

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 05-16**

March 30, 2005

RE                    May state employees perform duties for armories and be compensated by Installation Management Funds?

DECISION:        No.

This opinion is issued in response to your March 7, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 30, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Department of Military Affairs (the "Department") is responsible for Installation Management Fund ("IMF") accounts throughout the state. These accounts are funded by armory rentals and vending machine sales, and the funds are used for maintenance and repairs of the armory buildings and for other expenses for the collective benefit of Department and Army Guard personnel.

The management of these accounts is not a part of the armory managers' daily job duties, and therefore a Department in-house policy provides for custodians to be responsible for the management of such IMF accounts. The Department policy provides for the custodian to be compensated 10 % of the gross monthly income of the IMF account he manages, as reflected by the receipt vouchers, to be paid directly from the IMF account. Department policy also provides for the Director of the Facilities Division within the Department to be responsible for determining the sources of income and the general purposes for which expenditures may be made from the IMF accounts.

You state that armory managers who also serve as custodians of IMF accounts must manage the accounts outside of their regular working hours, but do receive compensation as provided above. Further, when the armories are rented and used by outside groups, security and clean-up services are required and paid by the IMF account. Many times these services are provided by a current armory manager or state maintenance worker who is compensated for such service.

As a result of a recent audit of the IMF accounts, a question has been asked as to whether state employees' acceptance of compensation from IMF accounts for service as custodians of the funds violates the state's conflict of interest policy found in KRS Chapter 11A. You also ask whether state employees may perform other duties at the armories and be compensated by the IMF account.

KRS 11A.040(4) and (5) provide:

(4) A public servant shall not knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

(a) A contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain; or

(b) Agreements which may directly or indirectly involve public funds disbursed through entitlement programs; or

(c) A public servant's spouse or child doing business with any state agency other than the agency by which the public servant is employed or which he supervises; or

(d) Purchases from a state agency that are available on the same terms to the general public or that are made at public auction.

(5) A public servant shall not knowingly accept compensation, other than that provided by law for public servants, for performance of his official duties without the prior approval of the commission.

Pursuant to KRS 36.086, the Department is responsible for the establishment of an IMF account for each National Guard armory. Funds derived from local organizations for the use of

EXECUTIVE BRANCH ETHICS COMMISSION  
ADVISORY OPINION 05-16  
March 30, 2005  
Page Three

armory buildings and grounds, and other events, shall be deposited in the accounts. These funds are to be used for miscellaneous maintenance and repairs and other services and equipment expenses associated with routine armory operations. Any expense of an IMF account in excess of \$50 must be approved by the Adjutant General or his designated representative. The Adjutant General also must provide an annual report to the Legislative Research Commission and the Secretary of the Finance and Administration Cabinet identifying the receipts and expenditures of the IMF accounts.

Pursuant to KRS 11.040(4) above, an employee of the Department is prohibited from having a contract or agreement to provide services for the state agency by which he is employed. Thus, armory managers and state maintenance workers are prohibited from having any kind of agreement with the Department to provide services as either a custodian of an IMF account or for security or maintenance purposes.

The Commission notes that the Department has responsibility for both the establishment and oversight of the IMF accounts. Thus, it appears that the Department is responsible for the monies in the IMF funds. Although the custodian and other workers are paid directly from the IMF accounts for their services, it appears that such employees have an "agreement" with the Department, since the Department is ultimately responsible for the IMF accounts. See enclosed Advisory Opinion 00-22 which addresses a similar issue within the Department of Corrections.

Further, if the Department determines that it is a part of the armory managers' daily responsibilities to maintain an IMF account, KRS 11A.040(5) prohibits employees from receiving additional compensation for performance of their official duties without prior approval of the Commission.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

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**BY CHAIR:** James S. Willhite

Enclosure: Advisory Opinion 00-22