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COMMONWEALTH OF KENTUCKY  
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September 19, 2013

Jennifer A. Jones, Esq.  
Interim General Counsel  
Kentucky Retirement Systems  
1260 Louisville Road  
Frankfort, KY 40601

Dear Ms. Jones:

By letter dated July 27, 2013, you requested that this office determine if a current member on the Kentucky Retirement Systems Board of Trustees ("Board of Trustees") could also serve in the position of OMB Accounting Manager for the Louisville/Jefferson County Metro Government. ("Metro Government"). In our opinion the answer is no.

KRS 61.645(6)(a) states that membership on the Board of Trustees shall not be incompatible with any other office unless a constitutional incompatibility exists. Kentucky Constitution Section 165 prohibits a person from, at the same time, being "...a State officer, or a deputy officer, or member of the General Assembly, and an officer of any county, city, town or other municipality, or an employee thereof...."

The position of trustee of the Board of Trustees is a state office. *See* OAG 00-7 (enclosed). We are of the opinion that the employees and officers of the Metro Government are, for the purposes of Section 165 of the Kentucky Constitution, county officers and employees. The Metro Government was created by the legislature through KRS Chapter 67C. It possesses the powers of both a county and a city. KRS 67C.101 (2)(c). It is neither a city nor a county. KRS 67C.101 (2)(d). But it is a subdivision of the state confined within the boundaries of the county and "...subject to the lesser restrictions applicable to, county government and cities of the first class under the Constitution...." KRS 67C.101 (2)(d). Jefferson County still exists and constitutes the boundaries and geographic jurisdiction of the Metro Government and is governed locally by the Metro Government. KRS 67C.101 (5). The Metro Government and its officers and employees are clothed with the sovereign immunity of a county. KRS 67C.101 (2)(e). In a situation somewhat similar involving a Division Director within the Cabinet for Health

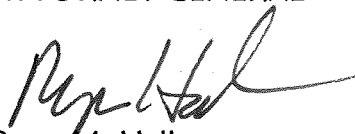


and Family Services who was also a member of the Lexington-Fayette Urban County Council (LFUCG) this Office decided the positions were incompatible under KRS 61.080(1). See OAG 04-010 (enclosed). In that opinion we determined that the council member was a county officer based on the holdings in *Holsclaw v. Stephens*, Ky., 507 S.W. 2d 462, 475 (1974) and *Lexington-Fayette Urban County Government v. Smolic*, et al., Ky., 142 S.W. 3d 128,131 (2004). Those cases held that because Fayette County still existed and was governed by LFUCG that LFUCG was a classification of county government. *Smolic* at 131-132. Based on the fact that Jefferson County still exists and the provisions of KRS Chapter 67C cited above we think the Metro Government is a classification of county government. Our opinion in OAG 04-010 was based on the language of KRS 61.080 (1). That statutory provision states in pertinent part: "No person shall, at the same time, be a state officer, a deputy state officer....and an officer of any county, city, consolidated local government, or other municipality, or an employee thereof." The statute does not apply to the issue here because the language of KRS 61.045 (6) (a) mentioned above provides "[m]embership on the board of trustees shall not be incompatible with any other office unless a constitutional incompatibility exists." But because the language of Section 165 of the Constitution is essentially the same as that applied in OAG 04-010 we adopt the reasoning in that opinion and apply it to this situation.

Accordingly, it is our opinion that a person who holds the position of OMB Accounting Manager in the Metro Government is either an officer or an employee of a county and that position is incompatible with being a member of the Kentucky Retirement Systems Board of Trustees. If you have any questions, please feel free to contact me. Telephone: 696-5670; e-mail: ryan.halloran@ag.ky.gov

Yours very truly,

JACK CONWAY  
ATTORNEY GENERAL



Ryan M. Halloran  
Assistant Director  
Office of Civil and Environmental Law

RMH/cct

## OAG 00-7

October 17, 2000

*Subject:* Kentucky Retirement System

*Requested by:* Board of the Kentucky Retirement System

*Written by:* Scott White, Assistant Deputy Attorney General

*Syllabus:* Trustees of the Kentucky Retirement System are holding a "State Office"

