

OFFICE OF GOVERNMENT ETHICS

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**Letter to an Administrative Law Judge
dated July 19, 2001**

This is in response to your letter dated April 16, 2001, in which you ask the Office of Government Ethics (OGE) for guidance regarding use of title and agency position in various writings. Specifically, your letter asks how section 2635.807(b) of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635, would apply to the following three situations:

1. An attorney engages in professional misconduct in cases before a United States administrative law judge (ALJ). The ALJ files a complaint with the state office of attorney ethics. In order to describe the situation, the ALJ refers to his official position as an ALJ and the federal agency by which he is employed. Does such reference to title and agency violate 5 CFR 2635.807(b)?

2. In the above situation, the state investigates the complaint and, after a hearing, finds that the attorney did indeed violate rules of professional conduct and a disciplinary review board recommends a reprimand to the state's highest court. The ALJ referred to in paragraph 1 above writes a letter to the court urging more severe discipline due to the egregious nature of the misconduct. In order to identify his relationship to the case, the ALJ refers to his title and the agency by which he is employed. Does such a reference to title and agency violate 5 CFR 2635.807(b)?

3. A federal ALJ suspects that improper conduct and/or discrimination has been engaged in by officials of his agency. As a result, the ALJ writes a letter to an outside organization or other entity to request advice and/or information to assist him in determining a course of action. In order to explain the situation, the ALJ refers to his title and agency. Does such reference to title and agency violate 5 CFR 2635.807(b)?

Subject to certain exceptions not relevant here, 5 C.F.R. § 2635.807(b) provides --

An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching,

speaking or writing activity or to promote any book, seminar, course, program or similar undertaking.

It is worth emphasizing at the outset that section 2635.807(b), like the closely related section 2635.702, is intended to address use of official position *for nonofficial purposes*, not to bar use of title or position for activity that is reasonably characterized as official. Thus, the section is explicitly said to govern teaching, speaking, and writing "as *outside* employment or as an *outside activity*." [Emphasis added.] The preamble to the proposed rule, moreover, explains that the provision "prohibits an employee who is engaged in outside teaching, speaking or writing *in a personal capacity* from using his or her official title or position." 56 *Fed. Reg.* 33778, 33791 (July 23, 1991) (emphasis added). See also section 2635.702(b) ("when teaching, speaking, or writing *in a personal capacity*, [an employee] . . . may refer to his official title or position only as permitted by § 2635.807(b).") [Emphasis added.]

While OGE normally avoids taking a position on whether the activities undertaken by employees of other agencies are properly characterized as official or nonofficial, the first two hypotheticals you pose seem to involve activity of an official, rather than personal, nature. In such cases, the bar on use of title and position set forth in section 2635.807(b), like the related bar in section 2635.702, would not apply to these activities. However, if you are not sure whether these activities may be properly undertaken as part of your official duties, we recommend that you seek the advice of your official superiors and your agency ethics official.

As to the third hypothetical, based on the facts you describe, we are unable to form an opinion as to whether the ALJ would be writing the letter in his official capacity. It may be that the letter would be directed to the appropriate agency or other entity for handling allegations of discrimination or other improper conduct. In such a case, writing the letter would clearly appear to be an official activity of the ALJ, and therefore would not implicate the prohibition of section 2635.807(b).

We apologize for our delay in responding to your inquiry and hope this advice is responsive to your needs.

Sincerely,

Marilyn L. Glynn
General Counsel

