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OAG 16-004

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Subject: Whether the Governor may remove a Kentucky Retirement Systems trustee at will prior to the expiration of the trustee's appointed term, and whether a particular appointee to the Kentucky Retirement Systems Board of Trustees is qualified for that appointment

Requested by: William A. Thielen, Executive Director
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Written by: Matt James
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Syllabus: The Governor may not remove a Kentucky Retirement Systems trustee at will prior to the expiration of the trustee's appointed term. The Governor's recent appointee to the Kentucky Retirement Systems Board of Trustees does not qualify as a professional with at least ten years of experience in finances.

Statutes construed: KRS 61.645; KRS 63.080

OAGs cited: OAG 16-001

Opinion of the Attorney General

William A. Thielen, Executive Director of Kentucky Retirement Systems ("Retirement Systems"), has requested an opinion of this office on two issues: 1) whether the Governor may remove a Retirement Systems trustee at will prior to the expiration of the trustee's appointed term, and 2) whether an appointee to the

Retirement Systems Board of Trustees is qualified for that appointment.[1] We advise that the Governor may not remove a Retirement Systems trustee at will prior to the expiration of the trustee's appointed term. The Governor's appointee to the Retirement Systems board does not qualify as a professional with at least ten years of experience in finances.

Thomas K. Elliott was appointed to the Retirement Systems Board of Trustees effective Apr. 1, 2011, and reappointed on Apr. 1, 2015. His term was set to expire on Mar. 31, 2019. Mr. Elliott was appointed as the investment expert trustee under KRS 61.645(1)(e). On Apr. 20, 2016, Governor Matt Bevin issued an executive order removing Mr. Elliott as a trustee, citing KRS 63.080 and 61.645. On Apr. 21, 2016, Gov. Bevin issued another executive order appointing Dr. William F. Smith to replace Mr. Elliott. At issue are: 1) whether the Governor may remove a Retirement Systems trustee at will, and 2) whether Dr. Smith is qualified as his replacement.[2]

I. Removal of a Retirement Systems Trustee Prior to the Expiration of the Trustee's Term

KRS 61.645(3)(a) provides that "each trustee shall serve a term of four (4) years or until his successor is duly qualified except as otherwise provided in this section." KRS 61.645(6)(b) provides that "a trustee shall be removed from office upon conviction of a felony or for a finding of a violation of any provision of KRS 11A.020 or 11A.040 by a court of competent jurisdiction." As authority for the removal of Mr. Elliott, the Governor cites to KRS 63.080, which provides:

> (1) Except as provided in subsection (2) of this section and otherwise provided by law, any person appointed by the Governor, either with or without the advice and consent of the Senate, may be removed from office by the Governor for any cause the Governor deems sufficient, by an order of the Governor entered in the executive journal removing the officer.

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[1] These questions are raised in two separate opinion requests, which have been combined.

[2] What is not at issue in this opinion is any question or evaluation of the performance of any Retirement System trustee or the Retirement System itself. This opinion is concerned only with the legal questions involving the removal of a trustee and the appointment of another.

KRS 63.080(1) provides that except as specified in KRS 63.080(2) and otherwise provided by law, any person appointed by the governor may be removed by the governor for any cause. KRS 63.080(2) provides that the boards of state universities, the Kentucky Board of Education, and the Council on Postsecondary Education may only be removed for cause. The Governor argues that "except for the members of the boards of trustees of the various state universities, colleges, and governing education boards, the Governor may remove any person he or she appoints unless 'otherwise provided by law.'"[3]

In OAG 16-001, we addressed the application of the Governor's authority under KRS 63.080(1) in the context of the Governor's removal of a member of the Horse Park Commission. We advised that "KRS 63.080 does not provide a Governor with the power to remove a duly appointed member of the Kentucky Horse Park Commission during his or her term. Instead, a Governor must wait until the term set forth under KRS 148.260 ends before he may replace the member." OAG 16-001. We relied on the language of KRS 148.260(3), which provides that "the appointed members of the commission shall hold their offices for a term of four (4) years." In interpreting KRS 63.080(1) and KRS 148.260(3), we reasoned that "the statutes should be read together and harmonized if possible. . . . KRS

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[3] In support of his argument, the Governor cites to the case of *Johnson v. Laffoon*, 77 S.W.3d 345 (Ky. 1934). In *Laffoon*, Gov. Laffoon announced his intention to remove Johnson from the offices of road commission and chairman of the state highway commission without cause. *Id.* at 346. The former Court of Appeals upheld the Governor's power to make such a removal. *Id.* at 350. However, *Laffoon* dealt with a predecessor to KRS 63.080, KY. STAT. § 3750, which provided at the time that "any person heretofore or hereafter appointed to an office by the Governor either with or without the advice and consent of the Senate may be removed therefrom by the Governor, during the term for which he was appointed, for any cause the Governor may deem sufficient." *Id.* at 346. The version of KY. STAT. § 3750 applied in *Laffoon* contained the additional phrase "during the term for which he was appointed," which is no longer part of KRS 63.080(1), and did not contain the additional phrase "and as otherwise provided by law," which is now present in KRS 63.080(1). Therefore the holding of *Laffoon* is not controlling.

