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EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 21-13
November 18, 2021

RE: The Kentucky Department of Corrections (DOC) seeks guidance on the following questions concerning staff canteen accounts established to support the employee morale and recognition in correctional facilities:

- (1) May DOC staff participate in limited fundraising and administrative activities associated with managing outside bank accounts to support the staff canteen funds on state time?
- (2) May DOC staff utilize state resources on a limited basis to conduct these activities?
- (3) May staff canteen bank accounts be associated with the correctional facility name so long as the Commonwealth's employer identification number (EIN) is not used?

DECISION:

- (1) No, state time and resources may not be used for the management of the staff canteen bank accounts.
- (2) No, state resources may not be used to conduct these activities.
- (3) The DOC should follow the recommendations of the Finance and Administration Cabinet to avoid using the correctional facility names in the name of the bank account.

This opinion is issued in response to your October 18, 2021 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the November 18, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

On behalf of the Kentucky Department of Corrections (DOC), you request that the Commission provide guidance related the DOC's staff canteen bank accounts as recommended by the Finance and Administration Cabinet's Office of Policy and Audit (OPA) Review.

To assist the Commission in the review of these issues you provide the following information:

Staff canteen bank accounts exist in all thirteen correctional facilities to manage and preserve cash and cash equivalents derived from employee generated internal fundraising activities to benefit correctional facility staff and cultivate employee morale and retention. These bank accounts were established to maintain internal controls and cash handling guidelines and to eliminate the possibility of mishandling of funds. You indicate that staff conducting these activities, including management of the bank account, on state time is limited as is the use of state resources consistent with opinions in 08-24 and 13-03. The staff canteen bank accounts and related activities are not organized as 501(C)(3) non-profit entities, but they exist and operate to support the moral and work of correctional facility staff.

The accounts are not associated with the Commonwealth's Employer Identification Number (EIN) at the recommendation of the Finance and Administration Cabinet's Office of the Controller. Fundraising examples include collecting money for non-uniform staff wearing jeans on Fridays, raffles for items purchased with staff canteen funds, operations of small staff canteens, aiding in serving food to staff for facility wide meals (typically donating their own lunch period), etc. Staff canteens are small onsite "grills" offering correctional facility staff access to hot meals other than those provided in the institutional food service. The majority of correctional facility staff are unable to leave the facilities during lunch breaks to maintain facility security and these small canteen operations provide access to an alternative meal. In turn, funds raised from these operations are deposited into the respective staff canteen bank accounts and used to conduct employee morale activities such as prize drawings, employee recognition events, and staff meals for Correctional Employees' Week and holidays.

You indicate that all staff of the respective facilities are eligible to participate in these events and no single individual receives a personal benefit from staff canteen activities or funds. Your argument in support of these events is that they are integral to employee morale, most especially in a time when the Department faces extensive turnover and vacancy rates of over 50% in many facilities.

Based on this information, you ask for guidance from the Commission for the following questions:

- (1) *With the permission of the DOC management and outlined in written policy, may DOC staff participate in limited fundraising and administrative activities of the related outside bank accounts, and where applicable, staff canteens/food service for the purpose of supporting staff morale and recognition on state time?*

- (2) *With the permission of Department of Corrections' management and outlined in written policy, may DOC staff utilize state resources on a limited basis to conduct these activities?*
- (3) *May staff canteen bank accounts be associated with the correctional facility name so long as the Commonwealth's employer identification number (EIN) is not used?*

As a follow-up to the Commission's staff request for further information, you provided a copy of the OPA's Draft Report that was not provided with your original request. The OPA raises several concerns over the establishment and management of the staff canteen accounts. The OPA Draft Report indicates that the staff canteen accounts appear to be "personal in nature," that the accounts should be managed by a trusted employee, and that the state should not be involved as an agent to establish the accounts. The DOC responded that it would establish a two-signature requirement on the accounts, they would be managed by the institutional business office, not outside the state system by a private employee. The FAC then responded that this would not be appropriate to use state employees and resources for the management of the accounts. However, the OPA recommended that the DOC seek an opinion from the Ethics Commission on this issue.

Another issue noted by OPA is that the staff canteen bank accounts were created in the correctional facility names. The OPA noted that since these bank accounts are private accounts that the state facility names should not be associated with the staff canteen bank accounts. OPA recommended that "any accounts containing the name of a state facility be changed to avoid any confusion about the state's legal and financial responsibilities for the accounts."

