

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 05-25**

May 27, 2005

RE:            May the Executive Branch Ethics Commission investigate violations of or impose penalties for violations of agency in-house policies for unpaid volunteers?

DECISION:    No.

This opinion is in response to your May 9, 2005, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 27, 2005 meeting of the Commission and the following opinion is issued.

You refer to the ethics policy established by the Governor's Office for its unpaid volunteers and the related compliance certification, and ask the following questions:

1.        *Is the policy as broad as KRS 11A? What, if any, prohibitions under KRS 11A are not addressed in the policy?*
2.        *Does the Commission have the statutory authority to investigate allegations of violations of the referenced policy?*
3.        *Can the Commission seek relief or impose penalties under KRS 11A for violations of the referenced policy?*

In Advisory Opinion 03-49, issued December 18, 2003, the Commission responded to questions by the Governor's transition team that had been raised regarding whether individuals who volunteer their time for state service are considered public servants subject to the Executive Branch Code of Ethics (the "Code") as contained in KRS Chapter 11A. To be subject to the Code, one must be a "public servant" as defined in KRS 11A.010(9).

In Advisory Opinion 03-49, based on the fact that the individuals in question were not appointed to positions in state service and were not compensated by the Commonwealth, the Commission opined that those individuals would not be considered employees nor would they

be considered public servants. This being the case, the “volunteers” would not be subject to the Code. The Advisory Opinion went on, however, to say that while not subject to the Code, the Commission envisioned potential conflicts of interest that could exist for certain individuals who volunteered their service, particularly if serving in policy-making or advisory roles, and therefore recommended that in order to avoid such potential conflicts, the Office of the Governor, or any other agency making use of volunteers, should establish policies for any volunteer policy-making individuals or advisors.

At a minimum, it was recommended that the policies prohibit volunteers from being involved in any interviews, discussions, or decisions concerning any agency that regulates, does business with, or makes discretionary decisions concerning the volunteer or a business owned by the volunteer.

The Commission also stated that volunteer service is a “gift” pursuant to KRS 11A.010(5) and 11A.045(1), and as such, volunteer service may be accepted by an agency only if the individual volunteering is not regulated by, doing business with, or seeking to influence the agency in any way. It was thus the opinion of the Commission that unless an individual is regulated by or doing business with the Office of the Governor, or seeking to influence the actions of the Office of the Governor, no apparent conflict would exist for members of the Governor’s staff to accept such volunteer service.

The Office of the Governor did establish a “volunteer policy” (a copy of which is attached), but in answer to your first question, that volunteer policy is not as broad as the Code. The policy does cover a number of potential conflicts of interest relating to the volunteers or businesses in which the volunteers might have an interest, but is narrower in scope than the provisions regarding conflicts of interest within the Code. Further, the volunteer policy does not address other areas such as acceptance of gifts, solicitation, use of one’s position to give himself or others an advantage, representation, post-“employment”, financial disclosure, or enforcement of the policy.

Regarding your second question, the Commission does not have the statutory authority to investigate allegations of violations of the volunteer policy. Pursuant to KRS 11A.080, the Commission only has the authority to investigate violations of the Code. The volunteer policy is not part of the Code.

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Finally, the Commission cannot seek relief or impose penalties under KRS Chapter 11A for violations of the referenced policy. There exists no provision under the Code that would allow for either. The volunteer policy was developed by the Office of the Governor upon the advice of the Commission, but it is strictly a self-monitoring action by that agency.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

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**BY CHAIR:** James S. Willhite

Attachments: Advisory Opinion 03-49  
Volunteer Policy

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 03-49**

December 18, 2003

RE: Are individuals who volunteer their services to state government subject to the Executive Branch Code of Ethics?

DECISION: No, however potential conflicts may exist.

This opinion is issued by the Executive Branch Ethics Commission (the "Commission") upon its own motion. This matter was reviewed at the December 18, 2003, meeting of the Commission.

A number of questions have been raised by the Governor's transition team members, as well as by other state employees, as to whether individuals who volunteer their time for state service are considered public servants subject to the Executive Branch Code of Ethics. In an attempt to answer these questions and other questions that might arise, the Commission issues the following opinion.

The commission views this matter in light of the following provisions in KRS Chapter 11A.

KRS 11A.005 provides:

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
  - (a) A public servant be independent and impartial;
  - (b) Government policy and decisions be made through the established processes of government;

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(c) A public servant not use public office to obtain private benefits; and

(d) The public has confidence in the integrity of its government and public servants.

(2) The principles of ethical behavior for public servants shall recognize that:

(a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;

(b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and

(c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.010(9) provides:

(9) "Public servant" means:

(a) The Governor;

(b) The Lieutenant Governor;

(c) The Secretary of State;

(d) The Attorney General;

(e) The Treasurer;

(f) The Commissioner of Agriculture;

(g) The Auditor of Public Accounts; and

(h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

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In previous advisory opinions (copies of which are enclosed), the Commission has addressed whether state agencies may accept donations of funding, tangible gifts, and in-kind contributions, but it has never specifically addressed the issue of acceptance by an agency of the donation of service. Several questions also need to be addressed concerning whether individuals who volunteer their time, but receive no compensation, are considered public servants subject to the Executive Branch Code of Ethics, and whether the type of volunteer service provided to the Commonwealth makes a difference.

