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Executive Branch Ethics Commission
ADVISORY OPINION 13-03
September 9, 2013

- RE:**
1. While on state time and with the permission of KHS management, may KHS staff participate in temporary fundraising activities and donor/sponsor cultivation events on behalf of the Foundation?
 2. While on state time, and with the permission and oversight of KHS management, may KHS staff provide longer term administrative support to the Foundation that is consistent with the employee's state job duties?
 3. Is there any ethical conflict for the KHS senior management to establish job duties for a KHS staff member to be a designated liaison and public contact person between the KHS and the Foundation?
 4. Is there any ethical conflict for the KHS Executive Director, Assistant Director, and specified management members to spend defined amounts of time cultivating and requesting gifts, bequests, and devises from private persons, corporations, and other nongovernmental entities that do not do business with KHS pursuant to the KHS statutory mission statement when these gifts, bequests, and devises may go either to KHS or the Foundation depending upon the donor's preferences?
 5. Is there any ethical conflict for the KHS and the Foundation to enter into a Memorandum of Agreement or Understanding (MOA or MOU) to (a) establish an exchange of services between the two organizations, or (b) to establish collaborative fundraising events, assuming other state laws for such agreements are followed?

- DECISION:**
1. Yes.
 2. Yes, with certain limitations.
 3. No, if acceptable under KRS Chapter 18A.
 4. No, with certain limitations.
 5. No, with certain limitations.

This opinion is issued in response to the Kentucky Historical Society's ("KHS") May 6, 2013, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") regarding what are permissible transactions between its staff and the Kentucky Historical Society Foundation, a private 501(c)(3) non-profit charitable organization. The request was reviewed at the September 9, 2013, meeting of the Commission and the following opinion is issued.

As background your request provides the following information: The KHS was formed in 1836 by a group of prominent Kentuckians intent on preserving the history of the Commonwealth. It was chartered as the state society in 1838 and began to collect books and printed materials. The Society became an agency of Kentucky state government in the early 1950s. Currently, KHS is an agency of the Kentucky Tourism, Arts and Heritage Cabinet.

You state that while KHS is an Executive Branch agency, by statute it has all the powers and liabilities of a corporation. KRS 171.311. KHS has a membership consisting of dues paying members, and currently has more than 3,300 members to whom it provides support and educational services. All members in good standing shall have the right to vote, hold office, and otherwise take part in the proceedings of the society. KRS 171.311(II). The Officers and policy-setting body for KHS is the Kentucky Historical Society Executive Committee which consists of the Governor of Kentucky as Chancellor, four officers, 16 members, and one person designated by the State Archives and Records Commission. Members of the Executive Committee are nominated through the nomination process of the committee and elected by KHS members. KRS 171.311(III, IV, and V).

Pursuant to KRS 171.311(I), the mission of the KHS is as follows:

The Kentucky Historical Society shall collect, maintain, and preserve authentic records, information, facts, and relics connected with the history of the Commonwealth and the genealogy of her peoples; and promote a wider appreciation of the American heritage, with particular emphasis on the advancement and dissemination of knowledge of the history of Kentucky. The society may receive and hold by donation or devise, real or personal property to any extent and may, by gift, loan, purchase, or otherwise hold books, papers, documents, historical memorials, and any other articles suited to promote the objects of the society in the Old State Capitol Building but all such property shall be held in trust for the Commonwealth of Kentucky according to the terms of acceptance.

Pursuant to KRS 171.321, all "receipts by KHS from nongovernmental sources, such as gifts, bequests, and devises from private persons, corporations, and other nongovernmental entities shall be held, deposited, invested, and used by the KHS under the direction of its executive committee and shall be exempt from the requirements of KRS 41.070". Additionally, all KHS staff hired pursuant to KRS 171.311 are exempt from the merit personnel laws of KRS 18A.005 to 18A.200. See KRS 18A.115 (1) (u).

In regard to the Kentucky Historical Society Foundation, Inc. (the “Foundation”), you provide that it was established in 1991 as a 501(c)(3) non-profit agency. The Foundation’s goal is to further the educational and stewardship purposes of the KHS by providing assistance and support to the Society as needed. The Articles of Incorporation of the Foundation specifically states the Foundation “shall be operated solely for the benefit of, the Kentucky Historical Society” which is defined by KRS 171.311. This intent is reaffirmed in the Bylaws of the Kentucky Historical Society Foundation, Article I.1.3, purpose statement which provides the Foundation shall “assist and support the Kentucky Historical Society, an independent corporate agency of the Commonwealth of Kentucky” pursuant to KRS 171.311. The Foundation is managed by a volunteer board whose individuals serve a three-year term.

