



COMMONWEALTH OF KENTUCKY
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Subject: Whether the University of Louisville Board of Trustees is in compliance with the minority representation requirement of KRS 164.821(5)

Requested by: Rev. Clay Calloway, West Louisville Ministers Coalition
Rev. Milton Seymore, Justice Resource Center

Written by: Matt James

Syllabus: The Governor's appointments to the University of Louisville Board are required by KRS 164.921(5) to reflect the racial composition of Kentucky. "Hispanic" counts as a minority for the purposes of appointment to state boards. The current composition of the University of Louisville Board of Trustees is not in compliance with KRS 164.821(5). The Governor should voluntarily undertake corrective action to bring the composition of the University of Louisville Board of Trustees into compliance with KRS 164.821(5), either through subsequent appointments or an executive reorganization under KRS 12.028.

Statutes construed: KRS 12.028; KRS 12.070; KRS 164.821(5)

Opinion of the Attorney General

Rev. Clay Calloway of the West Louisville Ministers Coalition and Rev. Milton Seymore of the Justice Resource Center have requested an opinion of this office on the following questions:



1. Whether KRS 164.821(5) requires that the Governor appoint citizen members to the University of Louisville Board of Trustees be reflective of no less than the proportional representation of the minority racial composition of the Commonwealth of Kentucky;
2. Whether by its own definition of race the Commonwealth of Kentucky recognizes "Hispanic or Latino" individuals as racial minorities;
3. Whether the Governor of the Commonwealth of Kentucky complied with KRS 164.821(5) by removing an African American racial minority from the University of Louisville Board of Trustees and appointing an identified Cuban-American to the University of Louisville Board of Trustees in lieu of other racial minorities;
4. Whether based upon the current U.S. Census Data and pursuant to KRS 164.821(5), the Governor is required to appoint more than one racial minority to the University of Louisville Board of Trustees or more decisively two or more racial minority members?

We advise as follows:

1. KRS 164.821(5) requires that the Governor's appointments to the Board shall reflect no less than proportional representation of the minority racial composition of Kentucky;
2. "Hispanic" qualifies as a racial minority for the purposes of appointment to state boards;
3. As both Hispanics and African-Americans qualify as racial minorities for the purposes of appointments to state boards, the appointment of Paul Diaz to a position formerly held by Rev. Kevin Cosby does not contravene KRS 164.821(5); however, the composition of the Governor's appointments to the Board currently is not in compliance with KRS 164.821(5);
4. Based on the current minority racial composition of Kentucky, the Governor's appointments to the Board should contain at least two minority members.

Recently, the term of Board trustee Rev. Kevin Cosby expired, and Governor Beshear nominated Paul Diaz, a Cuban-American, to fill Rev. Cosby's position on the Board. Rev. Cosby was the only African-American on the Board at the

time his term expired. The Governor's appointees to the Board now consist of sixteen persons who are not minorities, and Mr. Diaz. At issue is whether the composition of the Governor's appointees to the Board is consistent with KRS 164.821(5).

KRS 164.821(1) provides that "the board shall consist of seventeen (17) members appointed by the Governor," one member of the teaching faculty, one member of the permanent staff, and a student member. KRS 164.821(5) provides that the Governor's appointments "shall reflect no less than proportional representation of the minority racial composition of the Commonwealth." The racial composition of Kentucky according to the 2010 census¹ is as follows:

White	87.8%
Black or African American	7.8%
American Indian and Alaska Native	0.2%
Asian	1.1%
Native Hawaiian and Other Pacific Islander	0.1%
Two or More Races	1.7%
Hispanic or Latino ²	3.1%

Although there is no definition of "minority" in KRS Chapter 164, KRS 12.070 applies to the Governor's appointment powers generally. KRS 12.070(2) provides that "except as otherwise provided by law, the members of each administrative board or commission shall be citizens of Kentucky appointed by the Governor." In *Galloway v. Fletcher*, 241 S.W.3d 819 (Ky. Ct. App. 2007), the court held that "the phrase 'administrative boards and commissions' in KRS 12.070(3) includes the governing bodies of the state's universities," *Id.* at 823. KRS 12.070 therefore applies to the Board. KRS 12.070(1) provides that "'minority' means American Indian; Alaskan native; African-American; Hispanic, including per-

¹ American Fact Finder, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (follow "Kentucky"; then follow "Race and Hispanic or Latino Origin") (last visited Sept. 28, 2015).

² The federal government does not include "Hispanic" as a category of race. Rather, it regards "Hispanic or Latino" as an ethnicity. Office of Mgmt. & Budget, Exec. Office of the President, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997). The federal government's classifications do not trump the definitions of "minority" given in KRS 12.070(1).

sons of Mexican, Puerto Rican, Cuban, and Central or South American origin; Pacific islander; or other ethnic group underrepresented on state boards and commissions.”³ The definition of “minority” in KRS 12.070(1) expressly includes “Hispanic, including persons of Mexican, Puerto Rican, Cuban, and Central or South American origin.” Accordingly, “Hispanic” qualifies as a racial minority for the purposes of appointments to state boards, including state university boards of trustees. Counting Hispanics, minorities make up fourteen percent of the population of Kentucky.

