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Larry Green
City of Bardstown
220 N. 5th St., Suite 1
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Re: Fire Department

Dear Larry:

We write to preliminarily address the potential legal problems associated with the current structure of Bardstown's Fire Department, which is responsible for protecting Bardstown residents and property, and the private non-profit corporation ("the non-profit") which is responsible for protecting residents and property in unincorporated portions of Nelson County.

As currently constituted, these groups are highly integrated and interrelated. They occupy the same firehouse and rely on Bardstown employees. Bardstown furnishes the facilities and approximately 3/4 of the financial support for the combined efforts, although the population in the unincorporated areas is about twice Bardstown's population. Because the groups essentially function as one, most fiscal (and some operational) firefighting decisions made by Bardstown directly affects the non-profit, and vice versa.

The groups have substantial overlap in their leadership. The same Chief serves both groups. The Chief and other Bardstown firefighting employees also serve on the private non-profit's Board. Thus, Bardstown employees and officers are necessarily called on to make non-profit fiscal and operational decisions which directly affect Bardstown and its Fire Department. These decisions can, of course, be either favorable or unfavorable to the City. Although this structure is inherently troubling, it is easy to understand why it might be retained as long as the City and the non-profit are in lock-step as to their joint fiscal and operational decisions. Interests of expediency and harmony, however, do not make the arrangement technically lawful.

In short, the arrangement is fraught with legal problems. First, the arrangement likely violates Bardstown's Code of Ethics in several respects. Pursuant to Code Section 43.10, "No officer or employee may...engage in any transaction or activity which is in substantial conflict with the proper discharge of the officer's or employee's public duties." At best, the Chief and employees serving on the non-profit's board would have to recuse themselves from any decisions which would affect the City. Because the groups are so inter-related, this would presumably be impractical, making ethical conflicts nearly inevitable. Similar problems would likely arise under Code Section 43.11 when individuals with dual roles participate in the review

of contracts between the parties. In addition, the Chief and perhaps others, to fulfill their duties to the non-profit, could be called on to represent the non-profit on matters pending before the City, which would likely result in violations of Code Section 43.14. In sum, the dual service here is so antithetical to the Code of Ethics as to render it unworkable if one were committed to following the Code.

Second, the arrangement likely violates common law conflict of interest principles. A non-profit Board member or officer who also holds a position with the City on related subject matter simply cannot participate in deliberations on a matter of joint concern without creating a common law conflict of interest. Kentucky's Attorneys General and our courts have repeatedly addressed common law conflicts. A public servant must be "free from every kind of personal influence" in decisions which "carry with them services to which the public are entitled and compensation that the public must pay." *Meglenery v. Weissinger*, 140 Ky. 353, 131 SW 40, 41 (1910); *Smith v. McDermott*, 313 Ky. 184, 230 SW2d 636 (1950); *Lemon v. Fiscal Court of Casey County*, Ky.App., 291 SW2d 572 (1956); OAG 84-384. Moreover, as Kentucky's highest court has stated, "In general, the disqualifying interest must be pecuniary or proprietary by which he stands to gain or lose something. Falling within the principle are contracts with firms in which the member of the municipal body is a partner or a corporation of which he is an officer, or sometimes only a stockholder or employee.... Furthermore, it is not material that the self-interest is only indirect or very small. *Commonwealth v. Withers*, 266 Ky. 29, 98 S.W.2d 24, 25-26 (1936). Conflict of interest principles are strictly enforced and construed against the public servant involved. Ky. OAG 93-38. Directors and Officers of the non-profit gain a position of status and, to the extent that they deliberate on matters affecting the City, likely violate this duty. Again, given the interrelated nature of the operations, it is difficult to understand how one could decline to deliberate on matters affecting the City, while simultaneously carrying out any measure of the full duties associated with being a member of the non-profit Board.


Third, the arrangement likely violates common law compatibility of office principles. Once a person holds public office or public employment, he cannot accept a position contrary to that office or employment. He owes a duty to the public. Public servants "are not permitted to place themselves in a position in which personal interest may come into conflict with the duty they owe to the public." Ky. OAG 93-38. "Incompatibility" arises if one office or position is subordinate to the other, or the performance of one interferes with the performance of the duties of the other, or if the function of the two are inconsistent or repugnant. *Hermann v Lampe*, 175 Ky 109, 194 S.W. 122 (1917); *Polley v Fortenberry*. 268 Ky 369, 105 SW 2d 143 (1937). All of the above will likely apply at one time or another to the two groups.

Fourth, the arrangement gives rise to the ongoing possibility of common law breaches of duties of loyalty. An employee or officer has a duty not to act against the interests of his employer. *Stewart v. Kentucky Paving Co., Inc.*, 557 S.W.2d 435 (Ky.App.1977); *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W. 2d 476 (Ky. 1991). If a person holding simultaneous positions within the groups takes an action contrary to Bardstown's interests, they would arguably be subject to termination for disloyalty. Obviously, this predicament jeopardizes the effective operations of both groups.

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The bottom line here is that the structure with these groups is subject to legal challenge and likely runs afoul of one or more of the foregoing principles. However, in conducting this review we considered that various forms of inter-local associations throughout Kentucky may also present one or more of these legal problems. Members of inter-local boards often come from members to the inter-local agreements. A representative of the inter-local member could take an adverse action against the member, or could take an action against the best interests of the inter-local association. Given the interests of the inter-local members, and how intertwined they are with the inter-local association, it would be nearly impossible to remove member representatives from deliberation which involved potential conflicts. Kentucky's ethics laws may not have developed sufficiently to address all these issues. Ky. OAG 94-2-1 (admitting that incompatibility/conflict of interest issues were unclear when a Chair of an inter-local board served as the third party administrator for the board's claims handling). However, Kentucky law favors inter-local cooperation and Kentucky expressly authorizes members of the inter-local to serve on the inter-local's board. KRS 65.250(2)(a). The City should consider an inter-local structure which would carry with it the imprimatur of the Executive Branch, via the approval process, and the General Assembly, via KRS 65.210 et. seq.

Sincerely,


Robert D. Hudson

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