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EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 17-01
January 23, 2017

GIFTS EXCEPTION NO. 2017-1

AMENDING ADVISORY OPINIONS 00-15 AND 06-19

RE:

- (1) May the Kentucky Human Rights Commission accept gifts as dictated by KRS 344.190(6) without violating KRS 11A.045?
- (2) If so, do Advisory Opinion 16-09 and the provisions of the amendment to 9 KAR 1:090, once enacted, apply to the KCHR when accepting gifts on behalf of the agency?

DECISION:

- (1) Yes, within limitations.
- (2) No

This opinion is issued in response to your January 4, 2017 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") on behalf of the Kentucky Commission on Human Rights ("KCHR"). The Commission, on its own, is reviewing this request as a permanent exemption to KRS 11A.045(1). This matter was reviewed at the January 23, 2017 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows: KCHR is the state agency empowered to enforce the Kentucky Civil Rights Act ("KCRA"). As such, the KCHR's jurisdiction is broad and is statewide. Its enforcement powers include receiving, filing, investigation, conciliating, holding hearings, and ultimately adjudicating complaints of discrimination in employment, public accommodations, housing and credit transactions. KRS 344.190(8). The KCHR is also empowered to encourage fair treatment and discourage discrimination as well as conduct research projects and write reports on such topics. KRS 344.170 and 344.180. The KCHR

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regularly exercises its enforcement jurisdiction against individuals, businesses, and other enterprises through the state, including: employment agencies, labor unions, employers with at least eight (8) employees, public accommodations, real estate operators, housing providers, financial institutions and banks, as well as the state government. As such, its authority is widespread and considerable.

The General Assembly empowered the KCHR with the ability to “accept gifts, bequests, grants, or other payments, public or private, to help finance its activities” in enforcing KRS Chapter 344. KRS 344.190(6). KRS 11A.045, the gifts prohibition of the Executive Branch Code of Ethics (“Ethics Code”) was enacted in 1994 in the same session in which KRS 344.190 was last amended by the General Assembly.

In Advisory Opinion 00-15, the Commission in advising the KCHR on how to conduct its 40th Anniversary Program, instructed the KCHR by stating the following: (1) employees shall not solicit or accept donations from persons or businesses regulated by or doing business with the KCHR; (2) Solicitation or acceptance of donations by employees of the KCHR from entities that are potential vendors or may be regulated by the KCHR creates a conflict of interest in appearance, if not in fact, for those employees; (3) the KCHR is prohibited from accepting donations or grants from local governmental entities if such entities have the potential to be regulated by the KCHR.

In Advisory Opinion 06-19, the Commission reviewed the KCHR’s proposal to provide paid training to the general public and individuals and legal entities that are subject to the provisions of the Kentucky Civil Rights Act. The Commission specifically reviewed the provisions of KRS 344.190(6) in formulating its opinion. The Commission determined that KRS 11A.045, as is its longstanding interpretation, applies to public servants as well as state agencies in prohibiting them from soliciting or accepting gifts from persons or businesses that do business with, are regulated by, are seeking grants from, are involved in litigation against, or are lobbying or attempting to influence the actions of the state agency. As such, the Commission opined that “while KCHR has the statutory authority to accept gifts or bequests, grants, or other payments, to help finance its activities, the Commission believes KCHR must do so within the parameters of” the Ethics Code.

KRS 11A.005 provides a statement of public policy for enforcing the Ethics Code:

- (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;

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- (b) Government policy and decisions be made through the established processes of government;
 - (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.020 provides:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (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.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

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

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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.

To address your first question, we must review how the Commission has addressed the issue of gifts and state agencies in the past. In Advisory Opinions 93-23 and 93-35, the Commission stated that an agency's acceptance of gratuities from an entity which seeks to do business with or is regulated by the agency would create a conflict of interest for the agency and would tend to damage public confidence in the integrity of government. Beginning in Advisory Opinion 96-42, the Commission began establishing its long-standing consistent interpretation as precedent that state agencies, in addition to public servants, may not solicit or accept gifts, including in-kind contributions, from persons or businesses that do business with, are regulated by, receiving grants from, or are seeking to influence the actions of the state agency. In Advisory Opinion 02-48, the Commission first opined that even when a state agency has statutory authority to accept gifts and in-kind contributions, the Commission believes the state agency must do so within the parameters of its interpretation of the ethics law. The Commission, since 2002, has indeed consistently held that KRS 11A.045 must be followed by state agencies despite some agencies having specific statutory authority to accept or receive gifts.

In drawing the conclusion that state agencies must follow the provisions of KRS 11A.045 as would any public servant in spite of any specific statutes to the contrary, it seems that the Commission never considered the doctrine of statutory interpretation that dictates specific statutes override general statutes. The Kentucky Supreme Court has determined that when interpreting a statute, it is the Court's duty "to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor to discover a meaning not reasonably ascertainable from the language used." *Light v. City of Louisville*, 248 S.W.3d 559, 561 (Ky. 2008) (quoting from *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky.1994)). In the context of the Commission's responsibility to interpret KRS Chapter 11A, the Commission must also exercise this duty.

