



Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

David L. Armstrong
Chairman

James W. Gardner
Vice Chairman

Daniel E. Logsdon, Jr.
Commissioner

March 4, 2015

PSC STAFF OPINION 2015-005

Mr. Bernal Atkins
Chairman
Board of Commissioners
Sandy Hook Water District
727 Howard's Creek Rd
Sandy Hook, KY 41171

RE: Sandy Hook Water District
Request for an Advisory Opinion

Dear Mr. Atkins:

Commission Staff acknowledges receipt of your December 18, 2014 letter in which you express concern regarding the appointment of Mr. Darren Fannin to the Sandy Hook Water District ("Sandy Hook") Board of Commissioners. Commission Staff will treat your letter as a formal request for a Staff Opinion. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based on your letter, Commission Staff understands the facts as follows:

Mr. Darren Fannin has been appointed to the Sandy Hook Board of Commissioners. Mr. Fannin also serves as the Elliott County Assistant Judge Executive and Elliott County Road Foreman. You are concerned about the legality of Mr. Fannin holding these positions simultaneously.

Your letter presents the following question: Are the offices of Assistant Judge Executive and Road Foreman incompatible with the office of water district commissioner, making it impermissible for Mr. Fannin to simultaneously serve in these positions?

You state that Mr. Fannin currently holds the offices of Elliott County Assistant Judge Executive and Elliott County Road Foreman. KRS 61.080 sets forth the criteria

for incompatible offices in Kentucky. However, this statute does not address incompatibility of the offices currently held by Mr. Fannin. Therefore, statutory incompatibility is not applicable in this situation, and whether the offices are incompatible at common law must be examined.

KRS 74.455(1) provides, in pertinent part:

[T]he 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.

The Public Service Commission is a creature of statute, and is only vested with the powers granted to it by statutory authority.¹ KRS 74.455 only authorizes the Commission to remove a water commissioner from office for the reasons set forth above. Therefore, the Commission does not have jurisdiction to determine whether it is permissible for Mr. Fannin to simultaneously serve as a Sandy Hook water commissioner, Assistant Judge Executive, and Road Foreman.

However, the issue of whether it is permissible for a member of the fiscal court to serve on the board of commissioners of a water district has been addressed by the Office of the Attorney General. In *Honorable Virgil Pearman*, the Office of the Attorney General issued an opinion in which it determined that a county judge/executive could not legally serve at the same time as a water board commissioner.² The opinion noted that the water board commissioners are appointed by the county judge/executive with the approval of the fiscal court, and that the county judge/executive has the discretion to fix the salary of the water commissioners, to execute an order creating or discontinuing a water district, and to enlarge or diminish the territory of a water district.³ The opinion determined that a member of the fiscal court could not simultaneously serve as a water commissioner because "it simply would be against public policy for the county judge/executive, who plays such a central role in connection with water districts, to appoint himself as a water commissioner [though the fiscal court has to approve] and serve as a water commissioner."⁴

Based on this opinion, the Office of the Attorney General is the appropriate agency to issue an advisory opinion on the issue of whether holding the offices of Water District Commissioner, Road Foreman, and Assistant Judge Executive simultaneously constitutes holding incompatible offices at common law. (It is important to note the

¹ *Kentucky Public Service Commission v. Com. ex. rel. Conway*, 324 S.W.3d 373, 377 (Ky. 2010).

² Ky. OAG 78-651 (Ky.A.G.).


³ *Id.*

⁴ *Id.*

above referenced Attorney General opinion addresses incompatibility regarding the offices of county judge/executive and water district commissioner, not the offices of Assistant Judge Executive or Road Foreman and water district commissioner.) Alternatively, a binding decision on this issue could be obtained by filing a declaratory action in the Circuit Court of Elliott County.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Aaron Ann Cole, Staff Attorney, at (502) 564-3940.

Sincerely,



Jeff Derouen
Executive Director

AAC/ph