement. The county judge-executive rejected the recommendation and the employee sought judicial review. At issue was whether the final authority to remove the employee rested with the merit board or with the judge-executive. The Supreme Court concludes that on the facts of this case the authority rests with the judge-executive. The rules and regulations of the merit board in effect since its creation, consistent with KRS 67.710(7), recognize the authority of the judge-executive to remove covered employees conditioned on the approval of the fiscal court. *Friedman v. Armstrong*, 59 S.W.3d 875 (Ky. 2001).

Board of Claims - Claims Against Counties

The personal representative of an inmate who committed suicide in a county jail filed a complaint with the Board of Claims against the jailer and deputy jailers in their personal and official capacities and against various state agencies. In addition, the representative filed tort claims in Circuit Court. The Board of Claims dismissed the complaint, finding that it did not have jurisdiction over claims against counties or county officials. A sharply divided Supreme Court affirms the Board of Claims, finding language pertaining to counties "conspicuous in its absence from . . . KRS 44.070(1)." At the same time the court expressly overrules *Franklin County v. Malone*, 957 S.W.2d 197 (Ky. 1997), which suggested in dicta that the statute did apply to counties. The dissenters would hold that "as appendages of central state government," counties are properly subject to the jurisdiction of the Board of Claims. *Commonwealth v. Harris*, 59 S.W. 3d 896 (Ky. 2001).

Negligent Fire Fighting - Punitive Damages

Property owners sued a city after the city fire department failed promptly to extinguish a fire, resulting in the destruction of an entire building. A jury awarded compensatory and punitive damages. Owing to an erroneous jury instruction on the definition of gross negligence, the court reverses and remands for a new trial, but only on the issue of punitive damages. *City of Middlesboro v. Brown*, 63 S.W.3d 179 (Ky. 2001).

Sovereign Immunity - Interscholastic Sports

A high school baseball player taking batting practice was struck in the head and injured by a pitch thrown by a teammate. The injured player was not wearing a batting helmet. The player sued the county board of education, the athletic director, coaches, and the Kentucky High School Athletic Association. The trial court granted summary judgment to all defendants on grounds of sovereign, governmental, or official immunity, and the Court of Appeals affirmed. In an opinion reviewing the various concepts of immunity and their applications, the Supreme Court affirmed in part and reversed in part. The Supreme Court finds that "[a] local board of education is not a 'government,' but an agency of state government. As such, it is entitled to governmental immunity, but not sovereign immunity." To the extent that it holds otherwise, the court overrules *Cullinan v. Jefferson County*. The court goes on to find that interscholastic athletics is a governmental function entitled to governmental immunity. It also affirms the summary judgments as to the athletic director and the association, but reverses as to the coaches. The court also

holds unconstitutional portions of the Board of Claims Act. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

Prosecutors - Immunity

An attorney sued by his client for malpractice in a criminal case joined two prosecutors and a Kentucky State Police chemist as third-party defendants. The third-party complaint alleged that the prosecutors failed to disclose exculpatory evidence as required. Since this occurred at a time when the prosecutors were acting as advocates rather than investigators, the court holds that they are entitled to absolute immunity rather than qualified immunity. The third-party complaint also alleged that the chemist had a duty to disclose exculpatory material. However, the court finds no such duty on the part of a prosecution witness. Neither can the witness's testimony be the source of liability because a witness also has absolute immunity. The court upholds dismissal of the third-party complaint. *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001).

Confidentiality of Records - Power of Attorney General

A company that received economic incentives from the Commonwealth through the Cabinet for Economic Development intended to close its Kentucky plant and move to West Virginia. The Attorney General requested to review the Cabinet's records and the Cabinet refused, citing the confidential records provisions of the Open Records Act. Despite their confidential nature, the Attorney General, as the chief law officer of the state, asserted a right to review the records in order to protect the treasury. Because the Open Records Act permits the exchange of information between public agencies if necessary to the performance of a legitimate governmental function, the act does not remove the records from review and inspection by the Attorney General. The Attorney General has independent statutory authority (KRS 15.060) apart from the Open Records Act under which to review the records at issue and protect the state treasury. *Strong v. Chandler*, 70 S.W.3d 405 (Ky. 2002).

Inverse Condemnation - Void Statute

In 1993 the Court of Appeals declared KRS 65.115, a statute enacted to provide compensation for taking sewage treatment utility property, unconstitutional as special legislation. Subsequently a sanitation company asserted a claim under that statute, together with federal and state constitutional claims for inverse condemnation, arising from a sewer district's plan to tie into the pipe system that served the company's customers. Any statute passed in contravention of the constitution is void *ab initio*. Thus the 1993 decision rendered KRS 65.115 a nullity. An attempt now to sever the constitutional provisions from the unconstitutional provisions is ineffective. Once an appellate court in Kentucky has declared a statute unconstitutional in its entirety, the statute cannot thereafter provide any rights or powers under Kentucky law. *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918 (Ky. 2002).

Removal from Office - Joining Charges

A city commission brought charges against the mayor and a commissioner separately and jointly. The commission's plan in bringing the joint charge was to preclude the mayor and the commissioner from voting on the identical charge against the other. Removal votes must be unanimous with the exception of the charged member. By jointly bringing charges, a

faction of the commission can eliminate a rival faction. The court will not allow the commission to circumvent the requirements of KRS 83A.040(9) in that way. *City of Harrodsburg v. Royalty*, 73 S.W.3d 618 (Ky. 2002).

KENTUCKY COURT OF APPEALS



Subdivision Regulations - Mobile Home Park

A developer began the permitting and licensing process for a mobile home park as required by KRS 219.210-.410, but did not submit the project to the county for subdivision approval. The court rejects the developer's argument that the subdivision regulations did not apply because he intended only to lease spaces for mobile homes, not to sell divided lots. KRS 100.273(2) empowers a county to adopt subdivision regulations, and KRS 100.111(22) specifically defines subdivision to include division for the purpose of leasing the parcels. *Sizemore v. Madison County Fiscal Court*, 58 S.W.3d 887 (Ky. App. 2000).

Open Records Act - Police Disciplinary Records

In response to an Open Records Act request for documents pertaining to disciplinary actions involving police department employees, a city provided certain documents and withheld others. The newspaper that requested the documents appealed. The Circuit Court entered partial summary judgment from which both the newspaper and the police officer involved appealed. The police officer argued that the records were exempt pursuant to the preliminary action exemption and the personal privacy exemption in the Open Records Act and pursuant to the Open Meetings Act. Recognizing it as an issue of first impression, the court concludes that the preliminary action exemption fails because the police officer's resignation if a "final action" for purposes of the Open Records Act. The personal privacy exemption fails here because the conduct underlying the disciplinary action involved misconduct of a police officer while on duty such that disclosure would not be unwarranted. Recognizing it as a second issue of first impression, the court rejects the argument that disclosure of the initial complaint would defeat the closed meeting provision of the Open Meetings Act. *Palmer v. Driggers*, 60 S.W.3d 391 (Ky. App. 2001).

