



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 16-03
April 19, 2016

RE: May the employees of the Personnel Cabinet participate in a pilot project being managed by a Department of the Personnel Cabinet?

DECISION: Yes, provided the Department fairly and consistently administers the project.

This opinion is issued in response to your February 2, 2016 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the "Commission") on behalf of the Personnel Cabinet. This matter was reviewed at the April 19, 2016 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows: The Department of Employee Insurance ("Department") of the Personnel Cabinet ("Cabinet") is administering a pilot demonstration project ("pilot project"). The Department oversees and manages the Kentucky Employees' Health Plan (KEHP or the Plan). KEHP provides health insurance benefits for employees of the Commonwealth of Kentucky, Kentucky boards of education, health departments, quasi-government agencies eligible to participate in the Plan, and retirees (under the age of 65) of employers participating in the Plan.

The 2014-16 Biennial Budget of the Executive Branch included language requiring KEHP to fund a pilot project that would reduce healthcare costs for the Plan. The budget bill authorized KEHP to spend up to \$400,000 for the pilot project. If the pilot project is successful, the budget bill authorizes KEHP to expand the project to a larger population.

Through an authorized RFP process, KEHP chose Optum as the vendor to implement the pilot project, named Real Appeal, which will be a 52-week weight loss program focusing on addressing the health of KEHP members who struggle with diabetes, obesity, asthma, COPD, hypertension, or coronary artery disease. Consistent with Optum's recommendation, KEHP identified approximately 7,000 employee planholders from various KEHP participating groups across the Commonwealth to participate in the pilot project. Optum will conduct a personal

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assessment of the 7,000 planholders to identify 1,500 who will qualify to participate in the pilot project. To qualify for participation, the planholder is required to be within a specific Body Mass Index (BMI) range and be willing to commit to the long-term weight loss program.

The planholders who are invited to participate in the pilot project will receive a personalized session with a Real Appeal expert. Once chosen to participate in the project, the participant must attend the first virtual online class with a coach. After the participant attends the first class, the vendor will mail a tool kit to the participant, including an electronic body weight scale, a blender, an electronic food scale, a resistance band for exercise, a water bottle, measuring cups and spoons, a portion plate, a measuring tape, a pedometer, a session guide, a nutrition guide, and workout CDs. Online group classes, individual one-on-one classes with a coach, and online support tools continue throughout the 52-week weight loss program.

The Department chose the employees of the Kentucky Community and Technical College System, state parks, boards of education representing different areas of the Commonwealth, and the Personnel Cabinet to participate in the pilot project. The Department chose employees of the Cabinet to participate as a means to obtain immediate feedback regarding the pilot project and to gauge the progress of the program throughout the 52-week period. The Cabinet is seeking an opinion from the Commission regarding whether it is permissible and appropriate to include the Cabinet's employees in the pilot project given that the Department will be managing the vendor's administration of the pilot project.

KRS 11A.045(1) 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 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.

(emphasis added). KRS 11A.010 provides definitions for "business" and "person:"

- (1) "Business" means any corporation, limited liability company, partnership, limited partnership, sole proprietorship, firm, enterprise, franchise,

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association, organization, self-employed individual, holding company, joint stock company, receivership, trust, or any legal entity through which business is conducted, whether or not for profit;

- (20) "Person" means an individual, proprietorship, firm, partnership, limited partnership, joint venture, joint stock company, syndicate, business or statutory trust, donative trust, estate, company, corporation, limited liability company, association, club, committee, organization, or group of persons acting in concert.

The Commission has previously opined, in the context of applying the outside employment and post-employment, provisions that a governmental entity is not considered a "person" or "business." See Advisory Opinions 02-60 and 00-54. Therefore, for the purposes of the gift rules, it would also hold true that the Personnel Cabinet is not a person or business as contemplated by KRS 11A.045, thus Cabinet employees may accept items of value as part of the pilot project without violating the gifts rules.

KRS 11A.040(5) provides as follows:

- (5) No public servant shall 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.

"Compensation" is defined in KRS 11A.010(3):

- (3) "Compensation" means 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;

Without prior approval of the Commission, the provisions in KRS 11A.040(5) prohibit an employee from receiving compensation, other than that provided by law, for performance of his or her official work. However, in Advisory Opinion 00-49, the Commission determined that public servants may participate in various incentive programs, such as the employee suggestion system, the adoption benefit program, the education achievement award, the employee recognition award, and the adjustment for continuing excellence award, authorized by statute or regulation, without violating KRS 11A.040(5) because such compensation by public servants is allowed and does not need prior approval of the Commission because it is authorized by law.

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The pilot project is authorized by the 2014-16 Biennial Budget for the Executive Branch. Therefore, the pilot project is authorized by law, thus any public servant who is a participant of the pilot program would be authorized by law to accept any incentive or item of value that is awarded or provided as part of that program without accepting additional compensation or violating KRS 11A.040(5). Therefore, the Cabinet employees may freely participate in the pilot project as long as the Department consistently and fairly administers the program.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: W. David Denton

Attachments: Advisory Opinion 02-60
Advisory Opinion 00-49
Advisory Opinion 00-54