



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
<http://ethics.ky.gov/>

W. DAVID DENTON
CHAIR

WILLIAM G. FRANCIS
VICE CHAIR

JUDGE SHEILA R. ISAAC (RET.)
CHRISTOPHER L. THACKER
THERESA F. CAMORIANO

KATHRYN H. GABHART
EXECUTIVE DIRECTOR

MISTY DUGGER JUDY
GENERAL COUNSEL

#3 FOUNTAIN PLACE
FRANKFORT, KY 40601
(502) 564-7954
FAX: (502) 564-2686

Executive Branch Ethics Commission
ADVISORY OPINION 17-02
January 23, 2017

GIFTS EXCEPTION NO. 2017-2

RE:

(1) May the Kentucky Center for the Arts Corporation (“KCAC”) accept gifts as dictated by KRS 153.420(8) 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 KCAC when accepting gifts on behalf of the public corporation?

DECISION:

(1) Yes, within limitations.

(2) No

This opinion is issued in response to your January 9, 2017 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") on behalf of the Kentucky Center for the Arts Corporation (“KCAC”). 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.

KCAC is public corporation empowered to construct, maintain, and operate the Kentucky Center for the Arts. KRS 153.420. The General Assembly empowered the KCAC with the ability to receive “financial contributions of local governments, private persons and foundations” to support its responsibilities. KRS 153.420(8). KRS 153.420 was enacted in 1980, but was last amended by the General Assembly in 2010. KRS 153.430(3) provides that such contributions may be used to fund the operation of the Kentucky Center for the Arts:

All revenues derived by the corporation from the use of the Kentucky Center for the Arts, or contributions to the Kentucky Center for the Arts from any other source as

ADVISORY OPINION 17-02

January 23, 2017

2 | Page

authorized in KRS 153.420, shall be solely used to defray the expenses of the Kentucky Center for the Arts, including payment on debt, the cost of management and operation of its facilities, the creation of an adequate reserve for repair, replacement, debt service and capital improvements, and the procurement of insurance and promotional activities. Any additional revenues in excess of amounts necessary to defray the actual costs and expenses properly related to the conduct of any activity authorized in KRS 153.420 derived by the corporation from any other source, or as a result of any other activity authorized in KRS 153.420, shall similarly be used solely for the purposes enumerated in this section. An annual audit of all funds of the corporation and its affiliated entities shall be made by the State Auditor of Public Accounts, and reported to the Governor.

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;
 - (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;

ADVISORY OPINION 17-02

January 23, 2017

3 | Page

- (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 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. KRS 11A.045, the gifts prohibition of the Executive Branch Code of Ethics (“Ethics Code”) was enacted in 1994 and last amended in 2000. 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

ADVISORY OPINION 17-02

January 23, 2017

4 | Page

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 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 KCAC's ability to accept any gifts from those entities with which it or the Cabinet does business or is attempting to influence the decisions or lobby the Cabinet.

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 153.420(8) 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 153.420 was last reviewed by the General Assembly in 2010, after KRS 11A.045 was last amended. 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 153.420(8) applies specifically to the KCAC, 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 153.420(8) is a specific statute applying directly to a state agency and plainly allowing it to accept gifts with no conditions. Indeed, such gifts are meant to fund the operations of the Kentucky Center for the Arts and are a benefit to the Commonwealth to defray such costs from imposition on the General Fund. See KRS 153.430(3). Therefore, for the

ADVISORY OPINION 17-02

January 23, 2017

5 | Page

purposes of determining whether KCAC can follow its own statute, which dictates that it may accept “financial contributions of . . . private persons and foundations,” the Commission must interpret and enforce KRS 11A.045 in a way that does not nullify KRS 153.420(8) or interfere with the application of KRS 153.430(3).


The Commission believes KCAC may accept such gifts or financial contributions 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 153.420(8) only applies to KCAC as a public corporation in carrying out its statutory and regulatory mandates as dictated by KRS Chapter 153. KRS 153.420(8) does not apply to KCAC’s individual employees when deciding whether they may 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.

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 KCAC as it relates to KRS 11A.055 and fundraising for charities. However, the amended provisions will not apply to KCAC as dictated by KRS 153.420(8) when the KCAC accepts and receives financial contributions to fund the Kentucky Center for the Arts.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton