

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO TRANSACTIONS )  
BETWEEN SOUTHERN MADISON WATER ) CASE NO. 2006-00465  
DISTRICT AND COMMISSIONER JERRY COMBS )

ORDER

This matter involves an investigation into certain transactions between Southern Madison Water District (“Southern Madison”) and a member of its Board of Commissioners. Having reviewed these transactions, we find insufficient evidence to initiate the removal of the commissioner in question and close this proceeding.

BACKGROUND

Southern Madison, a water district organized in 1968 pursuant to KRS Chapter 74, provides water service to approximately 4,364 customers in portions of Garrard and Madison counties, Kentucky.<sup>1</sup> A three-member Board of Commissioners oversees the management and operation of the water district. Each member of the Board of Commissioners is paid an annual salary of \$4,800.<sup>2</sup>

Jerry Combs is a member and treasurer of Southern Madison’s Board of Commissioners. Mr. Combs has served as a commissioner since his appointment in 1997. Until his retirement in 2006 after 30 years of service, Mr. Combs had served as

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<sup>1</sup> Annual Report of Southern Madison Water District to the Kentucky Public Service Commission for the Year Ended December 31, 2006 at 5-6, and 27.

<sup>2</sup> Id. at 6. Southern Madison Water District’s Response to the Commission’s Order of Nov. 20, 2006, Item 3.

an officer in the Berea Police Department and had held the position of Assistant Chief of Police.<sup>3</sup>

In 2006 Southern Madison began construction of the Silver Creek-Bobtown Water System Improvement Project. This project included the construction of approximately 4,000 linear feet of 10-inch Polyvinylchloride (“PVC”) water main and 16,000 linear feet of 8-inch PVC water main to serve the Bobtown area of Madison County and the installation of a 300,000-gallon water storage tank and a 400-gallon/per minute water pump station.<sup>4</sup> Total project cost was \$900,000 and was financed through appropriations from the state treasury.<sup>5</sup>

On August 15, 2006, Southern Madison’s Board of Commissioners voted to retain Mr. Combs to inspect the construction of water mains that were part of its Silver Creek-Bobtown Water System Improvement Project. According to the minutes of the Board’s meeting, the Board of Commissioners believed that Mr. Combs could perform the inspections better and at a lower cost. The minutes further indicate that Commissioner Larry Todd made a motion to retain Mr. Combs and that Commissioner Paul Reynolds seconded the motion. The minutes do not indicate whether a vote was taken or whether Mr. Combs abstained from discussing or voting on the motion.

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<sup>3</sup> Southern Madison Water District’s Response to the Commission’s Order of November 20, 2006, Items 10 and 14.

<sup>4</sup> See Kentucky Water Project Profile No. WX21151016, <http://wris.ky.gov/KIAProjs> (last visited Jan. 30, 2008). See also E-mail from Denise Pitts, Kentucky Infrastructure Authority, to Gerald E. Wuetcher, Public Service Commission (Jan. 29, 2008).

<sup>5</sup> See 2006 Kentucky Laws Ch. 252 (\$400,000 appropriation for “Southern Madison Water District—Water Project”); 2005 Kentucky Laws Ch. 173 (\$500,000 appropriation for “Southern Madison Water District—Water and Sewer Projects” as set forth in Volume 1a of State/Executive Branch Budget Memorandum). See also E-mail from Denise Pitts, Kentucky Infrastructure Authority, to Gerald E. Wuetcher, Public Service Commission (Jan. 29, 2008).

When subsequently questioned about retaining Mr. Combs, Southern Madison stated that the water district had experienced problems with inspectors on prior projects<sup>6</sup> and was unsatisfied with the quality of the inspectors that the retained engineering firms for the project had provided. It noted that the engineering firm on the Silver Creek-Bobtown Water System Improvement Project had proposed to charge the water district \$45,627.45 for inspection services. Instead of using the engineering firm's services, Southern Madison contracted with Wet or Dry Tank Inspections to inspect the water storage tank at a cost of \$11,120 and with Mr. Combs to inspect the pump station and water main projects for \$3,500. Mr. Combs was to provide inspection services for "21 working days."<sup>7</sup>

Following the meeting of August 15, 2006, Southern Madison's legal counsel wrote to Southern Madison's Superintendent regarding the use of Mr. Combs as a project inspector.<sup>8</sup> Noting that Mr. Combs "did not participate in the voting to hire him to do the inspection on the water line project" and that the water district believed that Mr. Combs' retention would result in significant savings and better services than the alternative, legal counsel opined that the Board had acted properly. He further found that the Board's action was consistent with the Madison County Code of Ethics. On September 5, 2006, Southern Madison contracted with Mr. Combs.

