

Executive Branch Ethics Commission
ADVISORY OPINION 10-06
September 27, 2010

RE: May the Department of Corrections accept a gift in the form of \$70,000 in Correctional Officer uniforms from a vendor under the exception to the gifts rule provided for in KRS 11A.045(1)?

DECISION: No, due to the concern that it would create an appearance of impropriety.

This opinion is issued in response to your September 16, 2010 request for an exemption to KRS 11A.045(1) from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 27, 2010 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. The Department of Corrections ("Corrections") seeks to accept the gift of \$70,000 in Correctional Officer uniforms from a vendor of the agency ("Vendor A"). Currently Corrections does not obtain uniforms from Vendor A, but procures them from a different vendor under a Catalog Master Agreement ("Vendor B"). According to your letter, Vendor A provides Corrections with a variety of security related equipment such as riot gear, badges, gas masks, flashlights, and other police/security equipment essential to institutional security and protocols. These items are procured under Vendor A's Catalog Master Agreement.

Your letter states that Corrections did not solicit the \$70,000 worth of uniforms from Vendor A and that the gift is not predicated on any future obligation for continued or increased requisitions from Vendor A. If the exception is approved, you intend to disburse the uniforms to officers in your 13 Adult Correctional Facilities. You claim that even though Corrections utilizes Vendor A for a myriad of products, state and agency purchasing procedures are "resilient safeguards against favoritism." You further indicate that it is Corrections' intent to continue to procure officer uniforms from the Catalog Master Agreement with Vendor B.

The relevant statute is KRS 11A.045(1), which 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

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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.

KRS 11A.010(5) further provides:

(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;

Also to be considered is KRS 11A.005(1), which states:

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.

The Commission's long-standing interpretation of KRS 11A.045(1) prohibits state agencies (in addition to state employees) from accepting gifts, as defined above, from persons or businesses with which they do business. See, for example, Advisory Opinion 02-2 (a copy of which is enclosed), in which the Commission concluded that an agency should not accept donations of items and services from persons or businesses that were seeking to do business with that agency. While the Commission has granted exceptions to this general rule in the past, where such exemptions would not create an appearance of impropriety, these exceptions have been rare and have generally been granted due to certain unique circumstances that were involved. The current situation does not appear to involve any particularly unique circumstances. The vendor in question is one with which your agency has an ongoing business relationship. In fact, Corrections has a current Catalog Master Agreement with Vendor A. While the reason behind the donation of the uniforms is not stated, the appearance is one of a vendor seeking to promote themselves with a state agency by means of a generous donation. The appearance is made worse by the fact that Corrections has an existing agreement with Vendor B, bid through the open procurement process, for the purchase and provision of uniforms. While Corrections may save \$70,000 through this deal, Vendor B, who actually followed the established processes of government, will be rewarded for doing so by a loss of business because of the actions of Vendor A.

It is for these reasons that the Commission believes an appearance of impropriety would be created if Corrections' request for an exemption is granted and it is allowed to accept this large gift. It could, conceivably, give an unfair advantage to Vendor A in the future, either in the form of favoritism on the part of the agency for the vendor or for the particular uniforms marketed by the vendor, to the unfair detriment of Vendor B. While the Commission appreciates the purchasing procedures that are in place to protect against such conduct, there is always a degree of subjectivity involved therein. Should Corrections need to acquire the items in question, it should follow the proper purchasing procedures and procure the uniforms from Vendor B through the Catalog Master Agreement that is already in place.

For these reasons, the Commission denies your request for an exception to KRS 11A.045(1).

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Acting Chair: Ronald L. Green

Enclosure: Advisory Opinion 02-2

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