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SUPREME COURT OF KENTUCKY

2024-SC-0228-DG

ANDY BESHEAR, in his official capacity as
Governor of the Commonwealth of Kentucky, et al.

APPELLANTS

V.
ON REVIEW FROM COURT OF APPEALS
NOS. 2022-CA-0837, 2022-CA-0838 & 2022-CA-0991
APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
CIVIL ACTION NO. 22-CI-002228

RUSSELL COLEMAN, in his official capacity as
Attorney General of the Commonwealth of Kentucky, et al.

APPELLEES

BRIEF FOR APPELLEE, EXECUTIVE BRANCH ETHICS COMMISSION

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was electronically filed with the Clerk, Supreme Court of Kentucky on June 16, 2025, and served through U.S. mail upon Steven Travis Mayo, travis.mayo@ky.gov, General Counsel, Taylor Allen Payne, taylor.payne@ky.gov, Chief Deputy General Counsel, and Laura C. Tipton, lauractipton@ky.gov, Deputy General Counsel, Office of the Governor, 700 Capitol Ave., Suite 106, Frankfort, KY 40601 and Mitchel Terence Denham, mdenham@mcbayerfirm.com, McBrayer PLLC 500 W. Jefferson St., Suite 2400 Louisville, KY 40202, *Counsel and Co-Counsel for Appellants Andy Beshear, In His Official Capacity As Governor Of The Commonwealth Of Kentucky and David Karem, In His Official Capacity As A Member Of The Executive Branch Ethics Commission*; Matthew Franklin Kuhn, matt.kuhn@ky.gov, Solicitor General, Office of Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601, *Counsel for Attorney General Russell Coleman*; Gregory Allen Woosley, greg.woosley@lrc.ky.gov, Legislative Research Commission, 700 Capitol Ave., Ste. 300, Frankfort, KY 40601, *Counsel for Legislative Research Commission*; Jennifer Schwartz Scutchfield, jscutchfield@ky.gov and Michael Rollin Wilson, michael.wilson@ky.gov, Office of Secretary of State, 700 Capital Ave., Ste. 152, Frankfort, KY 40601, *Counsel for Secretary of State Michael Adams*; Heather Lynn Becker, heatherl.becker@ky.gov, Kentucky Department of Agriculture, 105 Corporate Dr., Frankfort, KY 40601, *Counsel for Commissioner of Department of Agriculture Jonathan Shell*; Sam Preston Burchett, sam.burchett@ky.gov and Robert Lucian Gullette, III, robert.gullette@ky.gov, Office of Kentucky State Treasurer, 1050 U.S. Hwy. 127, Ste. 100, Frankfort, KY 40601, *Counsel for Kentucky State Treasurer Mark H. Metcalf*; Alexander Y. Magera, alex.magera@ky.gov, Jeremy Joseph Sylvester, Jeremy.sylvester@ky.gov and Savannah Grace Baker, savannah.baker@ky.gov, Office of the Auditor of Public Accounts, 209 St. Clair Street, Frankfort, KY 40601, *Counsel for Auditor Allison Ball*, and to Hon. Jennifer Bryant Wilcox, *Jefferson Circuit Court, Division 8, 700 W. Jefferson St., Louisville, KY 40202* and to Kate Morgan, *Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601.*

I also certify that the record was not withdrawn before the filing of this brief.

/s/Susan Stokley Clary
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INTRODUCTION

The Executive Branch Ethics Commission (the Commission) was joined as a party in this action in the Jefferson Circuit Court because in its absence complete relief could not be accorded among the parties. CR 19.01. The Commission's interest in the subject of this action is limited to a detailed overview and statement of the history, mission, and function of the Commission and a request for a decision on the questions of law presented by this matter.

STATEMENT REGARDING ORAL ARGUMENT

The Supreme Court of Kentucky has designated this appeal for oral argument as it will assist the Court in deciding the issues presented herein.

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COUNTERSTATEMENT OF THE CASE

The mission, history, and current functioning of the Executive Branch Ethics Commission is not in dispute. The Kentucky Executive Branch Code of Ethics was first created by Executive Order 91-2, issued on December 10, 1991, by Governor Brereton Jones in response to the BOPTROT scandal. Citing the authority vested in him by Section 69 of the Constitution of the Commonwealth of Kentucky, Governor Jones set out standards of ethical conduct for executive branch officers and employees. Following the directive of Section 5 of Executive Order 91-2, Governor Jones' General Counsel and several members of the legislature met and drafted proposed legislation, codified by the General Assembly in 1992, that effectuated the substance of the Executive Order, thereby creating the Executive Branch Ethics Code in KRS Chapter 11A and the Executive Branch Ethics Commission to enforce the Code.

I. MISSION OF THE EXECUTIVE BRANCH ETHICS COMMISSION

The Executive Branch Ethics Code (the Ethics Code) establishes the ethical standards that govern the conduct of the nearly 30,000 executive branch employees throughout the Commonwealth. The Ethics Code was enacted to promote public confidence in the integrity of government and its public servants. KRS 11A.005(1) defines the public policy behind enacting the Ethics Code, providing:

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
 - (a) A public servant be independent and impartial;
 - (b) Government policy and decisions be made through the established processes of government;
 - (c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

To achieve the policy goals in KRS 11A.005(1), the General Assembly recognized the need for an unbiased Ethics Commission to ensure that those in government service follow the mandates of the Ethics Code and do not use their public office to obtain private benefit. Consequently, KRS 11A.060 authorized the Executive Branch Ethics Commission (the Ethics Commission)-an independent body-to administer and enforce the provisions of the Ethics Code¹. The Ethics Commission’s jurisdiction extends beyond just classified state merit employees and encompasses all persons who work in the executive branch in any capacity, including elected officials, non-merit advisors, full-time salaried members of boards and commissions, and management personnel. KRS 11A.010(7); KRS 11A.010(9). Stated succinctly by this Court, “[t]he statutory system of an Executive Ethics Commission is to promote ethical conduct of present and former employees and to investigate and adjudicate potential violations.” *Exec. Branch Ethics Comm’n v. Stephens*, 92 S.W.3d 69, 73 (Ky. 2002). Thus, rather than simply overseeing disputes between state employees and their state employers, the Ethics Commission functions as an independent body that investigates and adjudicates ethics complaints against all executive branch officers and public servants.

¹ In 2009 the Executive Branch Ethics Commission was moved, for administrative purposes only, from the “Office of the Governor” and attached to the Finance and Administration Cabinet, further strengthening and advancing the independence of the Ethics Commission. *See* Finance and Administration—Cabinet Reorganization, ch.12, sec.1, § 10, 2009 Ky. Acts (2009), *amending* KRS 11A.060(10). *See also* KRS 12.020 (clarifying that “the attachment [to the Finance and Administration Cabinet] shall be solely for the purpose of dissemination of information and coordination of activities and shall not include any authority over the personnel, funds, equipment, facilities, or records of the department or administrative body”).

II. HISTORY OF THE EXECUTIVE BRANCH ETHICS COMMISSION

Historically, proposals for governmental ethics regulation in Kentucky were typically triggered in response to publicized scandals of corrupt government officials engaging in unethical conduct. Beginning as early as the 1970's, executive action was taken by the Governor to combat misconduct and inappropriate use of official position. Executive Order 1975-211; Executive Order 91-2. The Watergate break-in and scandal in the early 1970's laid the foundation for the modern Ethics Code in Kentucky. This scandal significantly impacted public trust in government and led to national reforms aimed at increasing transparency and accountability in government. In response thereto, Governor Julian Carroll entered Executive Order 75-211 on March 4, 1975, establishing the Financial Disclosure Review Commission. The Commission's members would be appointed by the Governor and were directed "to review the personal financial status of major management personnel in State Government." Executive Order 1975-211. The "major management personnel" included the Governor and his Chief Executive Officer and Chief Administrative Assistant, all cabinet secretaries, commissioners, deputy commissioners, and division directors. *Id.* These executive branch officers filed personal financial statements, and later income tax returns, with the independent Financial Disclosure Review Commission. *Id.* Materials submitted were then reviewed by the Commission and any matters of concern regarding executive branch officers were brought directly to the attention of the Governor. *Id.* The requirements of Executive Order 75-211 were the precursors of the Statements of Financial Disclosure required to be filed by executive branch officers under the current Ethics Code.

