

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 03-21

May 29, 2003

RE: May a state agency express views on its state website and e-mail transmissions, including giving “positive” and “negative” ratings to various bills, identified by sponsor?

DECISION: Yes, if such activity supports the statutory mission of the agency.

This opinion is in response to a request made March 13, 2003, for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”). This matter was reviewed at the May 29, 2003, meeting of the Commission and the following opinion is issued.

The relevant facts are as follows. The Kentucky Commission on Women (“KCW”) is a state agency attached to the Office of the Governor. The mission statement of the KCW, copied from its website, is: “*The mission of the **Kentucky Commission on Women** is to improve the status of women in Kentucky. We serve as an informational clearing house for the needs of Kentucky women.*” You have been made aware that KCW operates a listserv, which, according to the KCW website, is “*...for the benefit of individuals interested in sharing information related to the improvement of the status of Kentucky women. The purpose of this list is to create a network between women throughout the Commonwealth, regardless of party affiliation.*” The listserv is essentially an e-mail clearinghouse for members of the listserv to post items of interest to other listserv members and has the following disclaimer which appears at the end of messages posted by KCW:

“The opinions expressed on the List are not necessarily the opinions of the Kentucky Commission on Women or the Governor’s Office. The purpose of the Kentucky Women List Serv is to provide information to and create a network between women across the Commonwealth, regardless of party affiliation.”

However, KCW does choose which items to post on the listserv. The listserv is, according to the KCW website, a “moderated” listserv, “...[W]hich means that any email messages sent to the List will be reviewed by KCW staff before being sent on to all members.

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KCW reserves the right to change the subject line of the message to better reflect its content and to add "editor's notes" to any messages for any reason." (from the KCW website). One of the e-mails you forwarded that had been posted to the listserv had the header "Bush Favors KY Religious Extremist M.D. to Head FDA Health Drug Advisory Unit" and another e-mail that had been posted on the listserv had in the subject line, "Choice Action Alert—Choose Life License Plates."

Likewise, you mention that KCW maintains a "Legislative Update" on its website. The "Update" currently on the KCW website lists 2003 session General Assembly bills by number and sponsor, with a brief summary of the bill and a symbol beside it denoting whether KCW supported, opposed or was "watching" the legislation. Bills were broken into categories such as "Civil Rights and Gender Neutrality," "Reproductive Rights," and others.

The Legislative Update maintained on the KCW website, as mentioned above, is a list of proposed legislation before the General Assembly, with the following examples culled from the KCW "Legislative Update" as it currently appears on the KCW website:

SB 140 R. Roeding (-)

Prohibits public funding of any program that provides contraceptives or information about contraception to persons 16 or younger without written parental consent. Also prohibits state health departments from distributing contraceptives or information about contraception to persons 16 or younger without the same written consent.

SB 177 R. Palmer III (+)

Require that health plans offering pregnancy-related benefits to also cover infertility diagnosis and treatment.

SB 214 K. Stine, J. Westwood, R. Roeding (-)

Require parental consent for persons under 18 to receive family planning services under Medicaid or KCHIP.

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From the KCW website, the following is listed as its statutory authority:

“KRS 344.510-344.530 mandates the Kentucky Commission on Women to:

- Promote, encourage, and provide advisory assistance in the establishment of local volunteer community improvement programs for, and of interest to, women;
- Conduct programs, studies, seminars, and conferences, and encourage state and local women’s business, professional, and civic organizations to do likewise, to educate the public to the problems of women;
- Consult with and advise the Governor and the agencies, departments, boards, and commissions of the state and local and municipal governments on matters pertaining to women; and
- Cooperate with the federal government and with the governments of other states in programs relating to women.

You ask whether KCW’s activities in providing a listserv and operating a “Legislative Update” on a state website are legal and/or ethical, in light of your belief that both the listserv and the “Legislative Update” promote partisan political views. A concern you had with the listserv was that you became aware that apparently, it was being used to disseminate mostly partisan views on highly sensitive and polarizing issues, such as abortion. You have provided the Commission with e-mails that you believe illustrate his point.

The Executive Branch Code of Ethics (the “Code”), at KRS 11A.005 provides in part that:

(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;

The questions posed, whether or not the KCW’s activities *vis-à-vis* the listserv and the “Legislative Update” are “legal” and “ethical” cannot be answered in a vacuum. KRS 11A.005, as noted above, requires that public servants be independent and impartial. Additionally, the

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Commission stated in Advisory Opinion 02-22 that "...[W]e expect state agencies to be independent *and impartial.*" (italics added).

The Commission is mindful that an agency must make its own management decisions as to the best use of state time and resources in the conduct of the agency's mission and has expressed this view in several advisory opinions including Advisory Opinion 03-20 (a copy of which is enclosed). However, the Commission believes that, although an agency mission may favor one political viewpoint over another, the agency should make an effort to remain impartial in all its activities, and should be mindful that giving the appearance of favoritism to one political viewpoint over another may not be in the best long-term interests of its mission.

It is certainly arguable from a review of items chosen by KCW to be posted on the listserv and from the stand taken by KCW on various pieces of proposed legislation, that KCW is not acting in an impartial manner, but rather is taking a partisan, political stand.

Furthermore, based on KCW's own statement of its statutory mission, it is clear that not all of the legislation on which KCW has commented on its "Legislative Update" may be related to KCW's statutory mission; nor, clearly, is the commentary (in the form of positive (+) or negative (--) ratings approval/disapproval) of the "Legislative Update" kept internal; instead it is posted on a state-funded public website as being the *official* position of a state agency. The Commission is aware that in state government an internal system (the Kentucky Legislation Review System) exists that allows state agencies to comment internally on proposed legislation that may affect a particular agency.

Thus, the Commission believes that KCW may post views related to its statutory mission on its listserv and may also take stands on legislation related to its statutory mission, but only so far as such communication does not give an appearance to the public of partisan, political activity not directly related to its mission. The Commission views the disclaimer on the KCW website as a step in this direction.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Joseph B. Helm, Jr.

Enclosure: Advisory Opinion 03-20