U.S. Department of Justice

Justice Management Division

Washington, D.C. 20530

MAY 2 5 2016

MEMORANDUM FOR VANITA GUPTA
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
FOR CIVIL RIGHTS

FROM: Lee J. Lofthus
Assistant Attorney General for Administration and Designated
Agency Ethics Official

SUBJECT: Waiver under E.O. 13490 and Determination under 5 C.F.R. § 2635.502

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standards of conduct on impartiality, 5 C.F.R. § 2635.502, that you may participate in a particular matter in which your former employer represents a party.

On April 19, 2016, the Fourth Circuit Court of Appeals issued an opinion in *G.G. ex rel. Grimm* v. *Gloucester County School Board*, No. 15-2056, -- F.3d --, 2016 WL 1567467 (4th Cir. April 19, 2016), reversing in part and remanding back to the district court. The Fourth Circuit, holding that the Department of Education's interpretation of Title IX of the Education Amendments of 1972 was entitled to deference, ruled in favor of a transgender boy who had been prevented by the school district from using restrooms that correspond with his gender identity. The American Civil Liberties Union (ACLU) represents the plaintiff in *G.G.*, and the Department of Justice had filed a statement of interest in the district court and an *amicus* brief before the Court of Appeals. The school board recently petitioned for a rehearing *en banc*, and the Court of Appeals has directed the plaintiff to file a response by May 16. If the Fourth Circuit grants rehearing en banc or if the Court requests the United States' views on whether rehearing en banc should be granted, the Department would need to act quickly to decide whether further amicus participation would be appropriate and to draft an amicus brief.

The Department of Justice (DOJ) has an important and vital role in protecting the civil rights of individuals, including gay and transgender individuals. DOJ also has an important role in ensuring that federal agencies' interpretative guidelines are given appropriate deference. The Civil Rights Division has a strong interest in ensuring that, if an *en banc* rehearing is granted, the full Fourth Circuit takes the correct approach in this case, and, if remanded, the district complies with the Fourth Circuit's holding.

Also of note, *G.G.* raises issues that overlap substantially with those in four other pending lawsuits that directly implicate the Civil Rights Division's interests. On May 9, 2016, the Civil Rights Division filed suit on behalf of the federal government in *United States* v. *North Carolina, et al.*, Case No. 1:16-cv-425 (M.D.N.C.), which challenges North Carolina's H.B. 2, a statute restricting transgender people from using the public restrooms that match their gender identity. The United States' lawsuit includes claims under Title IX, the same statute at issue in *G.G.* The lawsuit in *G.G.* also raises issues that are similar to those in *Carcano, et al.*, v. *McCrory, et al.*, No. 1:16-cv-236 (M.D.N.C.), a challenge by the ACLU and others to H.B. 2. You were recently granted a waiver to participate in the Department's response to *Carcano*. In connection with that response, on May 9, 2016, North Carolina and certain state officials filed two separate lawsuits against the United States, DOJ, and the Attorney General and you, in your official capacities. *See McCrory, et al.*, v. *United States, et al.*, Case No. 5:16-cv-238 (E.D.N.C.); *Berger, et al.*, v. *U.S. Dep't of Justice, et al.*, Case No. 5:16-cv-240 (E.D.N.C.). Also, on May 4, 2016, a group of parents in Illinois sued DOJ (among other defendants) to challenge the legality of the Department's interpretation of "sex" discrimination under Title IX to include discrimination on the basis of transgender status. *See Students and Parents for Privacy, et al.*, v. *U.S. Dep't of Education, et al.*, Case No. 1:16-cv-4945 (N.D. Ill.). Given this confluence, it is important that DOJ is able to coordinate its efforts on these cases and speak with one voice on the development of this area of the law. Each of these cases raises issues related to the treatment of transgender individuals, both by employers or educators, and proposed legislation addressing how states treat the transgender community are being debated by legislatures across the county. This rapidly developing area of law requires coordinated guidance from the highest levels of the Civil Rights Division and Department to ensure a clear, consistent, and well-considered message.

Immediately prior to your appointment on October 20, 2014, you served as a Deputy Legal Director at the national ACLU. Consequently, you are generally recused from participation in particular matters in which the ACLU[1] is or represents a party, under E.O. 13490. Further, we consider your participation under the impartiality standard of conduct, 5 C.F.R. § 2635.502, for the purpose of making a determination to authorize your participation in a particular matter with specific parties in which your former employer represents a party.