Freedom of Speech - Adult Entertainment Ordinance

Several adult entertainment establishments challenged ordinances regulating personnel qualifications, license requirements, and hours of operation and intended to reduce sex crime and social disease believed associated with adult entertainment establishments. Applying the test of *United States v. O'Brien*, the court finds that the ordinance is within the government's powers, that it furthers a substantial or important interest, that it is unrelated to the suppression of free expression, and that the restrictions on nude dancing are no more restrictive than necessary. The court also rejects an equal protection attack on the ordinances and, overruling the trial court, upholds the ordinances in their entirety. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Government*, 60 S.W.3d 573 (Ky. App. 2001).

Cemeteries - Wireless Communications Facility

A wireless telecommunications provider contracted with a nonprofit cemetery corporation to lease a parcel of land recently acquired by the cemetery and not yet developed. The provider proposed to construct a wireless communication

facility consisting of a tower, an equipment building, an access road and a fence. When the matter reached the Circuit Court, the court enjoined the construction on the ground that KRS 381.690 prohibits construction on any ground within the cemetery. The provider appealed. In upholding the injunction the appellate court interprets the statute to apply to the undeveloped parts of a cemetery as well as to those parts in which dead persons are buried. The duty of a city to protect the burial grounds from being used for building sites and other uses sets out a clear public policy that prevents the use of burial grounds for purposes unrelated to burial of the dead. *AT&T Wireless PSC v. City of Independence*, 63 S.W.3d 609 (Ky. App. 2001).

School Teachers - Reduced Employment

In order to fund an Alternative Learning Center, a school board reduced the extended employment days of forty-six teachers. Several of the affected teachers challenged the action as a violation of KRS 161.760 which prevents reductions in compensation except in certain instances. The board could reduce the teachers' extended employment days only if there were a uniform plan affecting all teachers or if the teachers received a corresponding reduction in responsibilities. The board maintained that the plan was uniform because it affected all teachers of similar class and responsibility. The court said a uniform plan must encompass all teachers even though not all are affected by its implementation. That was not the case here. Absent a uniform plan, a reduction in responsibility must accompany a reduction in salary. The court remands that issue to the lower court. *Pigue v. Christian County Board of Education*, 65 S.W.3d 540 (Ky. App. 2001).

Property Taxation - Location of Personal Property

An Ohio corporation leased houseboats to a corporation in Kentucky that in turn leased the houseboats for recreational purposes. The Ohio corporation maintained that the houseboats were taxable under KRS 186.020 in the county in which its registered agent was present. The defendant property valuation administrator maintained that the houseboats were taxable under KRS 132.220 in the county where they were primarily located. The dispute arose because under KRS 235.070 the houseboats did not have to be registered in Kentucky. The court holds that the houseboats acquired taxable situs in the county in which they were docked, stored, rented, repaired, and serviced, even though not operated entirely in that county. Transient personal property need not be taxed only in the domicile of the taxpayer. *Marina Property Services, Inc. v. Owen*, 66 S.W.3d 698 (Ky. App. 2001).

Open Records Act - Award of Costs

A prisoner requested certain records from the Department of Corrections, which the department denied. The Attorney General affirmed the department's denial. On further appeal the circuit court order the release of the documents, but determined that the department had a good faith basis for denying the request. The court denied the prisoner's request for imposition of a monetary penalty and denied a motion to award costs. The prisoner appealed, arguing that the Open Records Act entitled him to recover his costs. Because the department did not willfully withhold the requested records, the appellate court holds that the circuit court lacked authority to award costs. The court overrules its decision to the contrary in *Blair v. Hendricks. Lang v. Sapp*, 71 S.W.3d 133 (Ky. App. 2002).

UNITED STATES SUPREME COURT



Land Use Moratoria – Takings

The Tahoe Regional Planning Agency (TRPA) imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. Real estate owners affected by the moratoria claimed that TRPA's actions constituted a taking of their property without just compensation. The U.S. District Court concluded that the moratoria was a taking under the rule announced in *Lucas v. South Carolina Coastal Council*. On appeal the Ninth Circuit held that because the regulations had only a temporary impact on petitioners' interests, no taking had occurred. The Supreme Court held that development moratoria that impose temporary prohibitions on the development of land are subject to the three-factor test in *Penn Central Transp. Co. v. New York City*. Courts must consider "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ U.S. ___ (2002).

Judicial Candidates – Free Speech

The Minnesota Supreme Court, like many other states, adopted a canon of judicial conduct that prohibits a candidate for a judicial office from announcing his or her views on disputed legal or political issues (the "announce clause"). A candidate for associate justice of that court sought a declaration that the announce clause violated First Amendment. Reversing the lower courts, the Supreme Court overturned the Minnesota rule. The court rejected the state's argument that the rule was necessary to preserve the impartiality of the judiciary as well as the appearance of impartiality. The state failed to meet its burden to show that the rule was narrowly tailored to serve a compelling state interest. *Republican Party of Minnesota v. White*, ___ U.S. ___ (2002).

Student Extracurricular Activities – Drug Testing

A school district adopted a Student Activities Drug Testing Policy that required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. In response, high school students and their parents brought suit alleging that the policy violated the Fourth Amendment. The federal district court upheld the policy. The Tenth Circuit reversed, holding before imposing a suspicionless drug testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those tested. The Supreme Court reinstated the policy. The court held that a student has a limited expectation of privacy in a public school environment where the state is responsible for maintaining discipline, health and safety. The court also considered that the character of the intrusion was minimal and the consequence of a failed drug test was to limit the privilege of participation in extracurricular activities. Further, the court held that testing the affected students is a reasonably effective means of addressing the school's legitimate concerns in preventing, deterring, and detecting drug use. *Board of Education v. Earls*, ___ U.S. ___ (2002).

School Vouchers – Establishment of Religion

Ohio's Pilot Project Scholarship Program gives educational choices to families in any Ohio school district that is under state control pursuant to a federal court order. The program provides tuition aid to certain students in the Cleveland City

School District, the only covered district, to attend participating public or private schools of their parent's choosing and tutorial aid for students who choose to remain enrolled in public school. Both religious and nonreligious schools in the district may participate, as may public schools in adjacent school districts. Tuition aid is distributed to parents according to financial need, and where the aid is spent depends solely upon where parents choose to enroll their children. Cleveland schoolchildren also have the option of enrolling in community schools (charter schools) or magnet schools. Ohio taxpayers sought to enjoin the program on the ground that it violated the Establishment Clause. The federal District Court granted them summary judgment, and the Sixth Circuit affirmed. The Supreme Court held that the program did not violate the Establishment Clause. The program was one of true private choice where government aid reached religious schools only as a result of the genuine and independent choices of private individuals. *Zelman v. Simmons-Harris*, ___ U.S. ___ (2002).

Charitable Solicitation Permits – First Amendment

A village passed an ordinance that prohibited "canvassers" from going on private residential property to promote any cause without first obtaining a permit from the mayor's office. A group of Jehovah's Witnesses, publishers and distributors of religious materials, alleged that the ordinance violated their rights to the free exercise of religion, free speech, and freedom of the press. The federal district court upheld most provisions of the ordinance as valid, and the Sixth Circuit affirmed. The Supreme Court held that the ordinance violated the First Amendment. First, many persons support causes anonymously, and the permit requirement tends to chill such advocacy. Second, some persons' scruples will prevent them from applying for a license, so requiring a permit in advance imposes a substantial burden on the speech of some citizens. Third, the ordinance bans a significant amount of spontaneous speech because of the permit requirement. Fourth, the ordinance was not tailored to the village's stated interest in the prevention of fraud, the prevention of crime, and the protection of privacy. *Watchtower Bible and Tract Society v. Village of Stratton*, ___ U.S. ___ (2002).

UNITED STATES COURT OF APPEALS



Deputy Sheriffs - Retaliation for Political Activity

When a sheriff did not rehire certain deputy sheriffs, the deputies sued alleging that they were discharged in retaliation for supporting the sheriff's opponent, the former sheriff, in a past election. In his defense the sheriff claimed that deputy sheriffs fell within the confidential employee or policymaker exceptions to the general rule prohibiting patronage dismissals. The court holds that the sheriff failed to establish that Kentucky statutes confer on deputy sheriffs the degree of discretion to bring them within the exceptions. Further, the court rejects the sheriff's claim that he is entitled to qualified immunity. In view of its earlier holding in *Hall v. Tolleit* (involving Tennessee sheriffs), the court holds that a reasonable official would have understood that taking action against the deputy sheriffs for political reasons was unconstitutional. *Heggen v. Lee*, 284 F.3d 675 (6th Cir. 2002).

School Teachers - Retaliation for Political Activity

When a superintendent demoted and reassigned the coordinator of the school district's gifted and talented program, she sued alleging that the superintendent was retaliating for

her support of his opponent for the position. The federal district court granted summary judgment for the superintendent. Holding that the confidential employee and policymaker exceptions are not clearly applicable, the Court of Appeals reverses, finding a genuine issue of material fact as to whether the demotion was in retaliation for the teacher's political conduct. The court sees KRS 161.164 (4), which protects a teacher from demotion based on political affiliation, as raising a significant question as to the legitimacy of the superintendent's actions. *Hager v. Pike County Board of Education*, 286 F.3d 366 (6th Cir. 2002).

Public Servants - Immunity from Suit

After criminal charges were dismissed, the former defendant filed a civil action against state police officers and the Commonwealth Attorney. The suit alleged federal civil rights violations and various state law claims for false arrest, defamation, and perjury. On a motion for summary judgment, the federal district court dismissed the civil rights claim with prejudice and the state law claims without prejudice. The Court of Appeals affirmed. Because the court found no violation of a constitutionally protected right, state police officers were qualifiedly immune from suit. Because the court found the conduct of the Commonwealth Attorney to be prosecutorial in nature rather than investigatory or administrative, he was absolutely immune from suit. *Higgason v. Stephens*, 288 F.3d 868 (6th Cir. 2002).

Development of Streets - Religious Discrimination

When a city began development of a dedicated street, a church sued alleging violations of the United States and Kentucky Constitutions and the Religious Freedoms Restoration Act. The church claimed that it owned the land in question either because the city abandoned the street or because development of the street did not serve a public purpose. The court rejected these claims as unsupported by the facts. The church also failed to raise a genuine issue of material fact as to whether the City engaged in religious discrimination when it chose to develop rather than close the street. Therefore, the church could not show that the City's decision implicated the church's rights under the Free Exercise Clause or the Establishment Clause. The Religious Freedom Restoration Act, as amended by the Religious Land Use and Institutionalized Persons Act, is inapplicable because the city did not act pursuant to a zoning or landmarking law to which the act applied. *Prater v. City of Burnside*, 289 F.3d 417 (6th Cir. 2002).

Retaliatory Discharge - Freedom of Speech

A public employee, whose position was eliminated in a workforce reduction, filed a suit in which she alleged that her position was targeted because of her criticism of her superiors. The federal district court denied that her superiors had qualified immunity for their actions, and they took an interlocutory appeal. The Court of Appeals finds that the statements on which the employee relied concerned disputes over internal office functions, not matters of public concern. Therefore, her comments did not fall within the realm of protected speech and the employers were entitled to qualified immunity. *Gragg v. Kentucky Cabinet for Workforce Development*, 289 F.3d 958 (6th Cir. 2002).

Insubordination - Freedom of Speech

After being discharged from his position, the former Commissioner of the Kentucky State Police sued alleging that the termination violated the First Amendment of the U.S. Constitution and the Kentucky Whistleblower Act (KRS Chapter

61). Central to these claims was a memorandum stating a intention to eliminate a position and demote the holder of that position based upon that person's performance. Adopting an approach used by three other circuits, the Sixth Circuit holds that where an employee in a policymaking or confidential position is terminated for speech related to his political or policy views the balance favors the government as a matter of law. The rule "recognizes the fact that it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer . . ." Applying the rule, the speech at issue in the case was not protected under the First Amendment. As to the Whistleblower Act claim, Kentucky could be sued only in her own courts, not in federal court. *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002).

Zoning - Americans with Disabilities Act

A city refused to issue a zoning permit to a drug treatment facility to open a methadone clinic and subsequently amended the zoning ordinance to prohibit the clinic from opening anywhere in the city. The provider sued the city alleging discrimination under the Americans with Disabilities Act and the Rehabilitation Act. The District Court found for the clinic, and the Court of Appeals affirms. The clinic's potential clients are disabled persons within the scope of the Americans with Disabilities Act. The record at the zoning hearing showed that the reasons the city denied the permit was because it feared that the clinic's clients would continue to abuse drugs and attract more drug activity to the city. Equating clients' status as recovering drug addicts with criminality was based on fear and stereotyping of the kind the ADA was intended to address. *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002).

UNITED STATES DISTRICT COURT



Access to Records – Free Speech

On remand from the United States Supreme Court and the Sixth Circuit Court of Appeals, the district court holds that KRS 189.635 and KRS 61.874 do not violate rights of free speech and equal protection. KRS 189.645 limits access to certain Kentucky State Police accident reports. KRS 61.874 allows public agencies to charge a "reasonable fee" for copies of public records sought for a commercial purpose. The court concludes that a limitation on access to information in the hands of government is not the same as a direct restriction on protected speech. *Amelkin v. McClure*, 178 F.Supp.2d 766 (W.D. Ky. 2001).

Sexually Oriented Businesses – Licenses

An ordinance regulated and licensed adult entertainment establishments and adult entertainers. The licensing requirement operated as a form of prior restraint on an activity that receives some First Amendment protection. Any such scheme must assure a prompt, final judicial decision to minimize the deterrent effect of a possibly erroneous denial of a license. Kentucky law does not afford the required prompt judicial review, thus rendering the entire ordinance unconstitutional. In addition, the discretionary nature of the judicial review that is afforded and the inadequate provisions for a stay of administrative action fail to satisfy constitutional standards. *Déjà vu of Kentucky, Inc. v. Lexington-Fayette Urban County Government*, 194 F.Supp.2d 606 (E.D. Ky. 2002).

BE IT ORDAINED . . .

In Kentucky until recently, the siting of cellular antenna towers was under the control of the Public Service Commission. According to the commission, Kentucky was the only state to take this approach. Any local government that wished to plan for or regulate the siting of the towers had to register with the commission and coordinate its review with that of the commission, which could and sometimes did override the local decision. House Bill 270 (2002 Kentucky Laws Ch. 343) amended KRS 100.987 to eliminate the registration requirement and to empower local governments with locally adopted planning and zoning regulations to control cell tower locations. (This change was the basis of the purported emergency in Opinion of the Attorney General 02-OMD-91 summarized elsewhere in this issue). Outside the jurisdiction of a planning commission, however, the Public Service Commission will retain jurisdiction over the siting of cell towers.

The federal Telecommunications Act of 1996 act preserved local authority to control the placement of these cell towers, but with some limitations. For example, no regulation can unreasonably discriminate among providers of functionally equivalent services and no regulation can prohibit or have the effect of prohibiting the provision of services. In addition, the locality must act on a request for authorization to place, construct, or modify a personal wireless facility within a reasonable time. In addition, the Telecommunications Act requires that the locality must issue any denial of an application in writing and support that decision by "substantial evidence" contained in a written record. H.B. 270 reflects the requirements of the federal act.

Local governments in Kentucky looking to implement the powers conferred by H.B. 270 might consider the advice that Pennsylvania gave to its local governments in the following list of do's and don'ts for drafting a cell tower ordinance.¹

Do's

1. *Do* define relevant terms in the ordinance such as "Communications Antenna," "Communications Equipment Building," "Communications Tower" and "Height of a Communications Tower." In many existing ordinances, terms such as "Essential Services" are vaguely defined and could be argued to include telecommunications towers or antennas. Such definitions should be amended to exclude wireless facilities so that their placement in the community can be reasonably controlled.

2. *Do* encourage the installation of antennas upon existing structures, including building rooftops, water tanks or existing towers, rather than the construction of new towers. If community residents raise aesthetic objections to wireless facilities, such objections are almost always directed at towers and rarely at antennas mounted on existing structures. The best way to encourage such "co-location" of antennas on existing structures is to make it easier and quicker for providers to obtain a building permit for co-location than for construction of a tower. Typically, this is accomplished by making co-location of antennas on existing structures a use by right (requiring only a building permit) while making construction of towers (at least in some districts) a special exception or conditional use requiring public hearings and satisfaction of specific requirements.

3. *Do* encourage the construction of towers in the community's least restrictive zoning districts by considering making construction of towers in such districts (*e.g.*, industrial and manufacturing districts) a use by right. An

other incentive would be to allow higher towers in the least restrictive zoning districts.

4. *Do* define height limitations specifically applicable to towers and to the permitted height of co-located antennas above the highest point on the building or other structure.

5. *Do* require the provider proposing to co-locate antennas to certify that the proposed installation will not exceed the structural capacity of the building or other structure.

6. *Do* require co-located antennas to meet applicable building codes and other regulations.

7. *Do* require that wireless facilities comply with all applicable standards established by the FCC governing human exposure to electromagnetic radiation.

8. *Do* establish reasonable setback requirements for towers and equipment buildings.

9. *Do* establish reasonable standards for communications towers in more restrictive districts as special exceptions or conditional uses, such as compliance with applicable FAA and Airport Zoning regulations.

10. *Do* require that access be provided to the tower by means of a public street or adequate easement with an improved cartway.

11. *Do* require that the base of a tower be landscaped so as to screen the tower foundation and base and the communications equipment building from abutting properties.

12. *Do* require that the provider certify that a tower will be designed and constructed in accordance with current national standards for steel towers. Such standards include the Structural Standards for Steel Antenna Towers and Antenna Support Structures published by the Electrical Industry Association/ Telecommunications Industry Association.

13. *Do* require a security fence at least 8 feet in height around a tower and equipment building.

14. *Do* require that a tower remaining unused for 12 months be dismantled and removed by the provider.

15. *Do* encourage the use of appropriate public property for communications facilities. Many such properties are less intrusive locations than privately owned property for wireless facilities, and the revenue benefits to the municipality can be significant.

Don'ts

1. *Don't* unreasonably limit wireless facilities to a small portion of the community.

2. *Don't* treat co-location and tower construction applications the same. Encourage co-location by simplifying the approval process.

3. *Don't* require unreasonable "fall zones" or setbacks from adjoining property lines or unreasonably large minimum parcel size. A properly constructed tower designed and built to current national standards will be at least as reliable as surrounding structures.

4. *Don't* establish local safety or environmental standards for human exposure to radio frequency emissions. The 1996 Telecommunications Act prohibits it.

5. *Don't* require providers to construct towers to accom-

modate several providers. This will probably result in towers unnecessarily tall and thick to accommodate such users.

Ordinances regulating cell towers usually take one of two forms. Some are comprehensive, stand-alone ordinances. A typical ordinance of this kind is too long to reproduce here. The bibliography at the end of the article contains some examples of such stand-alone ordinances. The other approach incorporates cell tower regulation into existing zoning ordinances, an approach clearly contemplated by H.B. 270. Pennsylvania recommended that approach to its local governments.

Here, with minor modifications, is the model ordinance Pennsylvania developed.² Its authors note, "This ordinance is written in a general form for basic municipal zoning districts. Since land use districts, population densities, topography and other community characteristics vary significantly among communities throughout the Commonwealth, individual municipalities will have to adapt the suggested regulations to the format of their ordinances, particular zoning districts and community characteristics."

Section 1. The following new definitions are hereby inserted in alphabetical order:

Communications Antenna: Any device used for the transmission or reception of radio, television, wireless telephone, pager, commercial mobile radio service or any other wireless communications signals, including without limitation omnidirectional or whip antennas and directional or panel antennas, owned or operated by any person or entity licensed by the Federal Communications Commission (FCC) to operate such device. This definition shall not include private residence mounted satellite dishes or television antennas or amateur radio equipment including without limitation ham or citizen band radio antennas.

Communications Equipment Building: An unmanned Building or cabinet containing communications equipment required for the operation of Communications Antennas and covering an area on the ground not greater than 250 square feet.

Communications Tower: A Structure other than a Building, such as a monopole, self-supporting or guyed tower, designed and used to support Communications Antennas.

Height of a Communications Tower: The vertical distance measured from the ground level to the highest point on a Communications Tower, including antennas mounted on the tower.

Public Utility Transmission Tower: A Structure, owned and operated by a public utility electric company regulated by the Pennsylvania Public Utility Commission, designed and used to support overhead electricity transmission lines.

Structure: Any thing built, constructed, or erected which requires location on the ground or attachment to something located on the ground.

Section 2. The definition of Essential Services is hereby amended to read as follows:

Essential Services means the erection, construction, alteration or maintenance, by public utilities or municipal or other governmental agencies, of underground or overhead gas, electrical, steam or water transmission or distribution systems, collection, communication, supply or disposal systems

and their essential Buildings, excluding Communications Towers and Communications Antennas, as defined herein.

Section 3. The schedule of uses allowed as of right in a Single-family Residential District and the schedule of uses allowed as of right in a Multi-family Residential District are amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, and Communications Equipment Buildings.

