

Office of Government Ethics
95 x 5 -- 05/22/95

Letter to a Designated Agency Ethics Official
dated May 22, 1995

This is in response to your letters dated April 27, 1995, in which you requested our advice concerning two questions that were presented to you by officials of your agency.

The first question concerns two officials who, within the last year, were employed by a law firm that represents an organization (Company 1) which is separate but arguably related to an organization (Company 2) under investigation by your agency. You are trying to determine whether the officials may participate personally and substantially in the investigation of Company 2. That determination requires an analysis under 18 U.S.C. § 208, and subparts D and E of the Standards of Ethical Conduct for Employees of the Executive Branch (the Standards), 5 C.F.R. part 2635.

Under 18 U.S.C. § 208(a) and related regulations in subpart D of the Standards, an official is prohibited from participating personally and substantially(1) in an official capacity in any particular matter(2) in which, to his knowledge, he or any person whose interests are imputed to him under the terms of the statute has any financial interest, if the particular matter will have a direct and predictable effect(3) on that interest. Thus, in order for 18 U.S.C. § 208(a) and subpart D of the Standards to pose a bar to either of the officials' personal and substantial participation in the investigation of Company 2, that investigation would have to have a direct and predictable effect on the official's own financial interests or on the financial interests of a person whose financial interests are imputed to the official.

You have indicated that neither of the officials has any financial interest in Company 2. The only financial interests you have identified for either of the officials are that one of them maintains his previously committed funds in the law firm's 401(k) plan, which is managed by an independent manager paid by the firm on behalf of all participants; maintains his previously committed funds in the law firm's Keogh plan; and will be paid by the law firm, 12 months after the date of his departure from the law firm, the second half of a fixed amount retirement payment(4). There is nothing which indicates that the investigation of Company 2 would have a direct and predictable effect on those interests, including the ability of the official's previous employer to fulfill its

commitment to make the second half of the official's retirement payment. Accordingly, 18 U.S.C. § 208(a) and the related regulations in subpart D of the Standards would not bar the officials from participating personally and substantially in the investigation of Company 2.

Subpart E of the Standards implements the ethical principles at 5 C.F.R. § 2635.101(b)(8) (restated from section 101 of Executive Order 12674) that an employee shall act impartially and not give preferential treatment to any private organization or individual. To the extent that an employee's lack of impartiality in the performance of official duties might inure or appear to inure to his own benefit or to the benefit of certain other persons, subpart E also implements Executive Order 12674's principles, restated at 5 C.F.R. §§ 2635.101(b)(7) and (b)(14), that an employee shall not use public office for private gain and shall endeavor to avoid even an appearance of violating the law or the Standards. Under 5 C.F.R. § 2635.502(a),

[w]here 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 [5 C.F.R. § 2635.502(d)].

The officials would have a "covered relationship" with the law firm representing Company 1. Under 5 C.F.R. § 2635.502(b)(1)(iv), "[a]n employee has a covered relationship with: . . . any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." Moreover, the agency's investigation of Company 2 is a particular matter involving specific parties. However, Company 1 is not a party to the agency's investigation of Company 2. Thus, the agency's investigation of Company 2 is not a particular matter involving specific parties in which a person with whom the officials have a covered relationship is or represents a party, and the officials would not be required by 5 C.F.R. § 2635.502 to use the process described in that section before participating personally and substantially in that matter.

Nevertheless, 5 C.F.R. § 2635.502(a)(2) provides that "[a]n employee who is concerned that circumstances other than those specifically

described in this section [i.e., 5 C.F.R. § 2635.502] would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter." When considering whether there would be any question regarding the impartiality of his participation in a particular matter, the employee may seek assistance from his supervisor, an agency ethics official, or the person specifically designated by his agency to address appearance concerns ("agency designee"). Because the relevant facts will vary in each situation, the Office of Government Ethics (OGE) depends on the employee's agency to provide whatever assistance the employee needs in this regard; OGE is not able to decide for an employee or an employee's agency whether a reasonable person would question the impartiality of the employee's participation in any given particular matter.

