

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-35

September 2, 2005

RE: May the Cabinet for Health and Family Services, in this fact specific situation, partner with and accept donation from private corporation to benefit a children's health program?

DECISION: Yes.

This opinion is issued in response to your August 11, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 2, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The function of the Cabinet for Health and Family Services (the "Cabinet") is to improve the health of all Kentuckians, including the delivery of preventive health services in a safe and effective fashion. The Secretary of the Cabinet has the authority, pursuant to KRS 194A.025 (3), to enter into agreements with corporations as necessary to carry out the general intent and purposes of the Cabinet. A corporation that owns various restaurants has expressed an interest in partnering with the Cabinet in designing and implementing a series of four middle school-based physical activity programs to increase childhood physical activity, a key component in any effort to reduce and prevent childhood obesity.

The corporation will donate \$80,000 toward the cost of implementation of the pilot programs, primarily training and evaluation activities and for the purchase of necessary equipment. All pilot programs are to operate during portions of the 2005-06 school year and are to be offered during non-school hours. Management and oversight of the pilot programs will be provided through the Family Resource Youth Service Centers associated with the schools chosen for the programs.

Pursuant to KRS 217, the Department for Public Health, within the Cabinet, is responsible for the inspection of retail food service establishments for compliance with the Food Service Code, which is accomplished through agreements with local health departments. It is

probable that local health departments, which are not part of the Cabinet, will inspect franchisees of the corporation for compliance. This inspection process is routine for the food service retailers and would not be impacted in any way by the proposed corporate partnership arrangement with the parent corporation. You state that employees of the Cabinet would not have authority to direct or impact any of the inspections at the local health departments.

Local health departments operate under a local (or district) board of health, members of which are appointed by the Secretary of Health and Family Services. The local board of health employs the public health director who then is responsible for the hiring of employees who conduct inspections.

You ask whether the Cabinet may enter into an agreement with such a corporate partner and accept a donation to facilitate the development of physical activity pilot programs in middle schools in Kentucky. The Cabinet is aware of Advisory Opinion 02-21 where the Commission held that such a partnership arrangement must benefit the Commonwealth and be open to any company that wishes to partner with the state. You have provided a Memorandum of Understanding that cites the benefit of such a program to the citizens of the Commonwealth and specifically provides that other corporate partners interested in addressing child health and nutrition are welcome to participate. Further, you state that the acceptance of a donation by the Cabinet from the corporation is not an endorsement of any product.

KRS 11A.020(1)(d) provides:

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

Further, 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.

Advisory Opinion 02-21 states that state agencies and employees acting as representatives of their agencies should take great care not to reflect that they are endorsing or promoting a specific product or company. However, in this case, the Commission believes that since the state program appears to benefit the health of the children of the Commonwealth and the partnering is open to any company interested in such a partnership, the Cabinet may partner with the corporation for the benefit of the program. As stated in Advisory Opinion 02-21, the Commission believes that the overriding public benefit from such a partnership is sufficient to justify any benefit to the private company.

The question as to whether the Cabinet may accept the donation for the benefit of the program, however, is dependent on whether the Cabinet directly regulates the corporation or its franchisees. In Advisory Opinion 02-21, the Commission further states that a state agency is not prohibited from soliciting corporate donations for state-sponsored programs, provided the entities solicited have no business or regulatory relationship with the agency and provided the entities are not lobbying or seeking to influence matters of the state agency. Although the Cabinet has the ultimate authority in regulating such food establishments, you state that the health departments are responsible for the inspections of the franchisees of the corporation, and no decisions are made by the Cabinet concerning the inspections. Thus, in this fact specific situation, the Commission believes that no direct relationship exists between the franchisees of the corporation and the Cabinet that could cause a conflict of interest if the Cabinet were to accept such a donation. Any indirect regulation is insulated by the fact that the employees of the Health Department are not under the authority of the Cabinet.

The Commission also believes that had the corporation partnered with another state agency, such as the Department of Education rather than the Cabinet, no potential conflict

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 05-35
September 2, 2005
Page Four

issue would exist; however, because the regulation by the Cabinet is indirect and the level of separation between the Cabinet and the local health departments is distinct, insulation is provided from any potential for conflict in this specific situation.

Sincerely

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BY CHAIR: John A. Webb