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**Opinion of General Counsel
Opinion # 2016-01**

**Requirements to be a
Candidate for Staff Trustee
on the University of Kentucky Board of Trustees**

On Friday, April 22, 2016, the Staff Senate requested an Opinion of the General Counsel concerning requirements for an individual to seek election to the non-teaching personnel position ("Staff Trustee") on the University of Kentucky Board of Trustees ("Board"). Because the eligibility of prospective candidates must be verified by Thursday, April 28, 2016, the Staff Senate requested a response as soon as possible. This opinion responds to that request.

Specifically, the Staff Senate asks if it may inquire as to whether a prospective candidate, if elected, will be able to serve as both a full-time employee and a fully participating Trustee with only limited adjustments to the employee's job duties. The Staff Senate believes this inquiry is appropriate. The Staff Senate makes this inquiry by asking the prospective candidate's supervisor to certify that he/she recognizes the need to make adjustments to the candidate's job duties, is willing to make those adjustments, and is willing to continue those adjustments for the duration of the Staff Trustee's service on the Board. Under the Staff Senate's

Rules, the supervisor's response is determinative of the inquiry. If the supervisor refuses to answer in the affirmative, then the Staff Senate may decline to certify the individual as a candidate for Staff Trustee.

The supervisor of one prospective candidate has indicated the prospective candidate cannot serve as a full-time employee and a fully participating Board member with only limited adjustments. The prospective candidate has expressed the belief that making this inquiry of the supervisor is the imposition of an additional qualification beyond those set forth in the statute establishing the Staff Trustee position, and, thus, illegal. The Staff Senate believes the inquiry is a valid regulation of the election process.

For the reasons set forth below, the Staff Senate may make the inquiry.

This Opinion is limited in scope. It addresses only the issue of whether the Board and, by delegation, the Staff Senate may inquire as to whether a prospective candidate for Staff Trustee can be a full-time employee and a fully participating Board of Trustee member with only limited adjustment to the individual's employment duties. It does not address how the Staff Senate should make this inquiry or how the Staff Senate should determine the answer. Nor does it address whether any particular prospective candidate can be a full-time employee and fully participating Board of Trustee member with only limited adjustment of employment duties. As explained below, the administration of the election of the Staff Trustee is delegated to the Staff Senate and the Staff Senate has broad discretion in how it

chooses to exercise those administrative responsibilities. The Staff Senate's discretion includes both how to make the inquiry and how to determine the answer.

I. Background

The relevant statutes, regulations, and facts are straightforward. The University of Kentucky is governed by a Board of Trustees which:

shall consist of sixteen (16) members appointed by the Governor, two (2) members of the faculty of the University of Kentucky, one (1) member of the University of Kentucky nonteaching personnel, and one (1) member of the student body of the University of Kentucky. The voting members of the board shall select a chairperson annually.

KRS § 164.131(1)(e). With respect to the "Staff Trustee" position, the statute further provides:

The nonteaching personnel member shall be any full-time staff member, excluding the president, vice-presidents, academic deans, and academic department chairpersons. The staff member shall represent all nonteaching university employees including but not limited to building facilities and clerical personnel. The staff member shall be elected by secret ballot by the nonteaching employees. The staff member shall serve a term of three (3) years and until a successor is elected and qualified. The staff member shall be eligible for reelection, but a staff member who ceases being an employee of the university shall not be eligible to continue to serve as a member of the board. Elections to fill vacancies shall be for the unexpired term and shall be held in the same manner as provided for the original election.

KRS § 164.131(4). The Board of Trustees, interpreting the statute to eliminate ambiguities, has provided guidance on who qualifies as a full-time employee, who is eligible to vote in the election, and which senior administrators are ineligible to

serve or vote.¹ See G.R § II.B.2(b)(2). Additionally, the Board has delegated authority to the Staff Senate to “develop procedures for the election of a staff employee to serve as a member of the Board of Trustees, in accordance with the provisions of KRS 164.131(4).” G.R § II.B.2(b)(2).

Exercising the authority delegated by the Board, the Staff Senate has adopted guidelines for the election of the Staff Trustee. See *Election for the UK Staff Board of Trustee Representative Official Guidelines*. Those guidelines set out the dates of the elections, the method of voting, the requirement of the winning candidate receiving a majority in a run-off election among the top candidates in the first round, the regulation of campaign activities, and, most significantly, impose three requirements on prospective candidates for Staff Trustee. First, each prospective candidate must certify he/she is a full-time (1.0 FTE) employee and has at least one year of employment with the University.² Second, the prospective candidate must obtain the signatures of twenty-five other employees.³ Third, the prospective candidate’s supervisor must sign the following statement:

¹ Although the statute refers only to “the president, vice-presidents, academic deans, and academic department chairpersons,” the Board has clarified that those senior administrators in “equivalent positions” are ineligible to serve or to vote. Thus, for example, the Provost, Chief of Staff, General Counsel, and Director of Intercollegiate Athletics may not serve or vote.

² The requirement of one year of employment is not included in the statute or the Governing Regulation. Although the issue was not part of the Opinion request, the requirement of one year of employment may be legally problematic.