Section 4. The schedule of uses allowed as of right in a Parks District is amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, and Communications Equipment Buildings.

Section 5. The schedule of uses allowed as of right in a Conservancy District is amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, and Communications Equipment Buildings.

Section 6. The schedule of uses allowed by special exception in a Conservancy District is amended to include:

Communications Towers subject to the Standards For Communications Towers As Special Exceptions and Communications Equipment Buildings.

Section 7. The schedule of uses allowed as of right in a General Commercial District is amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, including existing Communications Towers, and Communications Equipment Buildings.

Section 8. The schedule of uses allowed by special exception in a General Commercial District is amended to include:

Communications Towers subject to the Standards For Communications Towers As Special Exceptions and Communications Equipment Buildings.

Section 9. The schedule of uses allowed as of right in a Central Commercial District is amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, including existing Communications Towers and Communications Equipment Buildings.

Section 10. The schedule of uses allowed by special exception in a Central Commercial District is amended to include:

Communications Towers subject to the Standards For Communications Towers As Special Exceptions and Communications Equipment Buildings.

Section 11. The schedule of uses allowed as of right in a Manufacturing District is amended to include:

Communications Antennas mounted on an existing Public Utility Transmission Tower, Building or other Structure, including existing Communications Towers, and Communications Equipment Buildings.

Section 12. The General Height Provisions and Exceptions in the zoning code shall not apply to any Communications Antennas or Communications Towers.

Section 13. The General Area Provisions and Exceptions are amended to add the following:

Regulations Governing Communications Antennas and Communications Equipment Buildings.

Building mounted Communications Antennas shall not be located on any single family dwelling or two family dwelling.

Building mounted Communications Antennas shall be permitted to exceed the height limitations of the applicable Zoning District by no more than twenty (20) feet.

Omnidirectional or whip Communications Antennas shall not exceed twenty (20) feet in height and seven (7) inches in diameter.

Directional or panel Communications Antennas shall not exceed five (5) feet in height and three (3) feet in width.

Any applicant proposing Communications Antennas to be mounted on a Building or other structure shall submit evidence from a registered professional engineer certifying that the proposed installation will not exceed the structural capacity of the Building or other Structure, considering wind and other loads associated with the antenna location.

Any applicant proposing Communications Antennas to be mounted on a Building or other Structure shall submit detailed construction and elevation drawings indicating how the antennas will be mounted on the Structure for review by the for compliance with the Building Code and other applicable law.

Any applicant proposing Communications Antennas to be mounted on a Building or other Structure shall submit evidence of agreements and/or easements necessary to provide access to the Building or Structure on which the antennas are to be mounted so that installation and maintenance of the antennas and Communications Equipment Building can be accomplished.

Communications Antennas shall comply with all applicable standards established by the Federal Communications Commission governing human exposure to electromagnetic radiation.

Communications Antennas shall not cause radio frequency interference with other communications facilities located in the [city, county].

A Communications Equipment Building shall be subject to the height and setback requirements of the applicable Zoning District for an accessory structure.

The owner or operator of Communications Antennas shall be licensed by the Federal Communications Commission to operate such antennas.

Section 14. The provisions of the zoning code pertaining to Special Exceptions are amended to add the following:

Standards For Communications Towers as Special Exceptions.

The applicant shall demonstrate that it is licensed by the Federal Communications Commission to operate a Communications Tower, if applicable, and Communications Antennas.

The applicant shall demonstrate that the proposed height of the Communications Tower is the minimum height necessary to perform its function.

In all Zoning Districts except Manufacturing Districts, the maximum height of any Communications Tower shall be one hundred fifty (150) feet provided, however, that such height may be increased to no more than two hundred (200) feet, provided the required setbacks from adjoining property lines (not lease lines) are increased by one (1) foot for each one (1) foot of height in excess of one hundred fifty (150) feet. In the Manufacturing District, the maximum height of any Communications Tower shall be one hundred eighty (180) feet.

The foundation and base of any Communications Tower shall be set back from a property line (not lease line) located in any Residential District at least one hundred (100) feet and shall be set back from any other property line (not lease line) at least fifty (50) feet.

The base of a Communications Tower shall be landscaped so as to screen the foundation and base and Communications Equipment Building from abutting properties.

The Communications Equipment Building shall comply with the required yards and height requirements of the applicable Zoning District for an accessory structure. The applicant shall submit certification from a registered professional engineer that a proposed Communications Tower will be designed and constructed in accordance with the current Structural Standards for Steel Antenna Towers and Antenna Supporting Structures, published by the Electrical Industrial Association/Telecommunications Industry Association and applicable requirements of the Building Code.

The applicant shall submit a copy of its current Federal Communications Commission license; the name, address and emergency telephone number for the operator of the Communications Tower; and a Certificate of Insurance evidencing general liability coverage in the minimum amount of \$1,000,000 per occurrence and property damage coverage in the minimum amount of \$1,000,000 per occurrence covering the Communications Tower and Communications Antennas.

All guy wires associated with guyed Communications Towers shall be clearly marked so as to be visible at all times and shall be located within a fenced enclosure.

The site of a Communications Tower shall be secured by a fence with a maximum height of eight feet to limit accessibility by the general public.

No signs or lights shall be mounted on a Communications Tower, except as may be required by the Federal Communications Commission, Federal Aviation Administration or other governmental agency which has jurisdiction.

Communications Towers shall be protected and maintained in accordance with the requirements of the Building Code.

If a Communications Tower remains unused for a period of twelve (12) consecutive months, the owner or operator shall dismantle and remove the Communications Tower within six (6) months of the expiration of such twelve (12) month period. One off street parking space shall be provided within the fenced area.

Section 15. All ordinances or parts of ordinances in conflict with the provisions of this Ordinance are hereby repealed to the extent of such conflict.

Continued on page 15

in executive agency lobbying. In his state government position, the Director served as the Governor's liaison with federal agencies and governors of other states. He had no managerial or decision-making authority, and only two employees reported to him. Because the position was listed as an administrative assistant, and because his actual duties did not rise to the level of major management, the individual was not regarded as an officer bound by the restrictions applicable to officers. However, for one year following termination of employment, he should not register as an executive agency lobbyist or legislative agent to lobby issues involving matters in which he was directly involved during the last three years of his tenure in state government. Additionally, for one year he should not represent any persons or businesses before the state in any matters in which he was directly involved during his last three years of employment. Advisory Opinion 00-34.

Working for another agency

While serving as Commissioner for the Department for Social Services, an individual approved and signed a contract between the DSS and Eastern Kentucky University's Training Resource Center. Subsequently, the individual wanted to contract with Eastern Kentucky University. Because the ethics code was not intended to prevent a public servant from accepting post-government employment with a state institution of higher education, the individual could accept the contract with Eastern Kentucky University immediately upon retirement from state government. Advisory Opinion 98-41.

