

Office of Government Ethics
94 x 10(1) -- 03/30/94

Letter to a Departmental Acting Assistant Secretary
dated March 30, 1994

This is in response to your letter of March 29, 1994, requesting that we review an Inspector General's Report of Investigation regarding the participation of a Department attorney in hearings [regarding Corporation A]. You asked that we review the March 18, 1994, report for the purpose of determining whether the [Department] Inspector General properly interpreted and applied the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. Our review indicates that the Inspector General incorrectly found that the [Department] attorney had an obligation to obtain authorization under 5 C.F.R. § 2635.502 before participating in the [Corporation A] matter.

The Inspector General's investigation was the result of allegations by [Corporation A's] counsel that the [Department] attorney's participation had tainted the proceedings, which resulted in an initial finding on December 22, 1993, that [Corporation A] was unfit for certification. While other allegations were made, those that were substantiated and formed the basis for the Inspector General's findings included the fact that the [Department] attorney's brother had been employed by [Corporation B] and resigned at approximately the time the primary investor in [Corporation A] became [the] President [of Corporation B]. As also alleged, the Inspector General found that the [Department] attorney's brother is presently employed by [Corporation C] and is a member of [an] Association. [Corporation C] is a potential competitor of [Corporation A], and [the Association] is a party to the proceedings opposing the application [by Corporation A].

Based on findings that the [Department] attorney and his brother had a "covered relationship" within the meaning of 5 C.F.R. § 2635.502(b)(1)(ii) and that a reasonable person with knowledge of the facts would question the attorney's impartiality in the matter, the Inspector General concluded that the attorney's failure to obtain authorization to participate in [Corporation A's] hearings was an "ethical lapse." While not stated in precisely those terms, the Inspector General appears to have concluded that the [Department] attorney had an obligation under 5 C.F.R. § 2635.502(a) to obtain authorization before participating in [Corporation A] proceedings.

There is nothing in the report that would give us reason to question the Inspector General's finding that the [Department] attorney has a "covered relationship" with his brother. It does not follow, however, that an executive branch employee must obtain authorization to participate in a matter if a person with whom he has a "covered relationship" has any connection with that matter. Except when he elects to use those procedures or when the financial interests of a member of his household are involved, an employee has an obligation to apply the procedures in section 2635.502 only when the person with whom the employee has a covered

relationship is a party or represents a party to a particular matter involving specific parties. Section 2635.502(a) provides:

(a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

The Inspector General found that the [Department] attorney's brother was not a member of his household. Thus, to reach the conclusion that the [Department] attorney improperly failed to obtain authorization to participate in [Corporation A] proceedings, the Inspector General would have to have concluded that the attorney's brother either was a party to the [Corporation A] proceedings or represented a party to the proceedings. The Report of Investigation contains no such finding, and it is apparent from the record provided that the brother had no role in the [Corporation A] proceedings. Thus, the Inspector General incorrectly applied section 2635.502 in finding that the [Department] attorney improperly failed to obtain authorization before participating in the proceedings.

In specifically requiring employees to consider the appearance implications of their participation in certain matters in which persons with whom they have covered relationships are or represent parties, section 2635.502 pinpoints the areas and relationships that, historically, have raised the most significant problems with appearances of lack of

impartiality. Its purpose is, in part, to provide a mechanism for a Government official, other than the employee, to make a determination as to whether the employee should or should not participate in those matters where his impartiality is most likely to be questioned. See 57 Fed. Reg. 35025 - 35027. While the focus of section 2635.502 is on the employee's participation in certain matters in which persons with whom he has covered relationships are parties or represent parties, section 2635.502(a)(2) recognizes that impartiality issues can arise in any number of circumstances. It does so, however, by giving the employee the election to use the decision-making process in section 2635.502 when he determines that participation in a matter would raise questions about his impartiality. Invoking that process will have the benefit of insulating the employee from criticism based on even vague allegations of appearances of lack of impartiality. The election not to use that process should not be characterized, however, as an "ethical lapse."

Even though section 2635.502 employs a reasonable person standard, there is necessarily a subjective element to any determination as to whether an employee's participation in a matter would raise questions about his impartiality. The fact that an interested party has raised such questions should not be viewed as establishing, as a matter of hindsight, that a reasonable person would question the employee's impartiality. In light of our determination that the Inspector General incorrectly applied section 2635.502 in finding that the [Department] attorney improperly failed to obtain authorization before participating in the proceedings, we cannot agree with the Inspector General's recommendation that additional ethics counseling be provided to four [Department] employees as a form of remedial action.

Sincerely,

Stephen D. Potts
Director