*Statutes construed:* KRS 61.080, 61.645, 61.650, Const. §165

*OAGs cited:* 66-586, 72-458, 72-594, and 91-208

### *Opinion of the Attorney General*

We have been asked by the Board of the Kentucky Retirement Systems (KRS) whether the position of Trustee is a "State Office." We have directly addressed this issue in two prior published opinions: OAG 72-458 and OAG 72-594. In analyzing this question, we invited a number of potentially interested entities to provide their legal opinions and comments. We received responses from the Office of the Governor, the Jefferson County Attorney, and the Legislative Research Commission.<sup>1</sup>

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<sup>1</sup>As a threshold matter, we need to dispose of the request of the Office of the Governor and Jefferson County Attorney to reverse an opinion set out in a miscellaneous letter sent to KRS on August 16, 2000, which apparently initiated this request. In that letter, we opined on whether various board members were properly serving, or if their service was incompatible under Kentucky Constitution Section 165. Given our opinion here, we see no need to revisit the issues dealt with in the August 16, 2000 letter opinion.

Based upon our analysis of the pertinent facts and law, we see no reason to depart from our opinion that the position of Trustee of the Kentucky Retirement Systems Board is a "State Office." As a result, then, Section 165 of our Constitution and KRS 61.080 apply in determining the qualifications of potential Board members.

### LEGAL ANALYSIS

The Kentucky Retirement System (KRS) was created by our Legislature in 1956 to manage a secure retirement plan for certain government employees. The KRS is composed of three separate systems: county employees, state employees, and state police. *KRS 61.645 (1)*. Each of these systems is represented on the governing board. Other members include, in an *ex officio* capacity, the Secretary of the Personnel Cabinet, and three gubernatorial appointments. The Board

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OAG 66-586 and OAG 91-208 deal with the issue of "dual office holding." That is a situation in which the General Assembly creates some board or commission, and provides that a particular official or class of officials serve on its governing board. The issue is whether that official can serve or if an impermissible incompatibility arises. Those opinions followed the well accepted general rule that no incompatibility exists if the duties discharged relate to the discharge of the other offices' obligations. In other words, the official is discharging the duties of the primary office by service in the other, new office. Ergo, the use of the phrase *ex officio* – service in "an official capacity." In that context there is no "dual office holding," or incompatibility to guard against since the offices are *compatible*.

Here, though, those opinions have no application. KRS 61.645 (1)(b) provides that two trustees of the KRS be a member of, or retired from, the County Employees Retirement System (CERS). The statute does not provide any more specific direction. It is clear from the plain language of the statute that current county employment is not a prerequisite to service on the Board. The Legislative policy underpinning the doctrine of *ex officio* is simply not present in KRS 61.645(1). If the Legislature wanted a County employee or officer it could well have said so (as it did in specifically requiring the Secretary of the Personnel Cabinet). Since these opinions and arguments have no application here, then there is no reason to reconsider our opinion on incompatibility contained in the letter of August 16, 2000.

As a final matter, then, it is the position of the Attorney General that those persons identified as holding incompatible dual positions in the letter of August 16, 2000, either resign or face an ouster action in the Franklin Circuit Court.

oversees the combined system in a fiduciary capacity, and administers the plan "solely in the interest of the members and beneficiaries . . ." *KRS 61.650 (1)*; and, *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710, 712 (Ky. 1995). The governing statutes precisely and specifically set forth the powers, duties, and obligations of the Board, its Trustees, and employees. *KRS 61.645 et seq.* This even includes an express assertion of sovereign immunity that encompasses a partial waiver of immunity for intentional or reckless misconduct by a Trustee. *KRS 61.645 (15)(d) and (e)1, 2.*

The KRS is not some private entity or quasi-governmental agency. The KRS is a state agency with appropriately delegated powers. *Jones*, 910 S.W.2d at 713-714. In fact, our Supreme Court affirmed the supreme power of the Legislature to determine how to fund its contractual obligations with its employees *vis a vis* the retirement plan. The Court held that the Legislature through the Budget Bill can modify the funding requests submitted to it by the Board -- thus, affirming the ultimate authority of the Legislature over the Board as well as underscoring the Legislature's oversight control. The Court clearly affirmed the ultimate authority of the Legislature, and reeled in the Board's attempt to place itself beyond that control. *Id.* at 715-716.