The Governor also cites to a 1995 miscellaneous letter from this office to the Secretary of the Governor's Executive Cabinet, in which we interpreted *Laffoon* to allow the Governor to remove a member of the Real Estate Appraisers Board without cause. That letter, which was not a formal Opinion of the Attorney General, did not consider the subsequent amendments to the version of KY. STAT. § 3750 applied in *Laffoon*, and to the extent it constitutes any expression of the views of this office, it is hereby withdrawn.

63.080(1) provides that other laws limit the removal authority of the Governor. KRS 148.206(3) does just that. It 'otherwise provide[s] by law' a set term for which an appointee "shall hold their office.' Thus, the statutes do not conflict." OAG 16-001 (citations omitted). We generally advised that the "otherwise provided by law" includes other statutes which provide that board members shall serve their terms.

In this case, we see no reason to deviate from the reasoning of OAG 16-001. In addition, a Retirement Systems trustee may only be removed for commission of a felony or violations of the Executive Branch Ethics Code. KRS 61.645(3)(a) provides that "each trustee shall serve a term of four (4) years or until his successor is duly qualified except as otherwise provided in this section." "'Shall' is mandatory." KRS 446.010(39); *see also Commonwealth v. Wright,* 415 S.W.3d 606, 609 (Ky. 2013) ("The term 'shall' is a word of command and . . . must be given a compulsory meaning."). KRS 61.645(3)(a) thus makes it mandatory that each trustee shall serve a term of four years. Further, KRS 61.645(6)(b) provides that "a trustee shall be removed from office upon conviction of a felony or for a finding of a violation of any provision of KRS 11A.020 or 11A.040 by a court of competent jurisdiction." "It is a familiar and general rule of statutory construction that the mention of one thing implies the exclusion of another." *Fox v. Grayson,* 317 S.W.3d 1, 8 (Ky. 2010). KRS 61.645(6)(b) provides only that a trustee may be removed upon conviction of a felony or a violation of KRS 11A.020 or 11A.040, provisions of the Executive Branch Ethics Code. In specifying the grounds for which a Retirement Systems trustee may be removed, the legislature is presumed to have excluded all other grounds for removal.

In interpreting the provisions of KRS 61.645 with KRS 63.080(1), "where there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible." *Commonwealth v. Halsell,* 934 S.W.2d 552, 555 (Ky. 1996). To interpret KRS 63.080(1) as giving the Governor the authority to remove Retirement Systems trustees at will would render KRS 61.645(3)(a) and 61.645(6)(b) effectively meaningless, as the Governor could remove any of his appointees to the Retirement Systems board at any time. To interpret KRS 64.645(3)(a) and KRS 61.645(6)(b) as "otherwise provided by law" in KRS 63.080(1) would harmonize the statutes and give effect to them all.

More generally, similar to the Horse Park Commission in OAG 16-001, the Retirement Systems board is intended to be "an independent agency with an independent governing board that is intended to be outside the normal operation and influence of the Executive Cabinet and the Governor, with the exception of his appointing power of Commissioners for mandatory four year terms." *Id.* As noted in OAG 16-001:

> If the current KRS 63.080(1) were read as the Governor's Office argues, it would leave the four year term required . . . as well as virtually every other term of years established for any board or commission meaningless. . . . It would effectively remove the independence or autonomy of the numerous boards or commissions the legislature has created, often times for the specific purpose of removing them from the direct control of the Governor.

The Governor has been granted power over boards and agencies such as Retirement Systems in that the Governor is allowed to appoint significant numbers of members to many of them, and sometimes controlling numbers of members. To further hold that the Governor may remove any of his appointees at will would damage or destroy the independence that such boards have. The Governor retains full power under KRS 63.080(1) to remove any of his appointees whose terms are not specified or are not otherwise protected by law, such as cabinet secretaries. However, the legislature intended for boards such as Retirement Systems to have a level of stability, independence, and insulation from political influence. Our interpretation preserves these boards as independent agencies, while the Governor still retains significant influence over such boards through the power of appointment.

Accordingly, we advise that the Governor is prohibited from using KRS 63.080(1) to remove a Retirement Systems trustee, as the removal of a Retirement Systems trustee is otherwise provided by law.