Working for a nonprofit organization

The former executive director of the Office of Performance Enhancement in the Cabinet for Families and Children accepted employment with a non-profit child-care agency that contracted with, and was regulated by, the Cabinet during the executive director's government employment. As executive director, the employee had ultimate supervisory responsibility over all staff and functions of the office and either could or did exercise decision-making responsibility on matters relating to the Cabinet's contracts with non-profit child-care agencies. As head of the office, the former executive director was "directly involved" in all matters of the office. Since a non-profit organization is a "person or business" under the code of ethics, the former executive director was prohibited for a period of six months from accepting employment or compensation from a non-profit child care agency that contracted with or was regulated by the Cabinet. Advisory Opinion 00-19.

A former Commissioner of the Department of Local Government (DLG) and former county judge executive of Franklin County received an offer from the Kentucky Association of Counties (KACo) to serve as its executive director. Although DLG has oversight responsibilities over the affairs of counties that may be members of KACo, it does not have any direct regulatory authority over KACo or any contracts or agreements with KACo that would establish a business relationship. An agency head is directly involved in all matters of the agency. Here, as Commissioner of DLG, the individual was directly involved in the regulation of counties. However, the Commissioner of DLG was not involved in the regulation of KACo, the organization that lobbies on behalf of counties. Consequently, the individual could accept employment with KACo immediately upon resignation from the Department. He could not, however, for a period of one-year following the resignation, act as a lobbyist or represent KACo before the

state in matters in he directly involved during the last three years of employment. Advisory Opinion 00-54.

Working on matters in which one was directly involved

A person who left the insurance industry for state employment in the Insurance Department wanted to return to private sector work with a workers' compensation program. Because the person was returning to his former profession in the insurance industry, he could immediately accept the proffered employment. For six months he could not work on any matters in which he was directly involved during the last three years of state employment, not just those matters when he was considered an officer. The affected individual could assist members and service providers as long as such assistance did not require the individual to represent anyone, for one year, before any state agency concerning such matters. Advisory Opinion 97-08.

The Director of the Division of Audits in the Cabinet for Health Service retired and wanted to work for a large national accounting firm after retirement. The prospective employer had earlier held a contract with the Cabinet with respect to which the retiring employee provided technical assistance to the Department of Medicaid Services during the contract. The individual did not personally work, direct, or have any responsibility for the project to which the contract related. However, because of the involvement in technical matters during the negotiations, the retiring employee was directly involved in matters concerning the prospective employer. Advisory Opinion 98-10.

The institutional pharmacy at the Kentucky State Penitentiary is operated through a contract with a local pharmacist. The local pharmacist employs his own pharmacy technicians. A pharmacy technician retiring from the Kentucky State Penitentiary wanted to work part-time for the local pharmacist. Because he was not an officer, the pharmacy technician could accept employment immediately with the pharmacist who holds a contract to provide services for the Kentucky State Penitentiary, provided he has not used his official position to give himself an advantage in violation of KRS 11A.020(1)(d). Advisory Opinion 99-33.

Endnotes

1. "Ethics in Government Act," Senate Report 95-170.
2. See Sandra Norman-Eady, *Governmental Ethics*, available at <<http://www.cga.state.ct.us/2000/rpt/olr/hm/2000-r-0154.htm>>.
3. For a model of a local government code of ethics, see Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 *Fordham Urban Law Journal* 61 (1993). Many other examples are available from the Local Government Law Center.
4. In addition to the provisions of an applicable government code of ethics, Kentucky lawyers in government service should be alert to any relevant provisions of the Kentucky Rules of Professional Conduct such as Rule 1.11, "Successive government and private employment."
5. See Mark Davies, *Governmental Ethics Laws: Myth and Mythos*, 40 *N.Y. L. School L. Rev.* 177, 180 (1995).
6. Discussions of revolving door provisions in other states include: Ohio, <http://www.ethics.state.oh.us/publicinfoevdoorpostemp.html>; New Jersey, <http://www.state.nj.us/lps/ethics/pempcode.pdf>; Hawaii, <http://www.state.hi.us/ethics/noindex/newsltr/98-3.pdf>; Louisiana, <http://www.ethics.state.la.us/pub/post.htm>; Texas, http://www.ethics.state.tx.us/pamphlet/rev_door.htm; Indiana, <http://www.in.gov/ethics/pubs/guide-leavingstategovt.html>; New York, <http://www.dos.state.ny.us/ethc/rdr.html>.

OPINIONS OF THE ATTORNEY GENERAL

OAG 02-2

February 25, 2002

Subject: Restrictions on city employees' First Amendment right of freedom of speech during their hours of work

Requested by: John W. D. Bowling, State Representative

Written by: Bill Pettus, Assistant Attorney General

Syllabus: City government may impose limited restrictions on the speech rights of its workers during working hours to achieve legitimate governmental objectives.

Statutes construed: None

OAGs cited: None

Opinion of the Attorney General

We have been asked by State Representative, John W. D. Bowling, whether a city can lawfully prevent city employees from speaking with candidates during working hours. Attached to Representative Bowling's letter is the first two pages of a January 17, 2002, memorandum from City Manager Steve Biven. This memorandum directs all city employees, in part, as follows:

... please advise any candidates that ask you to discuss your job with them, while you are at work, that they must first see the City Manager. All inquiries as to your job function etc.. need to be run through me. All request for documentation should also come to my attention, so that I can determine if the Kentucky Open Records Act applies and if a cost of our time and material needs to be passed on to those who are occupying our time. I will try to keep you from having to be caught up in the middle of any political activity. *You may simply state that 'the City Manager has asked us to direct you to him for assistance.'*

While wanting to be cooperative and polite, we do not want to allow individuals to interfere in your work activity and make your job anymore difficult than it has to be. It is not your responsibility to educate candidates as to the function of city government or to accommodate them into your schedule.

The question raised by State Representative Bowling implicates issue of infringement of the First Amendment right of speech by municipal governmental workers. The appropriate legal analysis applicable to the First Amendment rights of government workers has been well articulated by federal district court judge, D. Brook Bartlett, from Missouri as follows:

A. The Applicable Standard: The Pickering/NTEU Balancing Test

Individuals do not automatically relinquish their First Amendment rights by accepting government employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S. Ct. 675, 684-85, 17 L. Ed. 2d 629 (1967). At the same time, however, the Supreme Court has recognized that legislatures 'may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.' See *United States v. National Treasury Employees Union*, 130 L. Ed. 2d 964, 115 S. Ct. 1003, 1012 (1995) (NTEU) (explaining that Congress possesses the constitutional authority to restrict federal employees from participating in certain speech activities). Therefore, to determine the validity of a restraint on the speech of government employees, a court must 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968).

In order to qualify for the protection of the Pickering balancing test, government employee speech must involve 'matters of public concern.' See *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1689-90, 75 L. Ed. 2d 708 (1983). A government employee's speech addresses a matter of public concern when it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.' *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3rd Cir. 1995).

... the government's burden is greater with respect to a broad based restriction on expression than with respect to an isolated disciplinary action. Id.; see also *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395, 2401, 120 L. Ed. 2d 101 (1992) (explaining that there is a 'heavy presumption' against the validity of a prior restraint). The government must show that the 'necessary impact on the actual operation' of government outweighs the interests of present and future employees and their potential audiences in unrestrained public employee speech on issues and candidates in City elections. *Pickering*, 391 U.S. 563, 571, 88 S. Ct. 1731, 1736; *NTEU*, 115 S. Ct. at 1014.