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<sup>6</sup> In response to a Commission discovery request, Southern Madison acknowledged that the Silver Creek-Bobtown Water System Improvement Project was the first construction project that it has engaged in since on or before January 1, 2001. See Southern Madison's Response to the Commission's Order of Nov. 20, 2006, Item 11.

<sup>7</sup> Southern Madison's Response to the Commission's Order of Nov. 20, 2006, Item 8.

<sup>8</sup> Letter from Roger M. Oliver to Tommy Bussell (Aug. 21, 2006).

## PROCEDURE

On November 20, 2006, the Commission initiated this proceeding to investigate the transaction between Mr. Combs and Southern Madison and to determine if “any violations of KRS Chapter 74 have occurred, if the transaction is consistent with the duties that Kentucky law imposes upon water district commissioners, and if the transaction has adversely affected the quality of service that Southern Madison Water District provides.”<sup>9</sup> We took this action after a routine Commission Staff inspection revealed the existence of the transaction.

In our Order of November 20, 2006, we directed Southern Madison to respond to certain discovery requests. It submitted its response to these requests on December 22, 2006. Based upon adequacy of these responses, the Commission has determined that a final Order in this proceeding may be issued.

## DISCUSSION

Our investigation presents the following issues:

- Does Mr. Combs’ transaction with Southern Madison constitute grounds under KRS 74.455 for his removal?
- Did Mr. Combs act improperly by failing to abstain from the Board of Commissioners’ deliberations regarding the proposal to retain him as an inspector?
- Did Southern Madison’s payments to Mr. Combs violate the salary limitations contained in KRS 74.020?

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<sup>9</sup> Order of Nov. 20, 2006 at 3.

## Grounds for Removal

A water district is “a political subdivision” of the state.<sup>10</sup> It is administered by a board of commissioners that “shall control and manage the affairs of the water district.”<sup>11</sup> A member of a water district’s board of commissioners is a public officer.<sup>12</sup>

The Commission has statutory authority to remove a water district commissioner.

KRS 74.455(1) provides:

From and after the creation and establishment of a water district and the appointment of water commissioners to manage the affairs of the district, and following the acquisition or construction by any duly created and established water district of a public water system, and the consequent establishment of regulatory jurisdiction over such water district by the Public Service Commission of Kentucky, the Public Service Commission may remove any water commissioner from his office for **good cause, including, inter alia, incompetency, neglect of duty, gross immorality, or nonfeasance, misfeasance, or malfeasance in office, including without limiting the generality of the foregoing, failure to comply with rules, regulations, and orders issued by the Public Service Commission.** [emphasis added]

“Good cause” includes conduct that constitutes a conflict of interest.<sup>13</sup>

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<sup>10</sup> Louisville Extension Water Dist. v. Diehl Pumping & Supply Co., 246 S.W.2d 586 (Ky.1952). Water “districts are political subdivisions of county government.” Pub. Serv. Comm’n v. Dewitt Water Dist., 720 S.W.2d 725, 731 (Ky. 1986). “[A] water district is a type of special district which constitutes a political subdivision of the commonwealth.” Davis v. Powell’s Valley Water Dist., 920 S.W.2d 75, 78 (Ky. App. 1995).

<sup>11</sup> KRS 74.020(1).

<sup>12</sup> Commonwealth v. Howard, 379 S.W.2d 475 (Ky. 1964).

<sup>13</sup> See KRS 74.020(2) (permits water district commissioners to be removed from office as provided by KRS 65.007); KRS 65.007(1) (provides that “inefficiency, neglect of duty, malfeasance or conflict of interest” are grounds for removal from office); KRS 74.020(3) (permits the removal of any commissioner “who participates in any official action by the water district board of commissioners which results in a direct financial benefit to him”).