II. Qualifications of the Governor's Appointee to the Retirement Systems Board of Trustees

KRS 61.645(1) provides that the Retirement Systems board is composed of thirteen members. One of those trustees is the secretary of the Personnel Cabinet,

three are elected by the members of the County Employees Retirement System, one is elected by the members of the State Police Retirement System, two are elected by the members of the Kentucky Employees Retirement System, and six are appointed by the Governor. KRS 61.645(1)(e) provides that of the six trustees appointed by the Governor, one must be knowledgeable about the impacts of pensions on local governments, three are selected from lists submitted by the Kentucky League of Cities, the Kentucky Association of Counties, and the Kentucky School Boards Association, and two shall have investment experience. KRS 61.545(1)(e)(5) specifies the qualifications of the trustees with investment experience:

> Two (2) trustees shall have investment experience. For purposes of this subparagraph, a trustee with "investment experience" means an individual who does not have a conflict of interest, as provided by KRS 61.655, and who has at least ten (10) years of experience in one (1) of the following areas of expertise:
> a. A portfolio manager acting in a fiduciary capacity;
> b. A professional securities analyst or investment consultant;
> c. A current or retired employee or principal of a trust institution, investment or finance organization, or endowment fund acting in an investment-related capacity;
> d. A chartered financial analyst in good standing as determined by the CFA Institute;
> e. A university professor, teaching economics or investment-related studies; or
> f. Any other professional with exceptional experience in the field of public or private finances.

KRS 61.645(1)(e)(5) further defines "investment experience" as ten years of experience as a portfolio manager, a professional securities analyst or investment consultant, an employee or principal of a trust institution, investment or finance organization, a chartered financial analyst, a university professor teaching economics or investment, or any other professional with exceptional experience in finances.

We are presented with a limited factual record in determining the qualifications of Dr. Smith. Mr. Thielen cites to a newspaper article authored by Dr. Smith in which he describes his experience:

> William F. Smith is a physician in private practice in Madisonville, Ky., with a special interest in public pension analysis. He was a Presidential Scholar at Murray State University, where he earned a degree in engineering physics with an emphasis in mathematics, biology, and chemistry, and uses a purely mathematical approach to analyze pension data.
>
> He has worked with a number of legislators during the past few years, including several legislators who were on the state pension task force.[4]

The Governor stated that:

> Dr. Smith is a "professional" with "exceptional experience in the field of public and private finances." His educational background includes a comprehensive understanding of the mathematical and actuarial principles required to properly manage both defined benefit and cash balanced pension systems. Consistent with that background, Dr. Smith has personally undertaken and engaged in an extensive analysis of both the Kentucky Retirement System (KRS) and the Kentucky Teacher's Retirement System. Also consistent with that background, he recently served on the KRS Transition Commission for Governor Bevin and assisted Senator Damon Thayer while he was serving as co-chair of the KRS Pension Task Force. He has also worked directly with Senator Joe Bowen, who is co-chair of the Public Pension Oversight Board, regarding public pension issues.

While Dr. Smith does appear to have some experience with pension systems, KRS 61.645(1)(e)(5) expressly requires "at least ten (10) years of experience in one (1) of the following areas of expertise." Further, in interpreting statutes, "each section is to be construed in accord with the statute as a whole."

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[4] William F. Smith, *Unraveling $34 billion Ponzi Scheme*, THE STATE JOURNAL (June 29, 2015), http://www.state-journal.com/2015/06/29/unraveling-34-billion-ponzi-scheme/.

Combs v. Hubb Coal Corp., 934 S.W.2d 250, 253 (Ky. 1996). The other provisions of KRS 61.645(1)(e)(5) all list specific areas of practice in professional investment experience or education. Construing KRS 61.645(1)(e)(5)(f) in accord with the other provisions of KRS 61.645(1)(e)(5), we interpret KRS 61.645(1)(e)(5)(f) to require at least ten years of experience as a financial professional of some kind.

The Governor claims that Dr. Smith qualifies as having "exceptional experience in the field of public and private finances," and while his experience may be exceptional in some sense, it is not clear from the record before us that Dr. Smith has ten years of experience in public or private finances. The Governor had an opportunity to demonstrate Dr. Smith's qualifications and specify the number of years of financial experience, but did not provide a resume or other documentation proving his qualifications; the Governor only provided the paragraph quoted above. The Governor correctly notes that "provisions in statutes and Constitutions imposing restrictions upon the right of a person to hold office should receive a liberal construction in favor of his eligibility." *Howton v. Morrow*, 106 S.W.2d 81, 82 (Ky. 1937). However, while we are presented with limited evidence, the evidence we are presented with does not indicate that Dr. Smith has ten years of experience as a financial professional. Accordingly, although additional evidence may indicate otherwise, based on the limited record before us, we advise that Dr. Smith is not qualified for the position of Retirement Systems trustee as a "professional with exceptional experience in public or private finances." As he was not qualified to hold the position when he was appointed, his appointment is void *ab initio*. *See Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 411 (Ky. Ct. App. 1994).

In summary, the Governor may not remove a Retirement Systems trustee at will prior to the expiration of the trustee's term. The record before us indicates the Governor's appointee to the Retirement Systems board, Dr. Smith, is not qualified as a professional with ten years of experience in public or private finances.

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