According to your letter, in FY09, the General Fund allotment to the KHS covered nearly \$1,000,000 in programmatic expenses. With the most recent reduction in state appropriations to the KHS, this allotment of General Funds no longer covers any of the expenses incurred to provide programs and services. This results in a greater reliance on private funds and earned revenue to fulfill mission related activities. The KHS is currently re-tooling operations to accommodate this new reality.

As such, the KHS is seeking further clarification on the use of agency employees to solicit gifts and perform fundraising activities where the funds raised are held by the Foundation. Currently, the KHS has internally drawn a tight distinction between the KHS and the Foundation that does not allow for agency staff to perform fundraising activities. Given the integrated nature of private funds to be used for the sole benefit of the agency, the KHS seeks guidance to determine if it may relax this distinction and allow for more activities by agency staff. You state that at no time does the KHS intend for this request to be construed as a request to allow for direct benefits to any employee or individual.

You reference KRS 11A.055(1) (Raising of funds for certain activities permitted), which states:

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.

You point out that Advisory Opinion 08-24 asked whether employees of the Kentucky Department of Parks could perform duties and requested tasks for the Kentucky State Park Foundation on state time and utilizing state resources. The opinion held that proper use of state time and resources for Foundation purposes should be left to management’s discretion and oversight provided state time and equipment are not misused. Therefore, the KHS asks whether the following are permissible:

1. *While on state time and with the permission of KHS management, may KHS staff participate in temporary fundraising activities and donor/sponsor cultivation events on behalf of the Foundation? For example, the Foundation annual phone-a-thon in which employees on state time would commit to a few hours each day for two weeks a year?*
2. *While on state time, and with the permission and oversight of KHS management, may KHS staff provide longer term administrative support to the Foundation that is consistent with the employee's state job duties? For example, processing mail and mailings, maintaining donor lists, accounting support, development of promotional tools (print materials, social media, and other electronic presentations) to support KHS Foundation fundraising efforts, or cover for the duties of temporary vacant positions within the Foundation?*
3. *Is there any ethical conflict for the KHS senior management to establish job duties for a KHS staff member to be a designated liaison and public contact person between the KHS and the Foundation? This person would provide information and communication between the organizations, assist potential donors for both organizations, and seek mutually beneficial grant or fundraising opportunities.*
4. *Is there any ethical conflict for the KHS Executive Director, Assistant Director, and specified management members to spend defined amounts of time cultivating and requesting gifts, bequests, and devises from private persons, corporations, and other nongovernmental entities that do not do business with KHS pursuant to the KHS statutory mission statement when these gifts, bequests, and devises may go either to KHS or the Foundation depending upon the donor's preferences?*
5. *Is there any ethical conflict for the KHS and the Foundation to enter into a Memorandum of Agreement or Understanding (MOA or MOU) to (a) establish an exchange of services between the two organizations, or (b) to establish collaborative fundraising events, assuming other state laws for such agreements are followed?*

KRS 11A.005(1)(a) and (d) provide:

(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;

...

(d) The public has confidence in the integrity of its government and public servants.

KRS 11A.045(1), relating to the acceptance of gifts, provides the following:

(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.”

“Gift” is defined in relevant part in KRS 11A.010(5) as “a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received...”

The Commission has interpreted KRS 11A.045(1) to prohibit state agencies from soliciting or accepting gifts from persons or businesses that do business with, are regulated by, are seeking grants from, are involved in litigation against, or are lobbying or attempting to influence the actions of that state agency. (See Advisory Opinions 09-2, 06-19, and 02-48). However, KRS 11A.055 provides an exception to this rule by allowing a state agency or a public servant to raise funds, either individually or as a department or agency, for a 501(c)(3) charitable nonprofit organization granted a tax exemption by the Internal Revenue Service. Since the Foundation is such an organization, it is permissible for KHS and its employees to conduct fund raising activities on behalf of the Foundation with any person or business regardless of whether that person or business has a business or regulatory relationship with KHS.