The Supreme Court further dictated the process by which conflicting statutes are to be reviewed: "[s]ince we have two statutes whose provisions are in conflict, the conflict must be resolved under the doctrine of *in paria materia*. *Economy Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783 (Ky.1958). It is incumbent upon courts to resolve the conflict between the two statutes so as to give effect to both." *Id.* at 563. Pursuant to the

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Commission's current interpretation of the interplay of KRS 11A.045 to a statute specifically allowing a state agency to accept or receive gifts, the Commission's current interpretation is in effect nullifying the KCHR's ability to accept any gifts in light of its widespread authority.

The Commission must be guided by the Supreme Court, which dictated that "[i]n harmonizing the conflict between two statutes that relate to the same subject, Kentucky follows the rule of statutory construction that the more specific statute controls over the more general statute." *Id.* at 563 (citing *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky.1997); *City of Bowling Green v. Board of Education of Bowling Green Independent School District*, 443 S.W.2d 243 (Ky.1969)).

Nevertheless, even if the Commission is not convinced that KRS 344.190(6) is specific and KRS 11A.045 is general, it must be further guided by the principle of statutory construction that states where an apparent conflict in statutes exists, the "later statute is given effect over an earlier statute." *Abel v. Austin*, 411 S.W.3d 728, 738-39 (Ky. 2013). KRS 344.190(6) was last reviewed by the General Assembly in 1994, the same year that KRS 11A.045 was first enacted. We must assume that the General Assembly was aware that it was enacting two statutes with potentially disparate applications. In effect, the Commission must follow the same rule of statutory interpretation that applies to the courts; the more specific statute controls.

KRS 344.190(6) applies specifically to the KCHR, whereas KRS 11A.045 is a general statute that applies broadly to all public servants in the Executive Branch. The Commission has interpreted KRS 11A.045 to apply to state agencies because in practice it is difficult to remove a public servant from a state agency. However, the Commission's interpretation of applying KRS 11A.045 generally to state agencies must be subservient to the General Assembly's specific language to the contrary. KRS 344.190(6) is a specific statute applying directly to a state agency and plainly allowing it to accept gifts with no conditions. We must assume the General Assembly was aware of the widespread authority it gave to KCHR when it also gave the KCHR the ability to accept gifts from those entities it regulates. Therefore, for the purposes of determining whether KCHR can follow its own statute, which dictates that it may accept "gifts, bequests, grants, or other payments, public or private, to help finance its activities," the Commission must interpret and enforce KRS 11A.045 in a way that does not nullify KRS 344.190(6).

As a result of the reasoning above, the Commission reverses the language in its decisions in Advisory Opinion 00-15 and Advisory Opinion 06-19 that are contrary to the language in KRS 344.190(6) that provides KCHR with statutory authority to accept gifts or bequests, grants, or other payments, to help finance its activities. The Commission believes KCHR may accept such gifts or bequests, grants or other payments without first following the parameters of KRS 11A.045, but must still do so within the parameters of the remaining provisions of the Ethics Code. The Commission advises that KRS 344.190(6) only applies to KCHR as a state agency in

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carrying out its statutory and regulatory mandates as dictated by KRS Chapter 344. KRS 344.190(6) does not apply to KCHR's individual employees when deciding whether they can accept gifts for their own personal benefit. Individual employees must still follow the dictates of KRS 11A.045 in their dealings with persons or businesses offering them gifts in value over \$25.

Furthermore, the KCHR must diligently avoid creating an appearance that it is suspending enforcement of the KCRA in exchange for gifts to the KCHR. Such conduct would violate the provisions of KRS 11A.020. To avoid a perception that such a *quid pro quo* scenario is created when a regulated entity is providing a gift to KCHR, the employees of KCHR involved with investigations and enforcement of the KCRA should not be involved in accepting such gifts on behalf of the agency.

Finally, the Commission will address your second question concerning the application of Advisory Opinion 16-09 and the anticipated enactment of the amendment to 9 KAR 1:060, which is currently in the process of being amended pursuant to KRS Chapter 13A. Advisory Opinion 16-09 is in effect until the amendment to 9 KAR 1:060 becomes final.

9 KAR 1:060 currently applies to interpret and enforce the provisions of KRS 11A.055 concerning public servants and state agencies fundraising for charities in which the funds are given to the charity. The proposed amendment to 9 KAR 1:060 will apply as it relates to fulfilling the mandates of KRS 11A.045 when a state agency engages in fundraising for a charity and the funds will be controlled or given to the state agency. Even after the enactment of the amendment and in light of the reasoning above, 9 KAR 1:060 will continue to apply to KCHR as it relates to KRS 11A.055 and fundraising for charities. However, the amended provisions will not apply to KCHR as dictated by KRS 344.190(6) when the KCHR accepts and receives gifts to finance its own activities.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION


By Chair: W. David Denton

Attachments: Advisory Opinion 00-15
Advisory Opinion 06-19