



W. DAVID DENTON
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COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION
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JOHN R. STEFFEN
EXECUTIVE DIRECTOR

WILLIAM G. FRANCIS
VICE CHAIR

KATHRYN H. GABHART
GENERAL COUNSEL

LEWIS G. PAISLEY
RICHARD L. MASTERS
MARTIN E. JOHNSTONE

#3 FOUNTAIN PLACE
FRANKFORT, KY 40601
(502) 564-7954

Executive Branch Ethics Commission
ADVISORY OPINION 15-01
May 4, 2015

RE: May the Kentucky Department of Fish and Wildlife Resources be granted an exemption from KRS 11A.040(5) in order to provide awards as part of an employee recognition program to employees who have “achieved excellence” or had accomplishments that have “helped to advance the Wildlife Division”?

DECISION: Yes, pursuant to the proposed criteria.

This opinion is issued in response to your request for an exemption to KRS 11A.040(5) from the Executive Branch Ethics Commission (the “Commission”). The matter was reviewed at the May 4, 2015, meeting of the Commission and the following opinion is issued.

On behalf of the Kentucky Department of Fish and Wildlife Resources (the “KDFWR”), you have requested that the Commission grant a request for exemption from KRS 11A.040(5). This statute prohibits a public servant from accepting any additional compensation for the performance of his or her official duties, without the prior approval of the Commission. The KDFWR is seeking an exemption to be allowed to present certain employees with an award for exceptional performance during the course of a given year.

KRS 11A.040(5) specifically states that:

A public servant shall not knowingly accept compensation, other than that provided by law for public servants, for performance of his official duties without the prior approval of the commission.

As stated in your letter, in 2012 the KDFWR requested an Advisory Opinion addressing several issues concerning whether an employee selected as a recipient of a KDFWR award may accept monetary or tangible items donated by an outside entity. In Advisory Opinion 12-07, the Commission stated that the proposed scenarios would violate the additional compensation provisions. The Commission did state, however, that “the Commission is willing to review and consider granting its approval of certain specific programs or awards that recognize an employee for performance that could be said to exceed or to go above and beyond his official duties,” such as “employee of the month,” “Conservation Officer of the Year,” or “Biologist of the Year.”

ADVISORY OPINION 15-01

May 4, 2015

Page 2 of 5

The Advisory Opinion went on to state that the Commission would be willing to revisit this issue if KDFWR submitted more detailed information about the specific awards to be given.

KDFWR is now requesting that the Commission review the information you have provided and approve an exemption to KRS 11A.040(5) to permit KDFWR to present an award to employees who are selected for the Wildlife Division's Employee Recognition Program. Specifically, the Wildlife Division would like to present seven awards:

1. Biologist of the Year;
2. Game Management Foreman of the Year;
3. Wildlife Technician/ Administrative Support Employee of the Year;
4. Rookie of the Year (Less than 3 years' service);
5. Group Achievement Award;
6. Thinking Outside the Box Award;
7. Director's Leadership Award.

You indicate that the criteria for these awards is explained in the Nomination Form and Instructions that are distributed to the Division employees, attached as an enclosure hereto. The Division is seeking employees who have "achieved excellence" or had accomplishments that have "helped to advance the Wildlife Division." The KDFWR believes these criteria satisfy the criteria set forth in Advisory Opinion 12-07, but you state that if the Commission feels otherwise, the KDFWR would request that the Commission provide satisfactory wording for the criteria.

According to your letter, every employee selected for recognition (except for the Group award) would receive a framed wildlife print from the KDFWR's in-house art studio. The value of the print is \$20-\$25. The KDFWR would also pay to have the print framed, at an approximate cost of \$115. The KDFWR uses the Department of Parks frame shop, so no KDFWR funds will go to an outside vendor. All money spent for these awards will come from internal KDFWR funds and will not be provided by an outside entity.

Based on the foregoing, the KDFWR is requesting that the Commission grant an exception to KRS 11A.040(5) as recognition for select employees' exceptional performance above and beyond their official duties and approve an award of a framed print, as described above.