Goodman v. City of Kansas City, Missouri, 906 F.Supp. 537, 541 (W.D. Mo. 1995). See generally, 'Validity, construction, and effect of state statutes restricting political activities of public officers or employees,' 51 ALR4th 702.

Here, City Manager Steve Biven seeks to restrict city employees during their working hours from discussing their job functions with political candidates. It is, at best, tenuous whether this type of speech involves "matters

of public concern.” In other words, it is questionable whether restricting city workers’ discussion of their job function with candidates during working hours may be “fairly considered as relating to any matter of political, social, or other concern to the community.” Watters, 55 F.3d at 892.

Furthermore, city employees are not restricted from discussing their job function with political candidates during non-working hours; hence the restriction is limited in its application, notwithstanding the restriction’s broad application to all city employees.

Assuming that this minimal and limited restriction on First Amendment rights of city workers does involve “matters of public concern,” city government can justify this restriction by demonstrating that the City’s interest in “the effective and efficient fulfillment of its responsibilities to the public” outweighs the city workers’ interest in unrestrained speech. *Connick*, 103 S.Ct. at 1691.

It is evident that this restriction is based, at least in part, on city government’s desire to operate city government on an apolitical basis. (“I will try to keep you from having to be caught up in the middle of any political activity.”) This restriction is also based, at least in part, on the desire that city employees not be distracted from performing their job duties and responsibilities by responding to verbal inquiries from political candidates. (“[W]e do not want to allow individuals to interfere in your work activity and make your job anymore difficult than it has to be. It is not your responsibility to educate candidates as to the function of city government or to accommodate them into your schedule.”) Attachment to Representative Bowling’s January 17, 2002, letter, pp. 1-2.

These are legitimate governmental interests that are advanced by this limited restriction on city workers’ speech during their working hours. In our opinion, this minimal restriction on city workers’ speech is lawful because it is outweighed by city government’s legitimate and significant interests in operating city government effectively and efficiently.

There are, of course, limits to the government’s ability to restrict its employees’ freedom of speech, particularly if the restriction applies outside the employees’ hours of work or is overly broad in its application. For example, see, *Rogenski v. Board of Fire & Police Commissioners*, 3d Dist., 6 Ill App 3d 604, 285 NE2d 230, (1972) (a police captain who had discussed politics with an elderly woman while he was on duty could not be dismissed from the police department for violating a regulation which prohibited all members of the force from discussing politics, ruling that the regulation in question violated the police officer’s right to freedom of speech); *Michigan State AFL-CIO v. Michigan Civil Service Commission*, 455 Mich. 720, 566 N.W.2d 258, 155 L.R.R.M. (BNA), 3029 (1997) (civil service rule prohibiting use of union leaves of absence for partisan political activity violated First Amendment); and *Louthan v. Commonwealth*, 79 Va. 196 (1884), (public employee could not be discharged for violating a state statute which provided that it was unlawful for certain public employees to actively induce or procure, or attempt to induce or procure, directly or indirectly, any qualified

voter to vote for or against any candidate or party, or to participate actively in politics or make political speeches because the statute com unconstitutional infringement on the employees’ right to freedom of speech).

SUMMARIES OF SELECTED FORMAL OPINIONS OF THE ATTORNEY GENERAL

OAG 02-1

Subject: Municipal utilities: extension outside city limits and regulation by the Public Service Commission and fiscal courts.

Syllabus: Absent statutory authority, a city may not extend its facilities to provide extra-territorial service, however, city-owned utilities may allow non-resident access to surplus utilities.

Synopsis: Unless authority is specifically given by statute to a specific utility type, common law holds that city-owned utilities may only sell surplus utilities to non-residents and may not distribute those utilities through additional city-owned facilities dedicated to non-resident customers. Municipalities are excluded from the jurisdiction of the Public Service Commission, but cities do not have complete immunity from Commission regulation. Fiscal Courts, pursuant to KRS 67.083, may generally regulate water, sewer, and cable television services, but are restricted from governing the use of gas or electricity.

OAG 02-4

Subject: Disciplinary hearings pursuant to KRS 160.345

Syllabus: The Kentucky Board of Education has the obligation through its executive officer the Commissioner of Education to appoint or hire an attorney to present a case referred pursuant to KRS § 160.345 by the Office of Education Accountability, which is barred by the separation of powers doctrine from prosecuting the charges.

Synopsis: The Office of Education Accountability, a part of the Legislative Research Commission, has the authority to investigate violations of KRS § 160.345, to resolve the complaint, or to forward the matter to the Board of Education. As a legislative agency, it has no authority to prosecute a case in an executive branch administrative hearing. It falls to the Commissioner of Education under KRS § 156.148 to present the charges and, pursuant to KRS § 12.210, to hire attorneys to represent the agency.

OAG 02-5

Subject: Whether a private neighborhood association may use association funds to restore a registered state historical landmark that is religious in nature and located on public property

Syllabus: The University of Louisville may authorize the Saint Joseph’s Area Association to restore the registered state and local historical landmark, The Grotto and Garden of Our Lady of Lourdes, because of its cultural and historical value to the Louisville community.

Synopsis: The government has a valid secular purpose for preserving this registered historical landmark on property owned by the University. Its restoration by a private neighborhood association does not convey a message of governmental endorsement of religion. In reaching this conclusion, the opinion applies the test of *Lemon v. Kurtzman*, as interpreted in *Allegheny County v. ACLU*.

The opinion also finds support for its conclusion in *ACLU v. Capitol Square Review and Advisory Board*, the decision of the Sixth Circuit Court of Appeals upholding the Ohio motto "With God All Things are Possible." The attorney general analogizes the instant situation to that in *Suhre v. Haywood*, a federal district court case from North Carolina, that also involved a state-owned registered historical landmark with religious elements. A reasonable person who knows the history and secular context of the landmark would not believe that the Commonwealth is endorsing religion.

Under KRS 15.020 the Attorney General furnishes written opinions to public officers touching any of 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 not binding on the recipient, but the Attorney General, as the chief law officer of the Commonwealth, expects recipient officials to conform. Although they do not have the force of law, they are persuasive and may be cited in court. Copies of the decisions summarized here are available on-line at <http://www.law.state.ky.us/civil/openrec.html>.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

02-ORD-25

A police department denied a police officer's request to view an internal affairs investigation file, asserting that internal investigations did not fall under the Open Records Act. The attorney general disagreed, holding that preliminary investigative materials forfeit their preliminary character when a public agency adopts them as the basis for final action. The records are then no longer exempt under KRS 61.878(1) (i) and (j). The attorney general again rejects the contention of a law enforcement agency that unless an internal affairs investigative file is incorporated by reference into the final action, only the complaint and final action are disclosable. The term "adopt" denotes a broader concept than the term "incorporate."