It is quite conclusive that the Board of the KRS is a State agency. *See, Withers v. University of Kentucky*, 939 S.W.2d 344, 344 (Ky. 1997). It would be difficult to postulate, we think, that the operation of a retirement system for state employees is not " . . . [an] integral part[] of state government as to come within regular patterns of organization and structure." *Id.*

We are now able to turn to the real issue presented by this request: are the Trustees of the Board, themselves, holding a state office?

The case law in Kentucky has developed a five-part test to make this determination. The criteria are:

1. The office must be created by the Constitution, the Legislature, or a municipality with conferred legislative authority;
2. The office must possess a delegation of a portion of the sovereign power of the government to be exercised by the office holder for the benefit of the public;

3. The powers and duties of the office must be defined by the authority creating it;
4. The duties of the office must be performed independently and without control of any "superior" public power other than that contained in the law creating it; and,
5. The office itself is one of permanency and continuity until the law creating it is repealed or in some other manner dispensed with by the creating authority.

*Lexington v. Thompson*, 250 Ky. 96, 61 S.W.2d 1092, 1093-1094 (1933). And, *Lasher v. Commonwealth*, 418 S.W.2d 416 (Ky. 1967); *Commonwealth v. Howard*, 379 S.W.2d 475 (Ky. 1964); and, *Howard v. Saylor*, 305 Ky. 504, 204 S.W.2d 815 (1947). Applying this to the office of Trustee we quickly see that it is a "State Office."

The first criteria is met because the office was created by the General Assembly. *KRS 61.645*.

The second criteria is met in that the Legislature delegated a portion of its power to the Trustees to act as a Board to control and manage the retirement plan. This is clearly a power vested in the legislative branch. *See, LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984); and, *Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986). It is argued, though, that the Board is not acting "for the benefit of the public," since its duty is to administer the plan "solely in the interest of the members and beneficiaries. *KRS 61.550(1)*; and, *Jones*, 910 S.W.2d at 711-712. We disagree.

Although it is the obligation of the Board to act within its fiduciary obligations and this most directly affects beneficiaries, it cannot be said that by acting solely in the interest of them it solely *benefits* just them. Rather, by acting within their fiduciary duty and maintaining an actuarially sound system that pays out as it is supposed, maintains an appropriate balance between assets and liabilities, and is otherwise professionally and appropriately operated within the scope of the applicable fiduciary duties, the Board *is* benefiting the whole public by providing such a retirement benefit to its employees. The public is served by: the State being able to use a tool that is a prerequisite to attracting and keeping quality employees dedicated to *public* service; and, protecting general fund dollars from becoming a source for claims should the retirement plan become financially inadequate or insolvent. In other words, if the Board mismanages the

fund which leads to losses to beneficiaries, or places those obligations at risk, then the Board will by necessity turn to the Legislature for additional appropriations of *taxpayer* dollars.

The third criteria is met in that the Legislature has plainly defined the duties and obligations of the Board in KRS 61.645 *et seq.*

The fourth criteria is met in that the Board is the "supreme" authority over the affairs of the retirement plan subject only to the limits placed in the statutory scheme itself, and the generally superior and non-delegable powers of the Legislature. *See, generally, Jones v. Board of Trustees, supra.*

Last, the fifth criteria is met in that the office of Trustee is permanent and continual. The office has a specific term, and specific types of people serve. There is nothing that abolishes the office itself. Indeed, absent an amendment or repeal, the office of Trustee will continue indefinitely.

The office of Trustee of the Board of KRS is a State Office.

### CONCLUSION

The Legislature, as it can do, has devised a retirement plan for the public servants of this Commonwealth. In so doing, it also provided for an appropriate and responsible governing structure to best insure the responsible operation of that plan. We think it a simple matter to conclude that the persons governing those funds and managing that system are holding a "State Office." Moreover, the law plainly and unequivocally dictates that result.