Once the employee and the agency designee have made the threshold determination that a reasonable person would question the impartiality of the employee's participation in a particular matter, it is up to the agency designee to decide whether the employee may be authorized to participate in the matter anyway. In cases that do not involve a financial interest that would be disqualifying as a matter of law under 18 U.S.C. § 208(a), the agency designee has broad discretion under 5 C.F.R. § 2635.502(d) to authorize the employee's participation in the matter, based on the agency designee's determination, in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which the agency designee may take into consideration include:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (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 to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable

person would question the employee's impartiality.

The impartiality standard in subpart E of the Standards was intended to accommodate variant circumstances and to provide an analytical mechanism for employees and agency ethics officials to focus on situations where the employee's impartiality could be subject to question. Ultimately, the employee and the agency designee are the arbiters of whether, under the circumstances of a particular case, recusal is appropriate under the standard set forth in 5 C.F.R. § 2635.502. See OGE Informal Advisory Letter 93 x 25.

The second question concerns two officials who, within the last year, were employed by a law firm that represents a company being investigated by your agency (investigation 1). You are trying to determine whether those officials may participate personally and substantially in another agency investigation (investigation 2) for which a proposed consent order has been accepted by the agency for public comment, where that consent order, if approved, may serve as the precedent or model for the investigation of the company represented by the law firm that was the officials' previous employer. As was the case with the first question, your determination requires an analysis under 18 U.S.C. § 208 and subparts D and E of the Standards.

As explained above with respect to the first question, in order for 18 U.S.C. § 208 and subpart D of the Standards to bar either of the officials' personal and substantial participation in investigation 2, that matter would have to have a direct and predictable effect on the official's own financial interests or on the financial interests of a person whose financial interests are imputed to the official. There is not any indication that either of the officials has any financial interest in the company which is the subject of investigation 2. The financial interests of the law firm that was the officials' previous employer and that represents the company that is the subject of investigation 1 would not be imputed to the officials under the terms of 18 U.S.C. § 208 or subpart D of the Standards.

Like the situation in your first question, one of the officials maintains a financial interest in the law firm in that he is waiting to be paid by the law firm the second half of a fixed amount retirement payment. It seems likely that the agency's action on the proposed consent order in investigation 2 will affect the extent to which the law firm's services are needed by the company that is the subject of investigation 1, since that company has offered to sign a consent agreement similar or identical to the proposed order against the company that is the subject of investigation 2. However, unless the law firm's ability to make the

second half of the official's retirement payment is dependent on the outcome of investigation 1 (which, presumably, it is not), the officials would not be barred by 18 U.S.C. § 208 or subpart D of the Standards from participating personally and substantially in investigation 2.

The advice provided with respect to the first question regarding the application of subpart E of the Standards should also be followed with respect to the second question. Since the company represented by the officials' previous employer is not a party to investigation 2, the officials would not be required by 5 C.F.R. § 2635.502 to use the process described in that section before participating personally and substantially in that matter. The process described in that section may nonetheless be used to determine whether the officials should or should not participate in a particular matter. That process calls first for a determination as to whether a reasonable person would question the impartiality of the employee's participation in the matter, and, if so, a determination by the agency designee as to whether the employee may be authorized to participate in the matter anyway.

We trust that this advice will be of assistance to you.

Sincerely,

Stephen D. Potts
Director

Endnotes:

(1) See 5 C.F.R. § 2635.402(b)(4) for the definition of "personal and substantial."

(2) See 5 C.F.R. § 2635.402(b)(3) for the definition of "particular matter."

(3) See 5 C.F.R. § 2635.402(b)(1) for the definition of "direct and predictable effect."

(4) Although it would not be an issue with respect to the official's personal and substantial participation in the investigation of Company B, the official should be cautioned that under 18 U.S.C. § 203(a), no part of the retirement payment he is waiting to receive from the law firm may be derived from compensation for representational services rendered by the law firm, while he or she is a Government official, before any department,

agency, court, court-martial, officer, or any civil, military, or naval commission.