

MEMORANDUM

To: Dr. Davy Jones
From: Marcy Deaton
Date: May 6, 2011
SUBJECT: KRS 164.225

Per your request, this memorandum provides the Office of Legal Counsel's opinion on the interpretation of the prohibition contained in KRS 164.225 that "No relative of a board of trustees member shall be employed by the university." as it applies to elected faculty members to the Board of Trustees. Your specific questions are:

Question 1. Can you please clarify, when the Board GR's incorporate the meaning of 1997 amendment to KRS 164.225 as follows:

"Members of the Board of Trustees, except those elected to the Board as faculty, staff, or student representatives, and relatives of any member of the Board of Trustees are ineligible for employment at the University."

Question 2. Does this language exclude or include the interpretation that was applied post 1997 by Paul Van Booven to myself and Loys Mathers, i.e., that relatives employed at UK prior to the 1997 amendment to KRS 164.225 are 'grandparented'?

Response: The relevant section of KRS 164.225 states, "**No relative of a board of trustee member shall be employed by the university.**" The general assembly added this prohibition in 1992. Subsequently, on January 23, 2001, the UK Board of Trustees revised Governing Regulation, Part X.A, in order to be consistent with KRS 164.225. The action item (PR 3A) included a copy of a relevant Kentucky Attorney General opinion (OAG 97-27) as support for the revision. OAG 97-27 examined the 1992 revisions to several sections of KRS Chapter 164, including 164.225, prohibiting relatives of board member from being employed at the state universities. The opinion explains that the use of the word "shall" neither denotes futurity nor creates an implicit grandfather clause. The opinion explains clearly that no exemptions or exceptions to this prohibition were intended for any of the state universities. (Copies of PR 3A and OAG 97-27 are attached.)

The most recent Bill Drafting Manual for the Kentucky General Assembly, Informational Bulletin No. 117 (Revised 2004), provides the following additional guidance:

Section 303. Use of “Shall” and “May”. A duty, obligation, or prohibition is best expressed by “shall,” and a power or privilege is best expressed by “may.” “Shall” should never be used to express the future. Its proper function is mandatory, and generally its use is permissible only when “must” or “has a duty to” could be substituted. In statutory usage “shall” does not denote the future tense any more than “may” does. (emphasis added)

Sec. 304. Tense and Mood. Use the present tense and the indicative mood. Avoid using the passive voice. A statute is regarded as constantly speaking. It speaks as of the time when it is read or applied. It must, therefore, be written in the present tense, except for stating a condition precedent to its operation, which should be phrased in the perfect tense if it is required to be completed before the statute applies. (emphasis added)

The current version of **GR I,D.2(g)** states: “The University shall employ no relative of a member of the Board of Trustees. Members of the Board of Trustees, except those elected to the Board as faculty, staff, or student representatives, and relatives of any member of the Board of Trustees are ineligible for employment at the University.”

The prohibition is repeated in the current version of **GRX.A.1**: “Members of the Board of Trustees, except those elected to the Board of Trustees as faculty, staff, or student representatives, and relatives of any member of the Board of Trustees are ineligible for employment at the University.”

When KRS 164.225, GR I, and GR X, are each read in the present tense, it is clear that no relative of a Board member can be employed by the University during that Board member’s tenure on the Board.

Conclusion: In view of the opinion of the Attorney General’s Opinion (OAG 97-27), as well as the clearly written statute (KRS 164.225) which does not contain a specific exemption or grandfather clause, the only possible interpretation of the University’s Governing Regulations is that a member of the Board of Trustees, including an elected faculty member, cannot have a relative employed by the University during the time he/she serves as a Board member. There is no exemption or “grandfathering” of relatives who were employed prior to the effective date of KRS 164.225. In the case at hand, the faculty member can run for election to the Board, but if elected he will have to choose whether a) to serve on the Board and have his wife resign her employment with UK; or, b) not accept the Board of Trustee position.