The actions of Mr. Combs in contracting with Southern Madison to provide for inspection services while he served as a member of its Board of Commissioners constitute a conflict of interest. “Public officers are generally prohibited from contracting with the public agency which they represent or from having a private interest in its contracts.”<sup>14</sup> Recognizing this principle, Kentucky’s highest court has declared:

**It is a salutary doctrine that he who is interested with the business of others cannot be allowed to make such business an object of profit to himself. This is based upon principles of reason, of morality, and of public policy. These are principles of the common law and of equity which have been supplemented and made more emphatic by the foregoing and other statutory enactments. In their application and operation it is impossible to lay down any definite rules defining the nature of the interest of the office, or indicating the line between that which is proper and that which is unlawful. 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.**<sup>15</sup>

Kentucky’s Attorney General has similarly opined that “commissioners of a water district organized pursuant to KRS Ch. 74 are prohibited from entering into contracts with the district as a conflict of interest would exist which would be against public policy.”<sup>16</sup>

Southern Madison argues that Mr. Combs’ actions do not constitute a conflict of interest as his interests are not opposed to those of the water district. It asserts:

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<sup>14</sup> 63C Am. Jur. 2d. *Public Officers and Employers* § 262 (2007). See also 67 C.J.S. *Officers* § 244 (2007) (“[A] board cannot make a legal contract with one of its own members in respect of the trust reposed in it.”).

<sup>15</sup> Commonwealth ex rel. Vincent v. Withers, 266 Ky. 29; 98 S.W.2d 24, 25 (1936) (emphasis added) (citations omitted).

<sup>16</sup> OAG 66-788.

Mr. Combs is not acting in his own interest. He is acting on behalf of the District. He is its eyes and ears – its watchdog. It would not be possible to hire someone who would have the interest of the District more paramount than Mr. Combs.<sup>17</sup>

It further notes that retaining Mr. Combs to perform the services in question will lower the cost of construction and thus benefit the water district and its customers.

This argument ignores that, as a water district commissioner, one of Mr. Combs' duties is to oversee the performance of personal service contracts, such as a contract for the inspection of water mains. His ability to perform that duty is compromised if he is also the contract holder. He must review his own performance as a water main inspector and determine whether that performance is within appropriate standards and merits the agreed compensation. That duty clearly conflicts with his pecuniary interest in the contract for his services as an inspector.

While we find that conflict of interest exists, we are of the opinion that the circumstances do not warrant the initiation of proceedings to remove Mr. Combs. The record reflects that Mr. Combs was qualified to perform the contract services and that the contract resulted in cost savings to the water district. Moreover, it contains no evidence of improper motives or willful misconduct. Mr. Combs did not conceal his

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<sup>17</sup> Southern Madison's Response to the Commission's Order of November 20, 2006, Item 8.

involvement in the project. The water district obtained an opinion from its legal counsel regarding the contract in which its counsel raised no objections or concerns.<sup>18</sup>

While we take no additional action in the present case, we find that the better practice is for water district commissioners to avoid private business dealings with their water districts. Public policy weighs heavily against such business dealings. Moreover, such dealings create the perception that a water district commissioner is using his or her position for personal gain and may erode the general public's faith and support in the water district. We regard such conduct as a serious matter and, where the circumstances warrant, will not hesitate to act to protect the water district.<sup>19</sup>

#### Failure to Abstain

The record raises questions about Mr. Combs' level of participation in the decision of Southern Madison's Board of Commissioners to award a contract for inspection service to Mr. Combs. The minutes of the meeting of August 15, 2006 fail to indicate Mr. Combs refrained from participating in discussion or voting on the motion to

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<sup>18</sup> Southern Madison's legal counsel relied heavily upon the Madison County Code of Ethics, which Madison County Fiscal Court had enacted pursuant to KRS 65.003. The Code applies to all county officers, including "[a] member of a governing body of any local government agency who has been appointed to the governing body of the agency by the county." Southern Madison takes the position that the Code applied to the water district without any formal adoption. Southern Madison's Response to the Commission's Order of Nov. 20, 2006, Item 16. This position, however, conflicts with the Attorney General's stated position that a county government lacked the legal authority to extend a code of ethics to special districts and that such code could be extended to special districts, such as a water district, only if the district expressly adopted it. See OAG 94-71. Assuming that the transaction did not violate the Madison County Code of Ethics, compliance with that Code did not release Mr. Combs from other statutory obligations.