Regarding whether such fund raising activities may be conducted on state time is a question that has also been addressed by the Commission a number of times. In addition to Advisory Opinion 08-24, as discussed above and which is attached hereto, in which the Commission held that proper use of state time and resources for purposes similar to those at issue here should be left to management’s discretion and oversight provided state time and equipment are not misused, the Commission also addressed the issue in Advisory Opinion 10-05, attached. While Advisory Opinion 10-05 does not involve a charitable nonprofit organization, its guidance regarding the use of state time and resources for the benefit of an outside entity is relevant herein. In the opinion, the Commission again confirmed that agency management may decide whether and to what degree a public servant may use state time and resources to solicit on behalf of an outside entity, but added the cautionary statement that the work performed for the outside entity, if approved by agency management, should not prevent the employee from completing his regular job duties, nor should the use of state time and state resources on behalf of the outside

entity become onerous. The Commission concluded that it is management's responsibility in this regard to insure that limits are observed and abuses do not occur.

Based on the Commission's review of these, and other, previous opinions, the answers to your specific questions, above, are as follows:

1. KHS staff, with the permission of KHS management, may participate in temporary fundraising activities and donor/sponsor cultivation events on behalf of the Foundation. The Foundation's annual phone-a-thon provides an excellent example of an event in which KHS staff could participate as it takes place for a limited number of hours during a set period of time annually, thereby alleviating the concern that the work for the Foundation could infringe too much on the state employees' time and job duties.
2. KHS staff, while on state time and with the permission and oversight of KHS management, may provide longer term administrative support to the Foundation that is consistent with the employee's state job duties, such as processing mail and mailings, maintaining donor lists, accounting support, development of promotional tools (print materials, social media, and other electronic presentations) to support Foundation fundraising efforts, but may not do so to such a degree that the state employee is prevented from completing his regular job duties, nor should the use of the employee's time and state resources on behalf of the Foundation become onerous. This limitation would preclude KHS staff from covering for the duties of temporary vacant positions within the Foundation, unless this could be accomplished within a short period of time or not prevent the state employee from completing his regular job duties.
3. The Commission does not see an ethical conflict for KHS senior management to establish job duties for a KHS staff member to be a designated liaison and public contact person between the KHS and the Foundation in order to provide information and communication between the organizations, assist potential donors for both organizations, and seek mutually beneficial grant or fundraising opportunities. This opinion is premised upon the fact that this case involves a charitable non-profit entity, the purpose of which is to assist and support KHS, and should not be interpreted as addressing any implications this proposal could present under KRS Chapter 18A.
4. The Commission does not see an ethical conflict for the KHS Executive Director, Assistant Director, and specified management members to spend defined amounts of time cultivating and requesting gifts, bequests, and devises from private persons, corporations, and other nongovernmental entities that do not do business with KHS pursuant to the KHS statutory mission statement when these gifts, bequests, and devises may go either to KHS or the Foundation depending upon the donor's preferences. This is of course assuming that such efforts, when made on behalf of the Foundation specifically, would not be to such a degree that the state employee is prevented from completing his regular job duties, nor should the use of the employee's time and state resources on behalf of the Foundation become onerous. It would be management's responsibility to insure that limits are observed and abuses do not occur.

5. The Commission does not see an ethical conflict for the KHS and the Foundation to enter into a Memorandum of Agreement or Understanding (MOA or MOU) to (a) establish an exchange of services between the two organizations, or (b) to establish collaborative fundraising events, assuming other state laws for such agreements are followed. But again, any use of state employees on behalf of the Foundation must be limited so as to not prevent KHS staff from completing their regular job duties, and any such agreement or understanding with the Foundation may not create an onerous use of state time and state resources on the Foundation's behalf. It would be management's responsibility to insure that limits are observed and abuses do not occur.

The Commission's decision herein is limited to the facts presented and premised upon the fact that this case involves a non-profit entity, the mission of which solely benefits KHS. The Commission's jurisdiction extends only to the implications of the conduct presented under KRS Chapter 11A. This decision should not be interpreted as addressing any implications of the conduct presented under KRS Chapter 18A.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: W. David Denton

Enc. Advisory Opinion 08-24
Advisory Opinion 10-05

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