



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 19-07
September 23, 2019

RE:

- (1) May the Department of Agriculture (KDA) directly raise funds pursuant to KRS 11A.055 for a 26 USC Section 501(c)(6) tax-exempt organization to fund a conference being held in Kentucky for the organization over which the Commissioner of Agriculture is serving as president?
- (2) If the answer to number (1) is yes, may the Commissioner of Agriculture and the staff of the KDA raise funds for the 501(c)(6) organization by soliciting persons or businesses that may otherwise be prohibited from giving gifts to the KDA and its employees pursuant to KRS 11A.045(1)?
- (3) May the Commissioner of Agriculture and other members of the KDA's senior leadership seek donations to the 501(c)(6) organization in advance of the conference from individuals and/or corporate entities who do not meet any of the circumstances as set forth in KRS 11A.045(1)?
- (4) If the answer to number (1) is no, may the 501(c)(6) organization use the Commissioner's name and identity on solicitations sent to entities that are regulated by or doing business with the KDA or otherwise listed in KRS 11A.045(1)?
- (5) If the answer to number (1) is no, may the Commissioner of Agriculture and the staff of the KDA raise funds to be donated directly to the Department to fund a conference sponsored jointly by the KDA with the 501(c)(6) organization?

DECISION:

- (1) No
- (2) No
- (3) Yes, if using their own time and resources and avoid using state time and resources.

(4) Yes

(5) Yes, if allowable under KRS 45A.097.

This opinion is issued in response to your September 3, 2019 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the Commission). The Commission reviewed your request at the September 23, 2019 meeting and issued the following advisory opinion.

On behalf of the Department of Agriculture (KDA or Department) you have requested that the Commission review your agency's proposed course of conduct related to fundraising for an upcoming conference to be hosted by the Commissioner of Agriculture as the 2019-2020 President for the Southern Association of State Departments of Agriculture (SASDA). You state the relevant facts as follows:

The Kentucky Commissioner of Agriculture will host the SASDA 2020 conference from May 31 through June 3, 2020. Your agency is expected to raise between \$125,000 and \$150,000 to fund the conference. A former Kentucky Commissioner of Agriculture hosted the 2008 SASDA conference. However, that Commissioner engaged in conduct that was found to have violated the Executive Branch Code of Ethics that resulted in the Commission actions in Administrative Proceedings 13-001 and 13-002 because he directly solicited donations of persons or businesses who were regulated by or doing business with the KDA as prohibited by KRS 11A.020(1) and KRS 11A.045(1) among other numerous violations unrelated to the 2008 SASDA conference. The current Commissioner of Agriculture would like guidance to ensure that these infractions are not repeated.

In 2012, SASDA received 26 USC Section 501(c)(6) tax exempt status from the IRS. Section 501(c)(6) is the provision of the Internal Revenue Code that applies to business leagues, chambers of commerce, boards of trade, and similar organizations. The Commission must determine whether such an entity fits the definition of the term "charitable organization" as contained in KRS 11A.055, that would in turn allow the Commissioner and the KDA to raise funds for it.

KRS 11A.020(1) would otherwise prohibit public servants from using state time and resources to fundraise for non-charities or private entities because such would be using the public servant's official position or influence to benefit another without specific statutory authority to do so. However, KRS 11A.055 specifically allows state agencies to use state time and resources to fundraise for charities under certain circumstances. Specifically, you ask the following questions:

1. Does the November 13, 2012 IRS Letter, which specifically refers to Section 501(c)(6) of the Internal Revenue Code, qualify SASDA for KRS 11A.055(1)'s exemption allowing state agencies and public servants to "raise funds . . . for charitable nonprofit

organization granted a tax exemption by the Internal Revenue Service under Section 501c without violation of the provisions of this chapter”?

2. Does the Executive Branch Code of Ethics prohibit Commissioner Quarles and other members of KDA’s senior leadership from seeking donations to SASDA in advance of the 2020 conference from individuals and/or corporate entities that:

- a. are regulated by KDA;
- b. represent a group that KDA regulates;
- c. have a business relationship with KDA;
- d. seek grants from KDA;
- e. are involved in litigation against KDA; and/or
- f. are lobbying or attempting to influence the actions of KDA?