<sup>19</sup> Pursuant to KRS 65.007 and KRS 74.020, county judge/executives may also respond to such conduct by removing the offending water district commissioner.



award him a contract for inspection services.<sup>20</sup> Mr. Combs' participation in a decision from which he would directly benefit would constitute grounds for his removal.<sup>21</sup>

As a general rule, “[w]hen a quorum of a governing body is present, those members who are present and do not vote will be considered as acquiescing with the majority.”<sup>22</sup> In light of the lack of any official record to evidence that Mr. Combs took steps to recuse himself, he must be presumed to have participated in and voted in favor of the contract award.<sup>23</sup>

Addressing this same issue almost 20 years ago, the Attorney General provided the following guidance to board members:

[T]he rule is that a member who passes, or does not vote, acquiesces with the majority. Thus, the possibility exists when the member with the conflict abstains or refuses to vote, that abstention results in the third vote required for board action. KRS 160.270(1). In that instance, the effect of the abstention is no different than an affirmative vote. **Therefore, in order to prevent the problematic circumstance, the member with the conflict should be absent either from the entire meeting or from the**

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<sup>20</sup> In his opinion letter to Southern Madison's Superintendent, Southern Madison's legal counsel states that Mr. Combs did not vote on the award of the contract. Letter from Roger M. Oliver to Tommy Bussell (Aug. 21, 2006).

<sup>21</sup> See KRS 74.020(3) (“A commissioner who participates in any official action by the water district board of commissioners which results in a direct financial benefit to him may be removed from office as provided by KRS 65.007.”). While this statute refers to actions that a county judge/executive may undertake, the Commission is of the opinion that such action would also constitute “good cause” for removal pursuant to KRS 74.455(1).

<sup>22</sup> Pierson-Trapp Co. v. Knippenberg, 387 S.W.2d 587 (Ky. 1965). See also Hunters Ridge Homeowners Assn v. Hicks, 818 S.W.2d 623 (Ky. App. 1991).

<sup>23</sup> As to the decision to award the inspection services contract to Mr. Combs, the minutes of the August 15, 2006 meeting state:

MOTION BY LARRY TODD TO HIRE JERRY COMBS TO INSPECT WATER LINE AT TOTAL COST OF \$3,500 UP TO 21 DAYS OF WORKING DAYS. THE SMW BD. BELIEVED HE COULD DO A BETTER JOB AND SAVE SMW MONEY. SECOND BY PAUL REYNOLDS.

**discussion and the vote on the issue in which he or she has the conflict.**<sup>24</sup>

In the case at bar, Mr. Combs would have been better served to have not attended the meeting of August 15, 2006 or at least that portion of the meeting in which Southern Madison's Board of Commissioners discussed the inspection services contract. Moreover, the minutes of the August 15, 2006 meeting should have expressly reflected Mr. Combs' absence when the Board of Commissioners considered and voted upon the inspection services contract.

In light of the representation of Southern Madison's legal counsel that Mr. Combs did not participate in the vote<sup>25</sup> and the other circumstances earlier in this Order, we find that no additional action should be taken against Mr. Combs. We caution Southern Madison's Board of Commissioners and the boards of commissioners of all other water districts to prepare more accurate and complete minutes of their meetings to ensure a full and detailed record and to avoid unnecessary litigation or regulatory review.

Salary Limitations

KRS 74.020(6) provides that a water district commissioner may receive an annual salary of no more than \$3,600.<sup>26</sup> It further provides that the maximum annual salary may be \$6,000 for a water district commissioner who "completes during an educational year a minimum of six (6) instructional hours of water district management training approved by the Public Service Commission." The county judge/executive with the approval of fiscal court fixes the level of salary.

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<sup>24</sup> OAG 88-35 (emphasis added).

<sup>25</sup> See supra note 20.

<sup>26</sup> KRS 74.050 authorizes an additional payment of no more than \$200 annually to the commissioner who serves as treasurer to compensate him or her for those additional duties.