To date, you have not participated in *G.G.* because of your former position with the ACLU. However, in light of H.B. 2, *Carcano*, *McCrory*, *Berger*, and *Students and Parents for Privacy*, your participation in *G.G.* is of great importance in articulating and advocating the interests of the

[1] The ACLU has affiliate organizations in all 50 states; however, the affiliates are separate entities governed by independent boards of directors, and make decisions and act independently of actions taken by the national ACLU. Although not relevant here, we have previously determined that the national ACLU alone is Ms. Gupta's former employer, not any affiliate organization.

Civil Rights Division. Our approach in *G.G.* at the Fourth Circuit will inform and be informed by our approach in those cases arising from H.B. 2 and our interpretation of "sex" discrimination under Title IX. The issues presented in all these matters overlap and require a consistent response at the highest levels of the Department. The federal government's response in this nascent area of law at the appeals court level will inform future legislation and judicial interpretation, and the Fourth Circuit's decision in *G.G.* will likely guide the discussion by other courts considering the rights of transgendered individuals. Together, these matters are critical and may affect a number of the Division's institutional interests, with ramifications beyond the context of transgender rights. Because of the potential impact of this case on the Division's interests nationally, the Principal Deputy Assistant Attorney General, as the highest ranking official in the Division, should participate in the Department's decision-making about the positions the government will take in this case

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, ¶ 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (although the E.O. specifically includes regulations and contracts):

> 5 C.F.R. § 2641.201(h): Particular matter involving a specific party or parties – (1) Basic concept. The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. § 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The *G.G.* case may determine whether restricting transgender individuals from using the bathrooms that correspond with their gender identity violates Title IX. One of the central issues in the lawsuit is whether federal prohibitions on sex discrimination cover discrimination based on gender identity, including whether such laws require covered entities to allow people to use single-sex restrooms consistent with their gender identity. You have been instrumental in developing the Department's position on these issues. For example, you are a co-signatory to a proposed guidance document that DOJ and the Department of Education may issue in the near future to advise state and local education officials that Title IX's prohibitions on sex discrimination require that students be allowed to use restrooms and locker rooms consistent with their gender identity. You also authorized the Division to file a statement of interest in 2015 in a Michigan lawsuit to support the Title IX and constitutional claims of a transgender boy who alleged that school officials barred him from using restrooms consistent with his male gender identity. You also submitted a recommendation to the Solicitor General's Office seeking authorization for the Division to file an amicus brief in an appeal challenging a university's refusal to allow a transgender student to use restrooms and locker rooms consistent with his gender identity. (That case settled before the Solicitor General decided whether to authorize amicus participation.) And you have made recommendations to, and been an active participant in discussions with, Department leadership on issues directly relevant to the North Carolina litigation, including whether the Equal Protection Clause and all federal statutes prohibiting sex discrimination should be interpreted to bar discrimination on the basis of gender identity and sexual orientation. Your experience and leadership on these issues would contribute immensely to the Division's and Department's discussions over presenting a consistent message on these issues.

Because the school board's actions in *G.G.* directly implicate the Division's enforcement responsibilities under federal laws prohibiting sex discrimination, it is important that the Division's senior official be able to participate in internal Department discussions and decisions concerning the Division's involvement in the case, as well as be able to serve as a public face of the Division in communicating with other stakeholders and the public concerning the Division's positions in this and similar cases.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. For the reasons discussed above, I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department; the important legal, policy, and strategic considerations; and your knowledge of the relevant issues presented. I certify that it is in the public interest that you be able to participate in the Division's involvement in *G.G.*

5 C.F.R. § 2635.502

The Standards of Conduct, 5 C.F.R. § 2635.501 *et seq.*, prohibit participation in matters that raise a question of an actual loss of impartiality or the appearance of loss of impartiality. Specifically, whenever an employee knows that a person with whom the employee has a "covered relationship" (which includes a former employer or former client) is a party, or represents a party in a specific matter, and where the circumstances would cause a reasonable person to question the employee's impartiality under the appearance standard, the employee should not participate in the matter unless authorized to do so. 5 C.F.R. § 2635.502(a). An employee may participate in a specific party matter where it is determined that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. 5 C.F.R. § 2635.502(d).

An official has a covered relationship with a former employer for one year after employment terminates. You left the ACLU in October 2014, more than a year ago. You no longer have a covered relationship with the ACLU as defined by the regulation. The regulation also provides that, in other circumstances that would raise a question regarding an official's impartiality, participation may be considered using the process in the regulation. In circumstances such as these, where a senior official who is subject to recusal under the provisions of the Ethics Pledge seeks to participate in a particular matter with specific parties, the Department has also made a determination whether to authorize participation using the criteria provided in the impartiality regulation.

