



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 12-07
December 3, 2012

- RE:**
1. May an agency accept donations of monetary or tangible items in excess of \$25 from a non-profit organization where these donated items will be given to employees selected to receive awards given through an agency awards program?
 2. May agency employees selected as a recipient of an agency award accept monetary or tangible items in excess of \$25 directly from a non-profit organization?
 3. May agency employees who are recipients of an award given by a non-profit organization accept monetary or tangible items in excess of \$25?
 4. May employees who are recipients of an award given by a business or private organization accept monetary or tangible items in excess of \$25?

- DECISION:**
1. No, but specific awards could receive approval if certain criteria are met.
 2. No, but specific awards could receive approval if certain criteria are met.
 3. No, but specific awards could receive approval if certain criteria are met.
 4. No, but specific awards could receive approval if certain criteria are met.

This opinion is issued in response to the Kentucky Department of Fish and Wildlife Resources ("KDFWR") October 17, 2012, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The request was reviewed at the December 3, 2012, meeting of the Commission and the following opinion is issued.

As background your request provides the following: KDFWR is developing an employee awards program that will recognize employees across several KDFWR programs and divisions. Awards will not be given to all employees but will be based on a nomination process that allows employees who demonstrate certain performance based criteria to be recognized for their notable accomplishments.

As currently proposed, awards issued through this program will be in the form of verbal or written acknowledgment along with a plaque or other framed item worth less than \$25. However, the KDFWR may like to offer those employees who are selected for these awards additional recognition in the form of monetary or tangible items in excess of \$25. Therefore, KDFWR is asking the Commission to consider four questions, which will be discussed below. In the event the Executive Branch Code of Ethics (the "Code of Ethics") or other statute prohibits this additional recognition, the KDFWR would like to request an exception to the Code of Ethics and if granted, proceed with an awards program that may offer additional recognition in the form of monetary or tangible items in excess of \$25.

Your questions are as follows:

- 1) *May the KDFWR accept donations of monetary or tangible items in excess of \$25 from a non-profit organization where these donated items will be given to employees selected to receive awards given through a KDFWR awards program? Does it matter if the non-profit organization does business with KDFWR?*
 - a. *Example: The Kentucky Fish and Wildlife Foundation decides to donate five \$100 Bass Pro Shop Gift Cards to the KDFWR. May these gift cards be given to the five division winners selected annually by their program directors?*
- 2) *May the KDFWR employees selected as a recipient of a KDFWR award accept monetary or tangible items in excess of \$25 directly from a non-profit organization? Does it matter if the non-profit organization does business with KDFWR?*
 - a. *Example: Ducks Unlimited decides to give each KDFWR employee of the month a \$50 Visa Gift Card. May a KDFWR employee accept the gift card?*
- 3) *May KDFWR employees who are recipients of an award given by a non-profit organization accept monetary or tangible items in excess of \$25? Does it matter if the non-profit organization does business with KDFWR?*
 - a. *Example: A KDFWR employee is selected as the Conservation Officer of the Year by The Nature Conservancy (TNC). This award recipient is historically given a limited edition rifle. May a KDFWR employee accept a rifle as recognition for this accomplishment?*
- 4) *May KDFWR employees who are recipients of an award given by a business or private organization accept monetary or tangible items in excess of \$25? Does it matter if the business or private organization does business with KDFWR?*

- a. *Example: Cabela's sporting goods store selects a KDFWR employee as their Biologist of the Year. In recognition of this accomplishment Cabela's awards the employee with a fly fishing rod. May a KDFWR employee accept the fly fishing rod as recognition for this accomplishment?*

The provisions of the Code of Ethics most pertinent to your questions are KRS 11A.040(5) and KRS 11A.045(1).

KRS 11A.040(5) states as follows:

No public servant shall 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.

"Compensation" is defined in KRS 11A.010(3):

"Compensation" means any money, thing of value, or economic benefit conferred on, or received by, any person in return for services rendered, or to be rendered, by himself or another[.]

KRS 11A.045(1) states as follows:

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.

"Gift" is defined in KRS 11A.010(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[.]

Thus when considering awards programs, both KRS 11A.040(5) as well as KRS 11A.045(1) must be considered. The idea of incentives or awards for accomplishment has been addressed by the Commission previously in several advisory opinions. A very similar proposal was reviewed in Advisory Opinion 00-51. In that opinion, an inquiry was made regarding a committee within a different branch of state government that was working with an Executive Branch agency to initiate a program which would provide awards to employees of that Executive Branch agency who "excel in the services they

provide....” The awards were expected to be donated by local businesses with each having a value of approximately \$50. An official within the agency would determine who would receive the awards, which would then be given by the Committee. In that opinion, the Commission, taking specific note of the provisions of KRS 11A.040(5), stated that:

An employee is prohibited by KRS 11A.045(1) from accepting an award that exceeds a value of \$25 from a vendor of his agency. Similarly, the Commission believes that the committee may award prizes for exceptional service to executive branch employees, in addition to their compensation provided by law, but such awards should not have a value of greater than \$25 each.

Although such awards may appear to be compensation for performance of official duties, the Commission does not believe that small token awards, with a value of less than \$25, rise to the level of “compensation” and tend not to create a conflict for the employee The Commission sees the benefit of such awards in promoting improvement in the performance of Commonwealth employees.

This opinion makes it clear that KDFWR’s current plan for its employee awards program to issue awards in the form of verbal or written acknowledgment along with a plaque or other framed item worth less than \$25 is perfectly acceptable under the Code of Ethics. But it does raise concerns in regard to the questions you have asked the Commission to consider.

