

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 04-7

February 20, 2004

RE: Guidance Concerning the Governor's Solicitation and Acceptance of Gifts and Gratuities

This opinion is issued by the Executive Branch Ethics Commission (the "Commission") upon its own motion. This matter was reviewed at the February 20, 2004, meeting of the Commission and the following opinion is issued.

During its attempt to educate employees of the new executive branch administration on the provisions of the Executive Branch Code of Ethics ("code of ethics"), the Commission has had occasion to review and discuss several of its previously issued advisory opinions. The Commission believes that one of those opinions, Advisory Opinion 00-55, needs further clarification regarding the "ultimate authority" of the Governor, specifically, how that authority extends to the Governor for the acceptance of gifts and solicitation.

In Advisory Opinion 00-55, the Commission stated that the Governor should not solicit any entities doing business with or regulated by any agency under the ultimate authority of the Governor, or any entities seeking to influence the Governor's actions, including those persons and entities registered as executive agency lobbyists to influence executive agency decisions of the Governor's office.

The Commission still holds the belief that because the Governor has ultimate authority over every executive branch agency he should not solicit any persons or businesses regulated by or doing business with any agency within the executive branch, or any person or business seeking to influence some future action of the Governor, unless the solicitation is permitted under KRS 11A.055 as quoted below:

(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, 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.

A further question that needs to be addressed is whether the fact that the Governor has ultimate authority over every executive branch agency (other than the offices of other elected officials) can be construed to mean that the Governor is subject to the ethics prohibitions regarding the acceptance of gifts as if he were employed by or directly supervised every executive branch agency.

Provisions in the code of ethics pertaining to the acceptance of gifts by public servants are set forth in KRS 11A.045:

(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.

(2) Nothing in KRS Chapter 11A shall prohibit or restrict the allocation of or acceptance by a public servant of a ticket for admission to a sporting event if the ticket or admission is paid for by the public servant at face value or is paid for at face value by the individual to whom the ticket is allocated.

(3) Nothing in KRS 11A.001 to 11A.110 shall prohibit or restrict the acceptance by a public servant of the Cabinet for Economic Development or by any other public servant working directly with the cabinet on an economic incentive package of anything of economic value as a gift or gratuity, if the gift or gratuity:

- (a) Was not solicited by the public servant;
- (b) Was accepted by the public servant in the performance of his or her official duties and in compliance with guidelines to be established by the Kentucky Economic Development Partnership which shall include requirements that all

gifts or gratuities of a reportable value under KRS 11A.050(3)(k) be registered with the Kentucky Economic Development Partnership and with the Executive Branch Ethics Commission and that all tangible property with a value in excess of twenty-five dollars (\$25), other than food and beverages consumed on the premises, shall be turned over to the Cabinet for Economic Development within thirty (30) days of receipt. In filing reports of gifts or gratuities with the Executive Branch Ethics Commission, the Cabinet for Economic Development may delete information identifying the donors if the cabinet believes identification of the donors would damage economic development; and

(c) Was not accepted under circumstances which would create a violation of KRS Chapter 521.

Gift is defined in KRS 11A.010(5):

(5) "Gift" means a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received; "gift" does not include gifts from family members, campaign contributions, or door prizes available to the public;

Regarding the acceptance of gifts by the Governor that are not solicited, the Commission believes that although the Governor has ultimate authority over every executive branch agency, he should not be considered to be employed by or supervising every executive branch agency in applying the above provisions. Only when the Governor is directly involved or has direct participation in interests before a particular agency should the Governor be considered to be employed by or supervising that agency for purposes of the acceptance of gifts.

“Directly involved” defined in KRS 11A.010(18) means “to work on personally or to supervise someone who works on personally.” In KRS 45A.455, “direct participation” means “involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or purchase standard, rendering of advice, investigation, auditing or in any other advisory capacity.”

Thus, if the Governor is directly involved (or becomes directly involved after accepting a gift) in particular interests of a state agency and the person or business offering the gift is doing business with, regulated by, or is attempting to influence the agency or the Governor’s actions regarding the matters before the agency, then the Governor should not accept gifts or gratuities with a value of more than \$25 from the person or business. However, if the Governor is offered a gift or gratuity from a person or business doing business with, regulated by, or seeking to influence a state agency, and the Governor has no direct involvement in the matters of that state agency (and does not become directly involved after accepting the gift), other than general oversight, then the Governor is not prohibited from accepting a gift or gratuity from such person or business, as long as the gift is not solicited by the Governor.

The Commission reminds you that if Governor accepts any gift totaling a value of more than \$200 per year, per source, it must be disclosed by the Governor on his annual statement of financial disclosure.

BY CHAIR: Joseph B. Helm, Jr.