The Financial Disclosure Review Commission continued its work until the Commonwealth was rocked by the BOPTR0T scandal. After the FBI investigated legislators in the General Assembly and other officials who accepted bribes to support votes on horse racing legislation, Governor Brereton Jones issued Executive Order 91-2 on December 10, 1991, setting out specific standards of ethical conduct for executive branch officers and employees. A working group comprised of the Governor's General Counsel and representatives of the Kentucky Legislature then reviewed government ethics laws throughout the nation to draft and propose legislation codifying a Code of Ethics for State Government. Executive Order 91-2. Their efforts resulted in Senate Bill 63 in the 1992 Regular Session, codifying the standards of ethical conduct in Kentucky government and empowering a commission to enforce the statutory standards. S.B. 63, 1992 Gen. Assemb., Reg. Sess. (Ky. 1992). When presenting S.B. 63 to Committee, sponsor Senator Tim Shaughnessy remarked that the purpose of the Ethics Code was to increase public confidence in the integrity of state government and to ensure that official office was not used for personal benefit. Kentucky General Assembly, SENATE STATE GOVERNMENT COMMITTEE MEETING 2-20-92, DVD, 6:18 (1992) (on file with the Legislative Research Commission).

While the initial proposed legislation in S.B. 63 set up a single Ethics Code for both the legislative and executive branches, Senate Committee Substitute 1 in the Senate State Government Committee immediately limited the applicability of this Ethics Code to the Executive Branch only. S.B. 63. The Executive Branch Ethics Code adopted was thus kept separate from the legislature, thereby creating the Executive Branch Ethics Code in KRS Chapter 11A and the Executive Branch Ethics Commission to enforce the Ethics

Code. Senate Bill 63 further directed that a Task Force on Governmental Ethics be established to study the feasibility of creating one Kentucky Code of Governmental Ethics. *Id.* A draft was prepared that included jurisdiction not only over state executive branch employees and officers but also over legislative employees, city and county employees and Circuit Court Clerks. TASK FORCE ON GOV'T ETHICS, FINAL REP. OF KY. CODE OF GOV'T ETHICS ACT, BR 108 (1992). However, no further action was taken to implement the proposed Kentucky Code of Governmental Ethics or to so extend the jurisdiction of the Executive Branch Ethics Commission to the other branches of government.²

Further, S.B. 63 repealed the Financial Disclosure Review Commission so that the operating monies from that Commission could be transferred to the Executive Branch Ethics Commission for its operation. S.B. 63. Though the Financial Disclosure Review Commission is no longer active, provisions relating to its structure and function influenced the current Ethics Code requirements and the structure of the current Ethics Commission. The requirements for financial disclosure set out in Executive Order 75-211 were the basis for the Statements of Financial Disclosure that executive branch officers are required to file under KRS 11A.050. Furthermore, the appointive process was similar to the appointive process later set out by S.B. 63. Thus, when tracing executive branch ethics law back to its earliest iteration, it has persisted steadfastly in the Commonwealth for over fifty years.

² It should be noted that while justices, judges, and legislators are covered by separate ethics codes, employees of the legislature and judiciary are not covered by their respective ethics codes as are all employees of the executive branch. SRC 4.310; KRS 6.601-696.

III. APPOINTMENT AND REMOVAL OF ETHICS COMMISSION MEMBERS

Prior to the enactment of H.B. 334, KRS 11A.060 provided that the Commission would be composed of five members appointed by the Governor for staggered terms and removed by the Governor only for cause. KRS 11A.060(2)-(3), (7) (amended 2022). The Commission's appointive process has been amended at various times by recent Governors through Executive Orders. Governor Steven Beshear's Executive Order 2008-454 expanded the scope of the ethics provisions to members of policymaking boards and provided that the Governor would select two of the five Commission members from lists of three nominations submitted by the Attorney General and by the Auditor of Public Accounts. A few years later, Governor Matthew Bevin's Executive Order 2016-377 revoked the language in Executive Order 2008-454, Beshear's previous order regarding Commission appointments, and provided that all vacancies among the membership of the Executive Branch Ethics Commission would be filled solely by the Governor. However, through Executive Order 2020-423, Governor Andy Beshear reinstated the practice of appointing two members from a list of three nominees from both the Attorney General and the Auditor of Public Accounts. This remained the practice until H.B. 334 was enacted in 2022.

The Commission's removal process, however, was first amended by H.B. 334. For thirty years, Ethics Commission members, even those nominated by others, were only removable for cause by the Governor. KRS 11A.060(7) (amended 2022). Contrastingly, H.B. 334 prescribes that Ethics Commission members would be removed by their appointing authority, rather than the Governor. However, under both H.B. 334

and all previous versions of KRS 11A.060(7), Ethics Commission members remain only removable for cause, including substantial neglect of duty and inability to discharge powers and duties of office, which serves as a safeguard for their independent service.

IV. FUNCTION OF THE EXECUTIVE BRANCH ETHICS COMMISSION

Since its inception and continuing through the tenure of the last six Governors³, the mission and function of the Commission has not changed. The Commission, while currently bipartisan, has historically been and remains independent. The importance of independence for the body enforcing governmental ethics law is emphasized by the American Law Institute’s draft of the Principles of the Law, Government Ethics project. Section 702 guides the independent body to be effectively insulated from the control by those authorized to appoint the Commission members or by any person subject to the ethics rules the body is charged with administering and enforcing. PRINCIPLES OF THE LAW, GOVERNMENT ETHICS § 702(b) (A.L.I., Tentative Draft No. 3, 2021). The Executive Branch Ethics Commission seeks this insulation by selecting their own staff without political influence and by only being subject to removal from their positions for cause. KRS 11A.060(7); KRS 11A.070. Maintaining independence is essential for the Commission to administer and enforce the provisions of the Ethics Code on all executive branch officers and employees.

In addition to its investigative function, the Commission is also tasked with duties enumerated in KRS 11A.110, which include education and training of employees,

³ When considering the earliest iteration of executive branch ethics law (the Financial Disclosure Review Commission), the mission and function of independency has continued through the tenure of ten Governors and over fifty years. Executive Order 1975-211.

responding to inquiries from persons requesting information or advice on any aspect of the Ethics Code, and issuing written advisory opinions. The Ethics Commission also oversees the filing and review of Statements of Financial Disclosure required of elected officials, officers, and candidates for executive branch offices, and the registration of executive branch lobbyists. KRS 11A.047; KRS 11A.050; KRS 11A.201-246. The Ethics Commission holds bi-monthly meetings to consider advisory opinion requests, conduct business, open investigations, and to issue final orders from its administrative proceedings. Ultimately, the Ethics Commission's importance and impact extends beyond its investigatory and adjudicative functions. The Ethics Commission is an instrument that educates, trains, and advises to ensure that the 30,000 executive branch employees abide by the Ethics Code when serving in the executive branch.

CONCLUSION

From the inception and the imposition of an ethical code upon the conduct of public employees by Governor Jones, and through the codification of the Ethics Code and the Executive Branch Ethics Commission by the General Assembly, the process for the enforcement of the Code has been crafted to assure independence and public trust. Consistently for over thirty years, through numerous Commissions with over fifty Commission members, the important mission and steadfast work of the Executive Branch Ethics Commission has promoted and enforced high ethical standards for executive branch public servants.

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CERTIFICATE OF COMPLIANCE WITH RAP 31(G)

This Brief complies with the word limit of Kentucky Rule of Appellate Procedure 31(G)(3)(a) because, excluding parts of the brief exempted by Kentucky Rule of Appellate Procedure 31(G)(5), this Brief contains 3058 words.

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