The question as to whether individuals who donate their service of time to the Commonwealth without compensation, are considered public servants, subject to the code of ethics, is dependent on whether the individual is an "employee" as defined in state personnel statute KRS 18A.005(14). "Employee" means a person regularly appointed to a position in the state service for which he is compensated on a full-time, part-time, or interim basis.

The Commission believes that an individual is an employee only if a personnel action has been issued establishing a position and compensation for the individual, even if compensation is only \$1. If an individual is not appointed to a position in state service and is not compensated by the Commonwealth, then it appears that he would not be considered an employee and also would not be considered a public servant, subject to the code of ethics. Thus, any individual who volunteers time and service to the Commonwealth, regardless of whether the individual is performing ministerial tasks or serving as a policy advisor to the Governor, would not be subject to the Executive Branch Code of Ethics.

However, even though such individuals would not be under the code of ethics, the Commission envisions potential conflicts of interest that may exist for certain individuals who volunteer their service to the state even if they are not "employees". Volunteers who are serving in policy-making or advisory roles may be put in positions that pose conflicts with their private or professional interests. In order to avoid such potential conflicts for volunteers, the Commission advises the Office of the Governor, and any other agency that wishes to use the services of volunteers, to establish policies for any volunteer policy-making individuals or advisors that would serve to eliminate potential conflicts of interest for such volunteers. Such action would promote public confidence in the processes of government and eliminate any abuse of positions of public trust.

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At a minimum, the Commission believes policies should be implemented to prohibit volunteers from involvement, in their volunteer positions, in any interviews, discussions, or decisions concerning any agency that regulates, does business with, or makes discretionary decisions concerning the volunteer or a business owned by the volunteer.

The Commission also advises agency personnel to seek guidance from the Personnel Cabinet on the appropriateness of utilizing volunteer staff.

A second issue regarding volunteer service that the Commission believes needs to be addressed is whether such volunteer service is considered a gift, pursuant to 11A.010(5) and KRS 11A.045(1), and may be accepted by the agency.

Regarding gifts, KRS 11A.010(5) provides:

(5) "Gift" means a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received; "gift" does not include gifts from family members, campaign contributions, or door prizes available to the public;

KRS 11A.045(1) provides:

(1) No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars (\$25) in a single calendar year from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or attempting to influence the actions of the agency in which the public servant is employed or which he supervises, or from any group or association which has as its primary purpose the representation of those persons or businesses. Nothing contained in this subsection shall prohibit the commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

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As stated above, the Commission has opined in previously issued advisory opinions that it believes that **an agency** should not accept gifts with a value of over \$25 from any person or business regulated by, doing business with, or seeking to influence the agency in any way. As "service" is defined as a gift in KRS 11A.010(5) above, the Commission believes that volunteer service may be accepted by an agency only if the individual volunteering is not regulated by, doing business with, or seeking to influence the state agency for which he is volunteering. Thus, the Office of the Governor may utilize the services of individuals who may be regulated or doing business with other agencies within state government, provided the individuals are not given tasks pertaining to those other agencies. Although the Commission believes that the Governor has ultimate authority over all executive branch agencies (other than other elected officials), unless an individual is regulated by or doing business with the Office of the Governor, or is seeking to influence the actions of the Governor, no apparent conflict will exist for members of the Governor's staff to accept such volunteer service.

Finally, the Commission encourages any individual appointed to and employed in state government positions within an agency that previously regulated or did business with the individual's former employer to abstain from involvement for a reasonable period of time (six months, one year, etc.) in any matters concerning regulation or business of former employers. See Advisory Opinion 98-31.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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BY CHAIR: Joseph B. Helm, Jr.

Enclosures: Advisory Opinion 96-42  
Advisory Opinion 98-31  
Advisory Opinion 02-48



## **VOLUNTEER POLICY**

In order to utilize a volunteer in the Office of the Governor, the volunteer must first be approved by John McCarthy and John Roach.

Volunteers in the Office of the Governor who serve in policy-making or advisory roles may be put in situations that pose conflicts with their private or professional interests. In order to avoid impropriety or the appearance of impropriety, the Office of the Governor mandates the following ethics rules for its volunteers:

- No person lobbying or seeking to influence the Office of the Governor may volunteer in the Office of the Governor.
- No person doing business with or directly regulated by the Office of the Governor may volunteer in the Office of the Governor.
- A volunteer in the Office of the Governor may not take part in any interview, discussion or decision which relates to any agency that regulates, does business with, or makes discretionary decisions concerning the volunteer or a business in which the volunteer has an interest.
- A volunteer in the Office of the Governor may not perform any task which relates to an agency that regulates, does business with, or makes discretionary decisions concerning the volunteer or a business in which the volunteer has an interest.
- A volunteer in the Office of the Governor may not seek to influence the official actions of the Governor in any matter which concerns the volunteer or a business in which the volunteer has an interest.