The process for determining whether an employee should participate in a particular matter involving the appearance of a loss in impartiality is laid out at 5 C.F.R. § 2635.502(d). Under that process, I, as the agency designee, with the recommendation of an ethics official, must make a determination that the interest of the government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the Department's programs and operations. In making this determination, I may consider such factors as: (1) the nature of the relationship involved; (2) the effect the resolution of the matter will have on the financial interest of the person involved in the matter; (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the

matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter; and (6) adjustments, if any, that are viable to reduce or eliminate the likelihood that a reasonable person will question the employee's impartiality.

Using the above criteria, I conclude that you are authorized to participate as the PDAAG for Civil Rights in the Division's involvement in *G.G.* (1) You did not participate in this matter, which did not exist, while you served as Deputy Director of the ACLU, and you have no client confidences regarding this case. (2) The ACLU is a non-profit entity and is seeking injunctive relief in this matter, not a financial settlement. The resolution of this case may have a minor effect on the financial interest on your former employer, the national ACLU. Specifically, in cases in which there is authority to seek payment for attorneys' fees, the ACLU may seek reimbursement for such fees.

However, you have no continuing financial interest in the ACLU, and I do not consider the possible financial impact on the ACLU from a potential recovery of attorneys' fees to be a basis for a reasonable person to question your impartiality in advocating and supporting the government's interests where those interests may not be in accord with the interests of the ACLU's client. I note that the government's positions on the basic questions presented in this case is already on the record in the Department's statement of interest and amicus brief, neither of which included your involvement.

Further, (3 & 4) this case raises critically important issues related to the rights of transgender individuals and to the proper interpretation of federal law, and it is important that the Division's senior official be able to participate in internal Department discussions and deliberations concerning these issues. If the Fourth Circuit grants rehearing en banc, the Department will need to decide quickly whether to participate as an amicus at the en banc stage and, if so, will need to draft an amicus brief. If the Court were to deny rehearing en banc, the Department will need to decide whether to file another statement of interest or otherwise participate in the case on remand in the district court. It is in the best interest of the government that you be authorized to participate as soon as practicable in the deliberations leading up to those decisions. As head of the Division, you bring a valuable perspective and judgment to the Division's participation in this sensitive case. However, other Department equities have an impact on the Department's ongoing participation in this case, and therefore you would not have unilateral decision-making authority regarding the Department's involvement. Rather, you would be one important voice among Department leadership considering the appropriate action to take in this matter. (5) You have valuable expertise and experience related to civil rights issues, and can bring this experience and expertise to bear both within the Department and in any communications with the public. Accordingly, I conclude that the Department's interest in your participation in *G.G.* outweighs the possible concern that a reasonable person may question the integrity of the Department's programs and operations.

WAIVER: I hereby certify that it is in the public interest for you as Principal Deputy Assistant Attorney General to participate in the *G.G.* case. As discussed above, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, the ACLU. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine, under 5 C.F.R. § 2635.502, that the interest of the Department in your participation in these cases outweighs any possible concern that a reasonable person may question the integrity of the Department's programs and operations.

DEPARTMENT OF JUSTICE

Washington

May 25, 2016

CERTIFICATION OF PUBLIC INTEREST WAIVER FOR VANITA GUPTA

FROM: Lee J. Lofthus
Designated Agency Ethics Official, Department of Justice

SUBJECT: Waiver from Restrictions Related to American Civil Liberties Union for *G.G. ex rel. Grimm* v. *Gloucester County School Board*

Pursuant to the authority delegated under Section 3 of Executive Order 13490 and for the reasons stated in the attached memorandum and after consultation with the Counsel to the President, I hereby certify that a limited waiver of the restrictions of paragraph 2 of the Ethics Pledge is in the public interest for appointee Vanita Gupta in the position of Principal Deputy Assistant Attorney General for the Civil Rights Division of the Department of Justice. Ms. Gupta shall not be restricted from participating in *G.G. ex rel. Grimm* v. *Gloucester County School Board*, subject to the limitations set forth in the attached memorandum and without waiving the limitation on Ms. Gupta's participation in regulations and contracts as provided in paragraph 2 of the Ethics Pledge. This waiver does not otherwise affect Ms. Gupta's obligation to comply with other provisions of the Ethics Pledge or with all other pre-existing government ethics rules.

Signed _____ Date 5/25/2016

Lee J. Lofthus
Designated Agency Ethics Official
Department of Justice