More recently, in Advisory Opinion 12-01, the Kentucky Housing Corporation (“KHC”) inquired about implementing an employee incentive program which would provide KHC employees with cash awards for offering suggestions which improve KHC productivity and services. In the Advisory Opinion, the Commission expressed concern that the proposed program could result in an employee receiving additional compensation for the performance of his official duties in violation of KRS 11A.040(5). The Commission opined that if KHC added a disqualifier stating that any suggestion that “falls within the scope of the duties of the suggester” would be ineligible for a cash award, the proposed program would not pose any problem under the Code of Ethics.

The underlying concern is that executive branch employees are required to be independent and impartial. Acceptance of monetary or tangible rewards for the performance of one’s official duties, particularly those donated by outside entities, may create a perception that decisions made by your employees are not objective. Being given substantial awards for the performance of official duties creates concerns under KRS 11A.040(5) even in situations where KRS 11A.045(1) is not an issue. Based on this rationale and a review of the relevant statutes, the answers to your questions are as follows:

In regard to question number one, while the KDFWR may accept donations of monetary or tangible items in excess of \$25 from a non-profit organization that does not do business with the agency, as a general rule these donated items may not be given to employees selected to receive awards given through a KDFWR awards program as it would be providing the employees additional compensation for the performance of their official duties. In regard to whether KDFWR may accept donations in excess of \$25 from non-profit organizations that do business with the agency, while it is not expressly prohibited, it is the Commission’s opinion that KDFWR should not do so as it creates an appearance of impropriety.

In regard to question number two, as a general rule KDFWR employees selected as a recipient of a KDFWR award may not accept monetary or tangible items in excess of \$25 directly from a non-profit organization as to do so would be accepting additional compensation for the performance of their official duties. For this rationale, it does not matter whether the non-profit does business with KDFWR.

In regard to question number three, as a general rule KDFWR employees who are recipients of an award given by a non-profit organization may not accept monetary or tangible items in excess of \$25 as to do so would be accepting additional compensation for the performance of their official duties. For this rationale, it does not matter whether the non-profit does business with KDFWR.

In regard to question number four, as a general rule KDFWR employees who are recipients of an award given by a business or private organization may not accept monetary or tangible items in excess of \$25 as to do so would be accepting additional compensation for the performance of their official duties. For this rationale, it does not matter whether the organization does business with KDFWR.

However, recognizing that KRS 11A.040(5) provides the Commission with the authority to give prior approval for a public servant to accept compensation, other than that provided by law, for performance of official duties, the Commission is willing to review and consider granting its approval of certain specific programs or awards that recognize an employee for performance that could be said to *exceed* or to *go above and beyond* his official duties. While the programs you provide as examples in your request appear to meet this standard, e.g., “employee of the month,” “Conservation Officer of the Year,” “Biologist of the Year,” the Commission would prefer to review the specific criteria for each award that KDFWR wishes to include in its employee awards program before granting its prior approval. Therefore, while at this time the Commission denies your request for an exception under KRS 11A.040(5), in part because the request is too broad, the Commission is willing to revisit the issue if KDFWR submits more detailed information about specific awards that are to be part of the employee awards program.

However, as discussed above, KRS 11A.045(1) must be considered in regard to each proposed award as well. Neither KDFWR itself nor any of its employees, either directly or indirectly, may accept anything over \$25 in value 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 KDFWR, or from any group or association which has as its primary purpose the representation of those persons or businesses. Again, while this does not specifically preclude non-profit organizations that do business with or are regulated by KDFWR, the Commission does believe that to accept “gifts” from such organizations would create an appearance of impropriety. While the Commission may authorize exceptions to this general rule, such exceptions are only granted on a case by case basis and only when the exemption would not create an appearance of impropriety. While your request does provide some specific examples, they are not specific enough for the Commission to authorize exceptions under KRS 11A.045(1).

Using an example you provided for illustrative purposes, if Cabela’s is a vendor of KDFWR, then the “Biologist of the Year” could not accept the fly fishing rod, assuming it exceeded \$25 in value, without requesting an exemption under KRS 11A.045(1) from the Commission, even if the restrictions in KRS 11A.040(5) were not an issue. Assuming the granting of this exemption would not create an appearance of impropriety, the Commission could grant the “Biologist of the Year’s” request, if no other prohibitions existed. But each year, the particular individual chosen “Biologist of the Year” would have

to make this same request. For example, the Commission routinely grants exceptions to KRS 11A.045(1) for the acceptance of wedding gifts, as in calendar year 2009 when it granted four such requests, but the Commission cannot grant a blanket exception for this purpose. Each time the employee involved with the award must make the request for an exception if the source of the gift is a person or business that does business with or is regulated by KDFWR.

To summarize, the Commission is not willing to grant any exceptions at this time, but is willing to review specific awards that KDFWR wishes to include in its employee awards program. If the awards include criteria that indicate the potential recipients have exceeded or gone above and beyond their official duties, then the Commission will consider granting prior approval of those specific awards so that the employees may accept them without violating KRS 11A.040(5). However, in order for KDFWR or any of its individual employees, either directly or indirectly, to accept anything over \$25 in value 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 KDFWR, or from any group or association which has as its primary purpose the representation of those persons or businesses, the Commission would also have to authorize an exception to KRS 11A.045(1) before the award could be accepted. This can only be done on a case by case basis and if the appearance of impropriety would not be created by the granting of the exemption.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Vice-Chair: W. David Denton

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