3. Does the Executive Branch Code of Ethics prohibit Commissioner Quarles and other members of the KDA’s senior leadership from seeking donations to SASDA in advance of the 2020 conference from individuals and/or corporate entities who do not meet any of the circumstances set forth above (namely, the circumstances in 2(a) through 2(f)?

KRS 11A.055 specifically states that:

- (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.

(emphasis added). 26 USC 501(c)(6) creates tax-exempt entities comprised of:

“Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.”

The 501(c)(6) designation includes membership-based organizations or clubs that promote the business interests of their members. Such organizations include trade associations and sports leagues. While a 501(c)(3) charitable nonprofit must serve a public good and be supported by the public, a 501(c)(6) entity does not have to serve the public good. It can exist for the benefit of promoting the business interests of its members as long as its goal is not to make a profit. Thus, it can be called a nonprofit, but it does not fulfill the definition of charity.

In 2002, the Commission issued Advisory Opinion 02-28 to the then serving Commissioner of Agriculture. In this opinion, the Commission reviewed the question of whether the Commissioner could use his position to solicit and raise donations for the National Association of State Departments of Agriculture (NASDA) for which he was serving as President and was responsible for hosting the annual national conference. NASDA was a 501(c)(6) organization during the time of the Commission's review. KRS 11A.055 had recently been enacted and was considered by the Commission. The Commission determined that a 501(c)(6) organization did not meet the definition of charity and only 501(c)(3) organizations were charities.

However, the Commission further determined that the Commissioner could allow NASDA to use the Commissioner's name as an endorsement in solicitation letters sent directly from the director of NASDA to prospective donors even if those donors did business with or were regulated by the KDA. The Commission agrees with this previously issued opinion and reaffirms this reasoning for the present review. The current Commissioner of Agriculture may allow SASDA to reference his name and title in materials sent to potential donors, including those who are regulated by and doing business with or are otherwise listed as an entity in KRS 11A.045(1), as long as the solicitations come directly from SASDA and the donations are submitted to SASDA.

Nevertheless, there have been further updates in the law since the 2002 opinion was issued that may provide the KDA with other avenues to raise funds for the conference. KRS 11A.045(1) provides the gift exception of the Executive Branch Code of Ethics, but was amended in 2017 to add a reference to a new statute in the Model Procurement Code codified at KRS 45A.097. KRS 11A.045 now 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.

This subsection shall not apply to:

- (a) Activities involving sponsorships, naming rights, or similar honoraria granted under KRS 45A.097; or*
- (b) Individuals traveling on their own while involved in activities related to KRS 45A.097.*

(emphasis added).

You have requested that the Commission review your questions assuming that KRS 45A.097 will not be applicable to the present scenario. However, that is impossible because KRS 11A.045 and KRS 45A.097 are now interwoven, as shown above. Indeed, the General Assembly specifically enacted KRS 45A.097 to serve as an exception to KRS 11A.045(1) to allow state agencies to accept donations to fund the mission of the agency and to benefit the Commonwealth. KRS 45A.097 is enforced and administered by the Finance and Administration Cabinet. The Office of Procurement Services (OPS) has been designated to respond to inquiries under this new statute. If the OPS determines that the KDA may solicit and receive donations to fund the conference, then the KDA may use state time and resources to engage in fundraising to fund the conference if the donations are being accepted by the KDA. The parameters for accepting such donations must be established by OPS. KDA may then have the ability to fund the conference directly or provide those donations to SASDA. However, OPS must determine the overall application of KRS 45A.097 to the KDA's proposed conduct.

Finally, the Executive Branch Code of Ethics does not prohibit public servants from using their own time and resources to fundraise for a 501(c)(6) entity as long as the solicitations are only directed at persons or businesses that are not regulated by or doing business with or otherwise listed as a prohibited source in KRS 11A.045(1).

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: Christopher L. Thacker

ATTACHMENTS: Advisory Opinion 02-28