02-ORD-32

A citizen asked for copies of agendas and copies of ordinances to be considered at future meetings of a city commission. The city considered the request to be a "standing request" not covered by the Open Records Act. The attorney general agreed. Standing requests require an agency to produce records that do not exist at the time of the request and attempt to bind an agency to produce records when they are created. Neither the Open Meetings Act nor the Open Records Act places such a burden on a public agency.

02-ORD-36

A city's practice of placing redacted copies of incident reports at a front desk for anyone to pick up and review does not violate the Open Records Act for failure to provide an explanation for withholding victims' names. The city's obligation to fully comply with the Open Records Act arises only in response to a request that itself fully complies with the Open Records Act. When responding to such a request, a blanket withholding of the identities of crime victims is improper. In a departure from previous decisions, however, the attorney general opines that the city may properly rely on KRS 61.878

to withhold the names and identifying information of victims of sexual offenses. In support of that position, the attorney general cites the decision of the U.S. Court of Appeals for the Sixth Circuit in *Déjà vu of Nashville, Inc. v. Nashville*, ___ F.3d ___ (2001).

02-ORD-53

A fiscal court responded to a request for records of certain regular and special meetings of the fiscal court and its committees by saying that it did not prepare minutes of public hearings and committee meetings. The attorney general concluded that the fiscal court's response was substantially consistent with the Open Records Act. However, although no Open Meetings Act appeal was before the office, the attorney general addressed several open meetings issues raised by the fiscal court's response. Since the public hearings and the committee meetings were not regular meetings, they would be special meetings subject to the special meeting requirements. Further, the fiscal court is required to record minutes of all meetings of a quorum of its members or a quorum of its committees at which public business is discussed or at which action is taken.

02-ORD-69

Believing that multiple copies existed, an attorney submitted multiple requests for the same videotape to various city officers, including the mayor. The failure of the mayor to reply prompted an appeal. Even though the person who had the tape provided it in response to the request, the mayor had an independent obligation to reply to the request despite the multiple requests and despite the fact that the mayor did not have the tape.

02-ORD-75

A fiscal court denied the request of a mayor for a copy of letter from the county to a member of the city council. The letter was in the personnel file of a county employee and concerned an incident that occurred in the course of the employee's duties. The county asserted that the matter was of a personal nature and that release of the letter would constitute an unwarranted invasion of privacy. That interests, says the attorney general, is outweighed by the public's interest in monitoring the conduct of its servants and in the response of the public agency to allegations of misconduct leveled against them.

02-ORD-82

A county detention center denied a request for a copy of the jail roster based on concerns for security. In doing so it relied on KRS 197.025. The attorney general concludes that the action was proper, but expresses concern that the holding undermines earlier decisions which recognize that persons should not secretly be held in jail. The opinion suggests that the detention center should adopt a less restrictive policy of releasing a redacted copy of the roster.

02-ORD-89

A paid political consultant to a candidate for property value administrator requested records from the incumbent's office. The office required the requestor to state the purpose for which the records were requested and to sign a "Non-Commercial Applicant's Certified Statement." The PVA then released the records and charged a fee at the mailing list rate under the Revenue Cabinet's fee guidelines. The attorney general finds that requiring the requestor to disclose his purpose subverted the intent of the Open Records Act. Further, the attorney general opines that a request submitted by an

individual acting on behalf of a political candidate cannot be characterized as a request submitted for a commercial purpose. Since the Revenue Cabinet guidelines could permissibly extend only to uses for business or commercial purposes, the fees charged were presumptively excessive absent an explanation of how the fees relate to the factors in KRS 61.874(3).

02-ORD-120

A reporter requested statistical information about the academic performance of student athletes in a public school system. The district's original search for responsive records yielded none, although a report was generated that was at least partially responsive. However, because the district confined its search for records to those of only three persons, the attorney general concludes that the district was not sufficiently diligent in its search. Partially responsive records did exist in other offices within the district.

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 on-line at <http://www.law.state.ky.us/civil/Default.htm>.

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

02-OMD-21

A school site-based council went into closed session to discuss the hiring of persons to fill vacancies in a program providing extra school services. A citizen objected that the applicants were already employees of the school district and that a closed discussion of the terms and conditions of their continued employment was improper under earlier decisions of the attorney general (see 94-OMD-63). The school responded that the vacancies were separate positions of employment outside normal teaching positions and that a closed discussion of comparative qualifications was proper under prior decisions of the attorney general (see 96-OMD-97). The attorney general agreed with the school and found no violation of the Open Meetings Act.

02-OMD-78

A city commission conducted a retreat at a location some 80 miles distant from the city. A complaint alleged that the meeting was not "convenient to the public" within the meaning of the Open Meetings Act. The attorney general agreed saying that, although no day or time selected for a meeting of a local government agency will be convenient for all citizenry directly concerned, the site selected can and must be. Absent statutory authority, a city commission has no authority to conduct its meetings outside the city limits. Public meetings of local government agencies must be conducted within the jurisdictional limits of the governmental units they serve.

02-OMD-83

A mayor complained that a quorum of members of the city council over which she presides conducted a meeting from which members of the public were excluded and initiated an appeal to the attorney general. The attorney general accepted the appeal believing that the unusual procedural posture neither precluded an appeal nor relieved the attorney general of the duty to issue a decision. However, the attorney general could not resolve the conflicting factual claims in the matter.

02-OMD-91

A citizen challenged a city council's emergency meeting to adopt a tall structures ordinance on the ground that no emergency existed. The city asserted that an emergency existed concerning the impending construction of a cell tower. The attorney general views this as an insufficient basis for declaring that an emergency existed. The need to facilitate the city's negotiating posture was not "a serious, unexpected situation or occurrence that demands immediate action" nor is organized opposition to the cell tower the equivalent of "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 on-line at <http://www.law.state.ky.us/civil/openrec.html>.

Be It Ordained *continued from page 10*

A Sampling of Other Tower Siting Ordinances on the Internet:

City of Georgetown, Kentucky;
http://www.gscplanning.com/cell_tower_regs.htm
City of Decatur, Alabama;
<http://www.digitaldecatur.com/agencies/building/WirelessLaw.pdf>
City of Blue Springs, Missouri;
<http://www.marc.org/telecom/telecomdocs.htm>
City of Marion, Iowa;
http://www.iowahistory.org/preservation/clg_program/cell_tower_ordinance_preservation_friendly.htm
City of Rockville, Maryland;
<http://www.ci.rockville.md.us/telecomm/draft/ordWS525.htm>

Davie County, North Carolina;
http://www.co.davie.nc.us/documents/pb_ordinance_01_29_2002.pdf
State of Maine model ordinance; http://www.state.me.us/spo/cpip/local/mod_ord.htm
Cape Cod Commission, Massachusetts; <http://www.capecodcommission.org/bylaws/wireless.html>
Georgia Municipal Association, <http://www.gmanet.com/data/text/tower.sample.txt>

Footnotes

1. Governor's Center for Local Government Services, *Local Government Regulations of Wireless Telecommunications Facilities 5-6* (1997), available at http://www.landuseinpa.org/docs/Telecom_Fac_Regs/Telecommunications_Reg.pdf.
2. *Id.* at 8-15.

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