The record indicates several potential problems with the level of compensation that Southern Madison paid to Mr. Combs and to other members of its Board of Commissioners. First, Southern Madison has paid each of its commissioners an annual salary of \$4,800 since 1999.<sup>27</sup> It lacks any evidence that the Madison County Judge/Executive and Fiscal Court approved this salary level.<sup>28</sup> The only evidence that the water district could muster in support of this salary level is that of a resolution of its Board of Commissioners. Such resolution is insufficient.<sup>29</sup> In the absence of approval from the Madison County Judge/Executive and Fiscal Court for the salary level, payments to any of the commissioners are unlawful.<sup>30</sup>

Assuming that proper authorization has been obtained for the salary payments, the record does not contain any evidence to support the salary payment of \$4,800 to Mr. Combs for 2006. To obtain a salary in excess of \$3,600, Mr. Combs must have attended at least 6 hours of certified water district management training. Southern Madison asserts that Mr. Combs qualified for such a salary through his attendance at a program of instruction conducted by the Governor's Office of Local Development on December 14, 2006 in Somerset, Kentucky. The Commission's records do not indicate that the Commission has accredited such a program. In the absence of such

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<sup>27</sup> Southern Madison Water District's Response to the Commission's Order of November 20, 2006, Item 3.

<sup>28</sup> Id. at Item 2.

<sup>29</sup> OAG 77-425. The resolution also fails to note the requirement that to obtain any salary in excess of \$3,600, a water district commissioner must attend at least 6 hours of approved water district management training.

<sup>30</sup> Southern Madison may seek retroactive approval from the Madison County Judge/Executive and Fiscal Court for its prior payments. See OAG 77-425 (opining that a fiscal court may enter an order, nunc pro tunc, fixing and approving a salary level for a prior year or may by appropriate order ratify prior salary payments made to water district commissioners).

accreditation, Mr. Combs is not entitled to an annual salary in 2006 that exceeded \$3,600.<sup>31</sup>

In light of these problems, the Commission finds that Southern Madison should take action to obtain the necessary authorization for the current commissioner salary levels and for past payments to its commissioners or, in the alternative, take action to recoup the amounts that were improperly paid to the members of its Board of Commissioners.

Finally, assuming that Mr. Combs was properly authorized and entitled to receive an annual salary of \$4,800 as a commissioner, any additional amounts received under the terms of the inspection services contract do not appear to be contrary to KRS 74.020(6). While a public official may not receive additional compensation for services that are part of his or her official duties, he or she may be paid additional compensation for services that are not part of those duties.<sup>32</sup> While many commissioners of smaller, rural water districts have voluntarily inspected water mains out of a sense of civic responsibility and a desire to reduce the water district's expenses, such duties are not part of a water district commissioner's official duties. As the inspection services are not part of Mr. Combs' official duties, no violation of KRS 74.020(6) occurs even though it would result in total water district payments of \$7,300 to Mr. Combs for calendar year 2006.

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<sup>31</sup> A salary level of \$3,600 assumes that the Madison County Judge/Executive and Fiscal Court have authorized such level.

<sup>32</sup> See, e.g., Buchignani v. Lexington-Fayette Urban County Gov't, 632 S.W.2d 465, 468 (Ky. Ct. App. 1982) (stating that an official may not receive additional compensation for services performed as a part of his official duties, but finding that fingerprinting and photographing prisoners were not a part of a jailer's duties).

## SUMMARY

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Mr. Combs' transaction with Southern Madison to provide for inspection services for the Silver Creek-Bobtown Water System Improvement Project constitutes a conflict of interest.

2. Despite the existence of this conflict of interest, circumstances do not currently warrant the initiation of proceedings for the removal of Mr. Combs from his position as water district commissioner.

3. Southern Madison failed to prepare accurate and complete minutes of the meeting of August 15, 2006 of its Board of Commissioners to reflect actions taken at that meeting.

4. Southern Madison lacks documentary evidence that Madison County Fiscal Court has approved the salary level currently paid to the members of its Board of Commissioners.

5. Assuming the Madison County Fiscal Court has approved an annual salary of \$4,800 for each of Southern Madison's commissioners, Mr. Combs was not entitled to receive a salary greater than \$3,600 in 2006.

IT IS THEREFORE ORDERED that:

1. Within 30 days of the date of this Order, Southern Madison shall advise the Commission in writing of the actions that it has taken to obtain the necessary authorization for its current commissioner salary levels and for past payments to its commissioners or, in the alternative, to recoup the amounts that were improperly paid to the members of its Board of Commissioners.

2. The Executive Director shall serve a copy of this Order upon the Madison County Judge/Executive and each member of Madison County Fiscal Court.

Done at Frankfort, Kentucky, this 15<sup>th</sup> day of February, 2008.

By the Commission

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Executive Director