

Executive Branch Ethics Commission
ADVISORY OPINION 12-01
March 19, 2012

- RE:**
1. May the Kentucky Housing Corporation implement an employee incentive program which would provide employees with cash awards for offering suggestions which improve productivity and services?
 2. May the Kentucky Housing Corporation implement a vacation leave buy-back program?

- DECISION:**
1. Yes, with certain restrictions.
 2. Yes, if properly implemented.

This opinion is issued in response to the Kentucky Housing Corporation's ("KHC") January 24, 2012, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). The request was reviewed at the March 19, 2012, meeting of the Commission and the following opinion is issued.

KHC requests the Commission's opinion concerning two cost-savings initiatives recently proposed by a KHC employee committee. As background, the request provided the following relevant information in regard to KHC: 1) KHC is a "de jure municipal corporation and political subdivision of the Commonwealth created for the performance of essential public functions and the serving of public purposes in improving and promoting the health, welfare and prosperity of the people of the Commonwealth of Kentucky by the production of residential housing." See KRS 198A.020(4) and KRS 198A.030(2). 2) KHC participates in the state retirement and health care systems and is subject to the Executive Branch Code of Ethics ("Code of Ethics"), but its employees are not subject to the requirements of KRS Chapter 18A. 3) The Corporation is governed by a board of directors pursuant to KRS 198A.030(3) and, for administrative purposes, is attached to the Finance and Administration Cabinet.

According to the request, due to the recent economic downturn KHC has begun to examine every possible way to reduce costs and increase profitability. An employee committee has recently recommended to KHC management that KHC implement two proposed programs.

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One program is an employee incentive program, modeled upon the program in place for state government employees pursuant to 101 KAR 2:120, which would provide KHC employees with cash awards for offering suggestions which improve KHC productivity and services. A copy of this proposed policy, entitled "Employee Suggestion Program," was attached to the opinion request. The second program is one where KHC employees would be permitted to have KHC buy back some of their vacation time. A copy of this proposal was attached to the opinion request as well.

KHC asks whether either of these proposed programs would pose any problem under the Code of Ethics.

The relevant provisions of the Ethics Code appear to be KRS 11A.040(4) and (5), which state as follows:

(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; or

(e) Sales of craft items to a state park by interim state employees designated as craftspersons under KRS 148.257.

(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.

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In regard to KHC's proposal to establish an employee incentive program, the Commission is concerned that the proposed policy, as currently written, could result in an employee receiving additional compensation for the performance of his official duties, a violation of KRS 11A.040(5). KHC appears to have based its proposed policy on the one followed by executive branch employees who fall under the provisions of KRS Chapter 18A, but there is a critical difference between the two incentive programs. While 101 KAR 2:120 contains a provision, at Section 1(2)(c)(1), that makes a suggestion that "falls within the scope of the duties of the suggester" ineligible for a cash award, KHC's proposed program does not contain such a disqualifier. If a disqualifier of this sort were to be added to KHC's proposed Employee Suggestion Program, then it is the Commission's opinion that the program would not pose any problem under the Code of Ethics.

In regard to the vacation leave buy-back program, it is the Commission's opinion that such a program, if properly implemented, would also not pose any problem under the Code of Ethics. While the concept does at first glance present the appearance of KHC employees entering into an agreement or sale with their own agency, in violation of KRS 11A.040(4), upon closer review the Commission concludes that the proposed program does not fall within the sort of activity that the statute is intended to prevent. It is the Commission's opinion that KRS 11A.040(4) is intended to prevent public servants, in their private capacity, from entering into contracts or agreements with their own agency for the provision of goods or services. The proposed vacation leave buy-back program presents a situation whereby a public servant may choose to convert one form of employee benefit, i.e., paid vacation leave, to another form, in this case a cash payment. Either form of benefit comes to the public servants by virtue of their employment at KHC, not to them in their private capacity.

The Commission does caution that if the vacation leave buy-back program is implemented, all employees must be given the opportunity to exercise this option, and all employees must be allowed to freely choose whether they wish to do so. No one should use their official positions to pressure employees either way. Further, in issuing this advisory opinion, the only determination being made by the Commission is whether these proposals are acceptable under the Executive Branch Code of Ethics. It is making no determination regarding their propriety in any other regard.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Ronald L. Green

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