³ Although the Staff Trustee must be a full-time employee, employees who are less than full-time but at least 0.75 FTE may sign a candidate’s petition and vote in the election. G.R § II.B.2(b)(2).

I understand that by signing this form, I am agreeing to allow my staff employee to stand for election for the Staff Representative to the UK Board of Trustees. Our Department will support the employee as a Trustee throughout the three-year term, if elected. I confirm that I support the need for my employee's time away from normal work duties (approximately 25%) to perform Trustee duties and that my department will be compensated for time spent on Trustee business, if elected.

Staff Representative to the Board of Trustees Nomination Form at 2. In other words, the supervisor is being asked to certify that a prospective Staff Trustee candidate will be able to serve as both a full-time employee and a fully participating Trustee with only limited adjustments to the candidate's job duties.

By its very terms, the certification requires the supervisor to agree to adjust the employee's assigned duties and to continue those adjustments for the duration of the employee's service as a Trustee—three full years.⁴ Moreover, the required adjustment—one quarter of the employee's time—is significant. Indeed, it is the equivalent of excusing the employee from his or her job duties for more than a full day per week. While such an adjustment may be reasonable for many, if not most, staff positions, there are instances where such an adjustment is inherently unreasonable. Quite simply, there are some positions in some units where the University cannot excuse an employee for one quarter of the employee's work time for three consecutive years. To do so may require hiring a temporary employee,

⁴ To be sure, there are instances where the University makes dramatic alterations to an employee's schedule in order to accommodate a disability or a need for an extended medical leave. In many instances, federal or state law requires those alterations. To the extent the University makes alterations not required by the law, the University does so only after assessing whether the alteration is within the University's interests. A similar calculus applies to the supervisor's assessment of whether to make the certification.

forcing other employees to do a significant amount of overtime work, or disrupting normal university operations. By requiring the certification for all prospective candidates, the Staff Senate recognizes there are positions where such an adjustment is inherently unreasonable and asks whether the prospective candidate is not in one of those positions.⁵

The supervisor of one prospective candidate has indicated the prospective candidate cannot serve as a full-time employee and a fully participating Board member with only limited adjustments. This prospective candidate has asserted the required inquiry represents an attempt to impose an additional qualification beyond those imposed by the statute and, thus, is illegal. The Staff Senate believes the required inquiry is simply a regulation of the election process.

The Staff Senate, through its Chair, requested a formal Opinion of the General Counsel on the issue.

II. Analysis

Two propositions influence and inform the analysis. First, neither the Board of Trustees nor the Staff Senate can impose additional qualifications beyond those articulated in the statute. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (“If the qualifications set forth in the text . . . are to be changed, that text

⁵ Of course, the Staff Senate’s approach concentrates all of the decision-making power in the supervisor and does not require consultation with the supervisor’s own supervisor or Human Resources. However, the issue in this Opinion is the propriety of making the inquiry, not the wisdom of granting a single individual authority to make the determination.

must be amended.”). Because the statute simply says the Staff Trustee “shall be any full-time staff member, excluding the president, vice-presidents, academic deans, and academic department chairpersons,” KRS § 164.131(4), the Board and Staff Senate cannot impose age, educational, salary, or shared governance service requirements. If the Board or Staff Senate attempted to do so, those requirements would be invalid.⁶ The only requirements are that the potential candidate be a full-time non-teaching employee and not occupy a senior administrative position.

Second, the Board and, by delegation, the Staff Senate may regulate the time, place and manner of the Staff Trustee election. In other words, the Board and Staff Senate may interpret ambiguities in the statute and may adopt a process for conducting the election, just as other governmental officials may do with various federal and state election requirements. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013). For example, to prevent the chaos of an election with dozens of candidates, the Staff Senate may require prospective candidates to have a modicum of support through the use of voter signatures. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194–195 (1986) (holding States may regulate to avoid “voter confusion, ballot overcrowding, or the presence of frivolous candidacies”). Similarly, to “reduce election and campaign-related disorder,” the Staff Senate “may, and inevitably must, enact reasonable regulations of [candidates], elections, and ballots.” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Since it may be unwise

⁶ When the Staff Senate attempted to limit eligibility for the position of Staff Trustee to individuals who had served on the Staff Senate, the General Counsel advised the Staff Senate that such a requirement was illegal.

to have a Staff Trustee who has been rejected by a majority of the electorate, the Staff Senate can mandate a run-off election so that the winner has a majority. In sum, the Board and the Staff Senate may impose regulatory procedures as a means of implementing the statute.

Put simply, if the required inquiry is characterized as a qualification—the explicit position of the prospective candidate—then it is invalid. Conversely, if it is simply a regulation of the election process—the implicit position of the Staff Senate—then it is valid. Thus, the relevant question is whether the required inquiry is a qualification or a regulation of the election process.

The answer begins and ends with the statutory text. If the required certification is an election regulation, then the statutory text and reasonable inferences drawn from the statutory text will suggest a need for such a regulation. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding agencies administering statute may draw reasonable inferences from statutory text). In Kentucky, the rules of statutory interpretation are clear:

Where a statute is plain and unambiguous on its face, we are not at liberty to construe the language otherwise, even though such a construction may be more consistent with the statute's legislative purpose. "Our ultimate goal when reviewing and applying statutes is to give effect to the intent of the General Assembly. We derive that intent from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration."

Pennyrile Allied Cmty. Servs., Inc. v. Rogers, 459 S.W.3d 339, 343 (Ky. 2015) (citations omitted). A careful examination of the statutory text reveals several insights into the meaning of the statute and the legislature's purpose.

First, the statute contemplates the Staff Trustee will be *both* a full-time employee and a fully participating member of the Board. There is nothing in the statute suggesting the Staff Trustee will become a part-time employee or will have his/her regular job duties substantially diminished. To the contrary, the statute provides that “a staff member who ceases being an employee of the university shall not be eligible to continue to serve as a member of the board.” KRS § 164.131(4). At the same time, the statute makes the Staff Trustee a full member of the Board. There is no legal distinction among the Staff Trustee, the Student Trustee, the two Faculty Trustees, or the sixteen Trustees appointed by the Governor. *See* KRS § 164.131(1). Like the other Board members, the Staff Trustee is expected to attend all board meetings, serve on committees, participate in educational sessions, and perform the various ceremonial functions of a Trustee.⁷

Second, because there will be occasions when the duties of a full-time university employee conflict with a Trustee’s responsibilities, there is an implicit requirement to make some limited modification of the Staff Trustee’s ordinary job duties so that the Staff Trustee can be a fully participating member of the Board. For example, a Staff Trustee may not be physically present at his/her workstation on days when the Board is holding its regular meeting, committee meetings, educational sessions, or ceremonial functions. Similarly, when the Staff Trustee spends substantial time performing board functions, the Staff Trustee may have to work beyond regular business hours to ensure that all of his/her assigned work is

⁷ If elected by his/her peers, the Staff Trustee can serve as an officer of the Board.

complete.⁸ The University must make these limited adjustments to the Staff Trustee's employment responsibilities.

Third, there are limits to the University's obligation to modify the Staff Trustee's job duties. The University is not required to hire a part-time employee to do a portion of the Staff Trustee's job while the Staff Trustee is participating in board activities. Nor is the University required to force other employees to do a significant amount of overtime work because the Staff Trustee has board responsibilities. Nor is the University required to disrupt normal University operations so that an individual employee may serve on the Board of Trustees. The statute requires a reasonable adjustment of the Staff Trustee's responsibilities, but it does not require that the Staff Trustee be given carte blanche to redefine his/her position. *See Downey v. Kentucky Unemployment Ins. Comm'n*, 479 S.W.3d 85, 89 (Ky. App. 2015) (Statutes are interpreted to avoid absurd results.).

Taken together, these three insights suggest the Board and, by delegation, the Staff Senate may enact an election regulation to ensure that a prospective Staff Trustee will be able to be both a full-time employee and a fully participating Trustee with only limited adjustments to the job duties. Although achieving this balance will be relatively easy in many, if not most, circumstances, there are circumstances where the necessary adjustments would require hiring part-time employees, imposing significant obligations on other employees, or disrupting normal university operations. Because the University is not required to take

⁸ If the Staff Trustee were an hourly employee, the Staff Trustee would receive overtime for the additional work.

extraordinary measures, it is appropriate for the Staff Senate to ask whether such measures would be required. If extraordinary measures are required, it may be appropriate to exclude the prospective candidate from the ballot.

The Staff Senate's requirement of an inquiry of the supervisor is an attempt to ensure that a prospective Staff Trustee will be able to be both a full-time employee and a fully participating Trustee with only limited adjustments to the job duties. There may be more effective ways of making this inquiry, but that is not the issue. The issue is whether the Staff Senate may inquire as to whether the individual, if elected, will be able to discharge all of his/her job responsibilities and be a fully participating Trustee. Given the language of the statute and the logical inferences of the statute, the Staff Senate may make this inquiry.

III. CONCLUSION

For the reasons stated above, the Board and, by delegation, the Staff Senate may inquire as to whether a prospective candidate will be able to be both a full-time employee and a fully participating Trustee with only limited adjustments to the job duties. The Staff Senate has decided the best way for a prospective candidate to make this showing is by having the supervisor make a certification to that effect. If the prospective candidate cannot obtain the certification, then the Staff Senate may choose to exclude the prospective candidate from the ballot.

This Opinion is limited in scope. It addresses only the issue of whether the Board and, by delegation, the Staff Senate may inquire as to whether a prospective

candidate for Staff Trustee can be a full-time employee and a fully participating Board of Trustee member with only limited adjustment to the individual's employment duties. It does not address how the Staff Senate should make this inquiry or how the Staff Senate should determine the answer. Nor does it address whether any particular prospective candidate can be a full-time employee and fully participating Board of Trustee member with only limited adjustment of employment duties. As explained above, the administration of the election of the Staff Trustee is delegated to the Staff Senate and the Staff Senate has broad discretion in how it chooses to exercise those administrative responsibilities. The Staff Senate's discretion includes both how to make the inquiry and how to determine the answer.

April 26, 2016


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