Albert B. Chandler, III  
Attorney General

Scott White  
Assistant Deputy Attorney General

**OAG 04-010**

October 27, 2004

*Subject:* Whether membership on Urban County Council is statutorily incompatible with position of division director in Cabinet for Health and Family Services.

*Requested by:* David E. Fleenor  
General Counsel, Cabinet for Health and Family Services

*Written by:* Gerard R. Gerhard

*Syllabus:* An urban county is a county with an urban county form of government, such that officers of an urban county are county officers for purposes of Section 165 of the Constitution of Kentucky and KRS 61.080.

*Statutes construed:* KRS 61.080(1).

*OAGs cited:* 74-207 (Overruled); 82-482 (Overruled).

***Opinion of the Attorney General***

The question addressed in this opinion is whether a member of the Lexington-Fayette Urban County Council may also serve as a division director within the Cabinet for Health and Family Services.

For reasons expressed below, we believe one may not lawfully serve at the same time in the two positions in question.



The question here arises because of Section 165 of the Constitution of Kentucky, and Kentucky Revised Statutes (KRS) 61.080, which implements that section.

KRS 61.080(1) provides:

No person shall, at the same time, be a state officer, a deputy state officer or a member of the General Assembly and an officer of any county, city, consolidated local government, or other municipality, or an employee thereof.

Given Section 165 of the Constitution of Kentucky, and KRS 61.080(1), the first question here is whether the state position here concerned is that of a state "office," as distinguished from state "employment."

**Division director with state agency is state "officer."**

The state position is "class titled," for state personnel purposes, as "Division Director II."

As described in the request for this opinion, the Division Director will have "responsibility over the activities of service region administrators for human services programs in Kentucky."

In *Howard v. Saylor*, 305 Ky. 504, 204 S.W.2d 815, 817 (1947), the court cited five elements indispensable in any position of public employment in order to make it a public office of a civil nature:

It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they

be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

In our view, a division director within the Cabinet for Health and Family Services, with responsibility over the activities of service region administrators for human services programs in Kentucky, meets these requirements.

Having responsibility over the activities of service region administrators for human services programs in Kentucky appear to be the exercise of a portion of the sovereign power of government for the benefit of the public.

The power conferred and the duties to be discharged are defined. See, for example, the class specification for the position.

The duties are performed are those of a subordinate office created pursuant to legislative authority and under the general control of a cabinet secretary, commissioner or other similar superior officer.

The position appears to have some permanency and continuity, rather than one of a temporary or occasional nature.

For the reasons indicated, in our view, the division director position in question is clearly that of a state officer, rather than that of a state employee.

**Urban county council member is a "county officer."**

There remains the question of whether a member of the Lexington-Fayette Urban County Council is an officer of a "county" within the meaning of KRS 61.080(1).

In Opinion of the Attorney General (OAG) 74-207, which we here overrule, this office indicated, citing the then unreported case of *Holsclaw v. Stephens*, Ky., 507 S.W.2d 462, (1974), that:

In view of the fact that members of the metropolitan police department cannot be considered either city or county officers, but officers of a new form of local government not contemplated by the Constitution nor within the terms of KRS 61.080, there would exist no constitutional or statutory incompatibility were a person, such as yourself, to hold the position of patrolman with the Lexington Metropolitan Police Department and at the same time serve as a part-time deputy sheriff, which is, of course, a county office pursuant to § 99 of the Constitution.

Upon review incident to this opinion, we believe the better view is that Fayette County is a county with an urban county form of government and not, as indicated in OAG 74-207, "a new form of local government not contemplated by the Constitution nor within the terms of KRS 61.080." In our view the officers of the Lexington-Fayette Urban County are officers of a county, albeit one with an urban county form of government.

In *Holsclaw*, supra, at 475, the court observed:

Counties are basic subdivisions of the Commonwealth. They too may be abolished by the General Assembly (Section 63 of the Constitution) but in that event the territory comprising the county must be added to an adjoining county or counties. Fayette County has not been abolished. It remains as a geographic entity which shall hereafter be governed locally by urban county government.

In *Lexington-Fayette Urban County Government v. Smolcic, et al.*, Ky., 142 S.W.3d 128, 131 (2004), the Kentucky Supreme Court indicated:

Jurdana, Meculj, and Vasicek argue that LFUCG is neither a county nor a county government; that, rather, LFUCG is a new and different form of local government not anticipated by the Kentucky Constitution. \* \* \* A necessary premise for their argument that LFUCG is not a county is that Fayette County no longer exists. The premise is false.

Further, the Supreme Court indicates:

[W]e reaffirm our holding in Holsclaw that urban county governments constitute a new classification of county government.

*Id.* at 132.

Given our review of the cases cited above, we believe we must overrule the view of this office expressed in OAG 74-207, and in OAG 82-482 (finding the urban county government to be a "hybrid" form of government). Officers of an urban county are county officers.

It follows that, in our view, a member of the Lexington-Fayette Urban County Council, a county officer, cannot lawfully serve, at the same time, as a division director within the Cabinet for Health and Family Services, as such position is a state office. To hold both positions at the same time would be in violation of KRS 61.080(1).

Very truly yours,

GREGORY D. STUMBO  
ATTORNEY GENERAL

Gerard R. Gerhard  
Assistant Attorney General

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# Kentucky Constitution

## Section 165

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### Incompatible offices and employments.

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

**Text as Ratified on: August 3, 1891, and revised September 28, 1891.**  
**History: Not yet amended.**

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**61.080 Incompatible offices.**

- (1) No person shall, at the same time, be a state officer, a deputy state officer, or a member of the General Assembly, and an officer of any county, city, consolidated local government, or other municipality, or an employee thereof.
- (2) The offices of justice of the peace, county judge/executive, surveyor, sheriff, deputy sheriff, coroner, constable, jailer, and clerk or deputy clerk of a court, shall be incompatible, the one (1) with any of the others. The office of county judge/executive and county school superintendent are incompatible.
- (3) No person shall, at the same time, fill a county office and a municipal office. Notwithstanding the fact that consolidated local governments have both municipal and county powers, persons who hold the office of mayor or legislative council member of a consolidated local government shall not thereby be deemed to hold both a county office and a municipal office. Officers of consolidated local governments shall not, at the same time, fill any other county or municipal office.
- (4) No person shall, at the same time, fill two (2) municipal offices, either in the same or different municipalities.
- (5) The following offices shall be incompatible with any other public office:
  - (a) Member of the Public Service Commission of Kentucky;
  - (b) Member of the Workers' Compensation Board;
  - (c) Commissioner of the fiscal court in counties containing a city of the first class;
  - (d) County indexer;
  - (e) Member of the legislative body of cities of the first class;
  - (f) Mayor and member of the legislative council of a consolidated local government;
  - (g) Mayor and member of the legislative body in cities of the second class; and
  - (h) Mayor and member of council in cities of the fourth class.
- (6) No office in the Kentucky active militia shall be incompatible with any civil office in the Commonwealth, either state, county, district, or city.
- (7) Service as a volunteer firefighter in a volunteer fire department district or fire protection district formed pursuant to KRS Chapter 65, 75, 95, or 273 shall not be incompatible with any civil office in the Commonwealth, whether state, county, district, or city.

**Effective:** June 26, 2007

**History:** Amended 2007 Ky. Acts ch. 26, sec. 1, effective June 26, 2007. -- Amended 2002 Ky. Acts ch. 346, sec. 13, effective July 15, 2002. -- Amended 1978 Ky. Acts ch. 379, sec. 56, effective April 1, 1979. -- Impliedly amended 1942 Ky. Acts ch. 4, sec. 13. -- Recodified 1942 Ky. Acts ch. 208, sec. 1, effective October 1, 1942, from Ky. Stat. secs. 912, 1851b-8, 2711a-145o, 2768, 3043, 3107, 3484, 3746, 3952-4, 4921.

**61.090 Acceptance of incompatible office vacates first.**

The acceptance by one (1) in office of another office or employment incompatible with the one (1) he holds shall operate to vacate the first.

**Effective:** October 1, 1942

**History:** Recodified 1942 Ky. Acts ch. 208, sec. 1, effective October 1, 1942, from Ky. Stat. sec. 3744.