As previously discussed in Advisory Opinion 12-07, "compensation" is defined in KRS 11A.010(3) as "any money, thing of value, or economic benefit conferred on, or received by, any person in return for services rendered, or to be rendered, by himself or another[.]" Thus the awards proposed for the Wildlife Division's Employee Recognition Program do fall within the definition of "compensation" as used in the Executive Branch Code of Ethics.

Further, KRS 11A.045(1) states as follows:

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 KRS 11A.010(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[.]

Thus when considering awards programs, both KRS 11A.040(5) and KRS 11A.045(1) must be considered. The idea of incentives or awards for accomplishment has been previously addressed by the Commission in several advisory opinions. A very similar proposal was reviewed in Advisory Opinion 00-51. In that opinion, an inquiry was made regarding a committee within a different branch of state government that was working with an Executive Branch agency to initiate a program which would provide awards to employees of that Executive Branch agency who “excel in the services they provide....” The awards were expected to be donated by local businesses with each having a value of approximately \$50. An official within the agency would determine who would receive the awards, which would then be given by the Committee. In that opinion, the Commission, taking specific note of the provisions of KRS 11A.040(5), stated that:

An employee is prohibited by KRS 11A.045(1) from accepting an award that exceeds a value of \$25 from a vendor of his agency. Similarly, the Commission believes that the committee may award prizes for exceptional service to executive branch employees, in addition to their compensation provided by law, but such awards should not have a value of greater than \$25 each.

Although such awards may appear to be compensation for performance of official duties, the Commission does not believe that small token awards, with a value of less than \$25, rise to the level of “compensation” and tend not to create a conflict

ADVISORY OPINION 15-01

May 4, 2015

Page 4 of 5

for the employee The Commission sees the benefit of such awards in promoting improvement in the performance of Commonwealth employees.

In regard to the recognition program you describe, KRS 11A.045(1) is not an issue as the awards will neither be provided nor paid for by outside sources. Rather, internal KDFWR resources and funds will be used. However, as the value of each award will exceed \$25, for the purposes of KRS 11A.040(5) additional review is required .

In Advisory Opinion 12-01, the Kentucky Housing Corporation (“KHC”) inquired about implementing an employee incentive program which would provide KHC employees with cash awards for offering suggestions which improve KHC productivity and services. In the Advisory Opinion, the Commission expressed concern that the proposed program could result in an employee receiving additional compensation for the performance of his official duties in violation of KRS 11A.040(5). The Commission opined that if KHC added a disqualifier stating that any suggestion that “falls within the scope of the duties of the suggester” would be ineligible for a cash award, the proposed program would not pose any problem under the Code of Ethics.

The underlying concern is that executive branch employees are required to be independent and impartial. Acceptance of monetary or tangible rewards for the performance of one’s official duties, particularly those donated by outside entities, may create a perception that decisions made by your employees are not objective. Being given substantial awards for the performance of official duties creates concerns under KRS 11A.040(5) even in situations where KRS 11A.045(1) is not an issue.

However, as stated in Advisory Opinion 12-07, recognizing that KRS 11A.040(5) provides the Commission with the authority to give prior approval for a public servant to accept compensation, other than that provided by law, for performance of official duties, the Commission is willing to review and consider granting its approval of certain specific programs or awards that recognize an employee for performance that could be said to *exceed* or to go *above and beyond* his official duties.

It is the opinion of the Commission that the Wildlife Division’s Employee Recognition Program as you describe in your request and as detailed in the enclosed Nomination Form and Instructions is such a program. The awards include criteria that indicate the potential recipients have exceeded or gone above and beyond their official duties. Therefore, the Commission hereby grants an exemption to the restrictions found in KRS 11A.040(5) to allow KDFWR employees to accept the awards proposed for the Wildlife Division’s Employee Recognition Program without violating KRS 11A.040(5).

In issuing this advisory opinion, the only determination being made by the Commission is whether the awards program is acceptable under the Executive Branch Code of Ethics. It is making no determination regarding its propriety otherwise.

Executive Branch Ethics Commission

ADVISORY OPINION 15-01

May 4, 2015

Page 5 of 5

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: W. David Denton

Enclosure:

Wildlife Division's Employee Recognition Program Nomination Form and Instructions