The OPA further noted that state time and resources should not be used for the management of the accounts. DOC appears to disagree with this assessment and has provided the Commission with a copy of a draft policy the DOC would like to implement for the operating of the Staff Canteen Funds. Section L of the draft policy states, "[e]mployees conducting staff canteen activities on state time and/or utilizing state resources shall be limited as approved by the Warden or designee of each institution."

The Executive Branch Code of Ethics (the Ethics Code) provide provisions that prohibit certain conduct of public servants. KRS 11A.005 provides a policy statement about the use of state time and resources:

- (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.

(emphasis added). Furthermore, KRS 11A.020 provides certain prohibited conduct for public servants and provides in pertinent part as follows:

- (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.

9 KAR 1:025 was established by the Commission in 2016 to further explain the application of KRS 11A.020(1) and states as follows:

Section 2. If a public servant engages in any of the following conduct, the commission may conduct an investigation in accordance with KRS 11A.080 of the conduct as a possible violation of KRS 11A.020 or KRS 11A.030:

- (3) A public servant uses state time, equipment, personnel, facilities, or other state resources for private business purposes;

Alternatively, KRS 11A.055 concerns the raising of funds for certain activities permitted and allows an exemption from the requirements of the Ethics Code for fundraising for nonprofit charitable organizations. KRS 11A.055 provides in pertinent part as follows:

- (1) Any provision of KRS Chapter 11A to the contrary notwithstanding, a state agency or a *public servant may raise funds, either individually or as a department or agency, for a charitable nonprofit organization granted a tax exemption by the Internal Revenue Service under Section 501c of the Internal Revenue Code without violating the provisions of this chapter.* Raising of funds shall include but not be limited to holding events for the benefit of the charitable organization, contacting potential donors, providing prizes, and engaging in other forms of fundraising and providing the funds thus raised to the charitable organization.
- (2) Any provision of KRS Chapter 11A to the contrary notwithstanding, a state agency or a public servant may raise funds, either individually or as a department or agency, for crime prevention, drug and alcohol abuse prevention, tourism promotion, and traffic safety programs without violating the provisions of this chapter. Raising of funds shall include but not be limited to holding events for the benefit of a program specified in this section, contacting potential donors, providing prizes, and engaging in other forms of fundraising and providing the funds thus raised to the program.

(emphasis added). As such, the provisions of the Ethics Code are set aside for the limited purpose of using state time and resources to raise funds for a charity. In this event, 100% of the funds raised are donated to the charity and not used for the private, personal benefit of the state employees.

9 KAR 1:060 concerns requirements relating to fundraising activities and charitable nonprofit organizations. This regulation was implemented by the Commission to describe the fundraising efforts that can be engaged in by state agencies and guidance to ensure compliance with the Ethics Code. 9 KAR 1:060 provides in pertinent part:

Section 6:

- (1) Pursuant to KRS 11A.055, all funds raised by an agency or a public servant on behalf of a Category II or III charitable nonprofit organization shall be delivered to the charitable nonprofit organization or other statutorily authorized program. An agency involved in the fundraising effort shall not retain any funds.
- (2) An agency or public servant shall not enter into a contract with an entity to raise funds for a Category II or III charitable nonprofit organization or program pursuant to KRS 11A.055 if the contract provides that the agency shall:
 - (a) Be paid out of the funds raised;
 - (b) Receive a commission based on funds raised; or

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- (c) Receive any portion of the funds to be delivered to the charitable organization or program.
- (3) Except as provided in Section 7 of this administrative regulation, an agency may assign or permit a public servant to work on behalf of a Category II or III charitable nonprofit organization if:
 - (a) The public servant does not devote more than 100 hours per calendar year working on behalf of a Category II or III charitable nonprofit organization unless otherwise authorized by statute; and
 - (b) The agency determines in writing that these working hours are necessary to fulfill the statutory, regulatory, or programmatic mandates of the agency.

Section 7. An agency may devote state time and resources to any category charitable nonprofit organization without recompense from the charitable nonprofit organization if:

- (1) These activities are conducted for a cooperatively sponsored event; and
- (2) The event is conducted to further the statutory, regulatory, or programmatic mandates of the agency.

This regulation's reference to using state time and resources is only meant for the efforts of an agency to support a 501(c)(3) charity and not for the personal benefit of public servants.