Given that the racial composition of the Commonwealth is fourteen percent minorities, KRS 164.821(5) requires that approximately fourteen percent of the Governor’s appointees to the Board should be minorities.⁴ Since the Governor appoints seventeen trustees to the Board, fourteen percent of those seventeen equals 2.38. Accordingly, at least two of the Governor’s appointees to the Board should be minorities in order to comply with KRS 164.821(5), given the current minority racial composition of Kentucky.

As Mr. Diaz is of Cuban origin, he qualifies as a minority for the purposes of the minority racial composition requirement of the Board. There is therefore only one minority appointed by the Governor currently on the Board. In order to reflect the minority racial composition of Kentucky, at least two minorities should be appointed. The Governor’s appointments to the Board therefore reflect less than the minority racial composition of Kentucky, and are currently out of compliance with KRS 164.821(5).

Although KRS 164.821(5) requires that the Board reflect not less than the minority racial composition of Kentucky, it does not specify any penalties to impose or remedies to take when the Governor’s appointments to the Board do not reflect the minority racial composition of Kentucky. KRS 164.821(5) does not provide that appointments made in violation of it are void, nor does it mandate any action that must be taken to bring the distribution of the Board into compli-

³ This definition of “minority” is also used in KRS 160.345(1) and KRS 160.352(1).

⁴ There do not appear to be any Kentucky authorities interpreting KRS 164.821(5) or its companion statutes. The language used in KRS 164.821(5) appears to be largely unprecedented in other jurisdictions. In the absence of any applicable or comparable authorities, we apply the plain language of the statute. KRS 446.080(4); *Abel v. Austin*, 411 S.W.3d 728, 738 (Ky. 2013).

ance.⁵ In *Commonwealth ex. rel Stumbo v. Fletcher*, No. 07-CI-1456 (Franklin Cir. Ct. filed Sept. 12, 2007), Attorney General Stumbo filed suit against Governor Fletcher for failing to comply with KRS 164.131(2)(c), 164.321(3), and 164.821(5), alleging that the boards of the state universities had a disproportionate amount of Republican appointees. Since the remedial options of the Attorney General in such a case are quite limited, Stumbo's lawsuit sought only a declaratory judgment that Fletcher had failed to comply with the statutes, and sought "to allow the Governor to *voluntarily undertake* corrective action." (Complaint ¶ 9(D)) (emphasis added).⁶ Similarly, in this situation, we follow the example set by Attorney General Stumbo and advise that the Governor should voluntarily undertake corrective action to bring the composition of the Board into compliance with KRS 164.821(5). At a minimum, the Governor should make every effort to appoint another minority to the next vacancy on the Board.⁷

⁵ Further, "the appointment of officers is intrinsically an administrative or executive act." *Legislative Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 922 (Ky. 1984); see also KRS 12.070(2). It is unclear what actions could be taken to force the Governor to bring the Board into compliance with KRS 164.821(5), as any judicial remedy may implicate separation of powers concerns and the executive authority of the Governor.

⁶ The Attorney General does not have ouster authority in this case. KRS 415.030 provides that "if a person usurp an office or franchise, the person entitled thereto, or the Commonwealth, may prevent the usurpation by an ordinary action," and KRS 415.050 provides that "for usurpation of other than county offices or franchises, the action by the Commonwealth shall be instituted and prosecuted by the Attorney General." The Attorney General thus has ouster authority over usurpers of state offices. "A usurper is one who intrudes himself into an office that is vacant or without color of title or right ousts the incumbent and assumes to act as an officer by exercising some of the functions of the office." *Broyles v. Commonwealth*, 219 S.W.2d 52, 54 (Ky. 1949). In this case, while the overall racial composition of the Board is in violation of KRS 164.821(5), no individual trustee is a usurper, as each individual trustee meets the qualifications for office and has been duly appointed by the Governor.

Additionally, KRS 164.821(1)(b) provides that "board members may be removed by the Governor for cause, which shall include neglect of duty or malfeasance in office, after being afforded a hearing with counsel before the Council on Postsecondary Education and a finding of fact by the council." "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 164.821(1)(b) provides that board members can only be removed for cause such as neglect or malfeasance, by the governor, after a hearing and findings by the Council on Postsecondary education. The Attorney General has no role in the removal of Board trustees, and there is currently no known cause for removal of any individual trustee.

⁷ One novel corrective action that the Governor could possibly take is an executive reorganization of the Board. KRS 12.028(2) provides that "the Governor . . . may, between sessions of the General

In summary, we advise that KRS 164.821(5) requires that the Governor's appointments to the Board shall not reflect less than the minority racial composition of Kentucky. "Hispanic" counts as a minority. Given the current minority racial composition of Kentucky, at least two of the Governor's seventeen appointments should be minorities. As only one of the Governor's current appointees is a minority, the composition of the Governor's appointments to the board is currently out of compliance with KRS 164.821(5). We advise that the Governor should voluntarily undertake corrective action to bring the Board into compliance with KRS 164.821(5).

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Assembly, temporarily effect a change in the state government organizational structure as described in subsection (1) of this section if such temporary reorganization plan is first reviewed by the interim joint Legislative committee with appropriate jurisdiction." KRS 12.028(1) specifies that these reorganizations "may include the creation, alteration or abolition of any organizational unit or administrative body." The Governor thus has the authority to reorganize the Board in order to bring it into compliance with KRS 164.821(5).