In your request, you ask the Commission to review your scenario considering the same reasoning as followed by the Commission in Advisory Opinions 08-24 and 13-03. Advisory Opinion 08-24 dealt with fundraising being conducted by Kentucky Department of Parks employees on behalf of the Kentucky State Park's Foundation and Advisory Opinion 13-03 concerned the Kentucky Historical Society and its staff involvement with the Kentucky Historical Society Foundation. Both foundations were established 501(C)(3) non-profit charities. As such, they are in no way analogous to the scenario proposed by your request because the staff canteen accounts and activities are not related to an established 501(C)(3) non-profit charity. Furthermore, your stated purpose for establishing the staff canteen accounts for promoting employee morale and promotion are laudable, but they do not amount to fundraising for charities as contemplated by KRS 11A.055. Therefore, the reasoning of the Commission through the application of KRS 11A.055 in Advisory Opinions 08-24 and 13-03 is not applicable to your scenario.

Furthermore, in a follow-up email to the Commission staff, your staff indicates that the fundraising activities that are being conducted are similar to the fundraising that is done by agencies to fundraise for the Kentucky Employees Charitable Campaign (KECC). Again, your reliance on this analogy is inappropriate as the efforts by state agencies to fundraise for KECC is conducted for charitable purposes and not for the private benefit of the state employees involved with the fundraising.

As such, the Commission is only left with the provisions in KRS 11A.005 and 11A.020 that would prohibit a public servant from using state time and resources for a personal purpose. Nevertheless, the Commission does find analogous the scenarios presented in Advisory Opinions 98-15 and 04-6. These advisory opinions concerned the use of state time and resources to conduct retirement parties and baby showers. In Advisory Opinion 98-15, the Commission stated that “the proper use of state time and equipment [for employee-related functions] is an agency management decision” but “cautions management and employees not to misuse state time or equipment. Excessive misuse of state time and equipment may result in a violation of KRS 11A.020(1)(d).” In Advisory Opinion 04-6, the Commission stated that it

[S]till holds to its earlier advice in regard to the proper use of state time and resources, but cautions management and employees against misuse of state time and resources.

Although there is no “bright line” test as to exactly when and to what degree use of state time and resources goes from being an acceptable use to creating an ethical quandary, the Commission believes that prudence dictates that management and employees exercise common sense. For example, no employee should be tasked with “organizing” a retirement party or similar event to the point that the employee spends more time in a workday on the event than on state business.

Thus, the commission urges management and employees to be mindful of the requirement of [the Ethics Code], which cautions all state employees to be conscientious and to be good stewards of the public trust.

These advisory opinions concerned one-time events. However, the DOC’s drafted policy and current conduct related to the operation of these fundraisers to fund the staff canteen accounts and the administration of such accounts is an ongoing stream of events across the DOC’s thirteen facilities. The DOC has gone beyond the guidance provided in these earlier opinions about one-time de minimis use of state time and resources and is approaching the overuse of state time and resources for private benefit. As such, the DOC should proceed with greater caution than it is currently exercising. Ultimately, the Commission must agree with the recommendations of the draft audit by the OPA to the extent that state time and resources be managed appropriately. Specifically, in answer to your questions, the Commission determines the following:

- (1) With the permission of the DOC management and outlined in written policy, may DOC staff participate in limited fundraising and administrative activities of the related outside bank accounts, and where applicable, staff canteens/food service for the purpose of supporting staff morale and recognition on state time?

ANSWER: The Commission determines that KRS 11A.020(1) and (2) would allow the limited fundraising activities as described in your request but would prohibit state time and resources to be used to manage and administer the staff canteen accounts. Staff may use a de minimis amount of state time to collect the funds raised through the activities as approved by the management of DOC on state facility grounds. However, staff must be careful to only use breaks, personal leave time, and lunch times to administer the staff canteen accounts. Furthermore, the staff canteen accounts should not be administered by the DOC business office staff by the use of state time and resources as contemplated in the draft policy.

- (2) With the permission of Department of Corrections' management and outlined in written policy, may DOC staff utilize state resources on a limited basis to conduct these activities?

ANSWER: The Commission determines that KRS 11A.020(1) and (2) would prohibit the use of state resources to conduct fundraising activities to provide a personal benefit to public servants, except that the fundraising activities may be conducted on state grounds as long as the use of state time can be limited in association with breaks, lunch times, or at the beginning and ending of the employee's work schedules. DOC should take great effort to ensure that the workday is not disrupted by these fundraising activities.

- (3) May staff canteen bank accounts be associated with the correctional facility name so long as the Commonwealth's employer identification number (EIN) is not used?

ANSWER: The Commission determines that the DOC should follow the recommendations of the OPA in renaming the staff canteen accounts to avoid using the name of the correctional facilities.

EXECUTIVE BRANCH ETHICS COMMISSION


By Chair, Judge Roger L. Crittenden (Ret.)

ATTACHMENTS: