

Office of Government Ethics

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**Letter to a Designated Agency Ethics Official
dated September 21, 1999**

Your letter of September 17, 1999, requested advice from the Office of Government Ethics (OGE) as to whether the proposed reimbursable assignment of a Department employee to [a] State under the Intergovernmental Personnel Act (IPA) would be consistent with applicable conflict of interest restrictions for Federal employees. As indicated by our analysis herein, the proposed assignment would not, in our opinion, contravene the conflict of interest statutes discussed below, under the specific conditions outlined.

According to the background information provided by your letter, [the employee] is currently employed by [a second] Department in [a regional] office of [an agency of the second Department]. [A] Division of the [second] Department is investigating the State Police for possible violations [of a Federal statute]. It has been proposed that [the employee] be assigned as a Federal employee to the State, to serve as the Superintendent of its State Police. Although [the employee] has not participated in the Division's investigation, the [second] Department has determined that it will not make the proposed assignment of [the employee], because of the possible appearance of a conflict in connection with that investigation, including a potential law suit against the State Police.

Instead, the [second] Department has proposed that [the employee] be permanently transferred to [a] Bureau [of the Department], and that he then be assigned as a [Bureau] employee to the State Police as its Superintendent, under the IPA. His salary and benefits as a Federal employee would be paid by [the Department], but the State would fully reimburse [the Bureau] for those payments.

The IPA, at 5 U.S.C. § 3372, authorizes the head of a Federal agency, under certain conditions and restrictions, to arrange for the temporary assignment of an employee of his agency to a State or local government "for work of mutual concern to his agency and the State or local government that he determines will be beneficial to both." It requires that both

the Federal employee and the State or local government must have consented to the IPA arrangement. In accordance with 5 U.S.C. § 3373, a person so assigned remains an employee of his Federal agency during the assignment, and is deemed to be either on detail to a regular work assignment in his agency or on leave without pay from his position in the agency. Section 3373 also authorizes reimbursement by the State or local government to the Federal agency for travel and transportation expenses, and for the pay or supplemental pay of the employee during the assignment. Additionally, it provides that the supervision of the duties of an employee on detail may be governed by an agreement between the Federal agency and the State or local government concerned.

We are not in a position to comment on the propriety of an intergovernmental assignment under the IPA in terms of the purpose behind that statute, or whether the assignment would involve work of mutual concern and benefit to [the Department] and the State, or whether it meets the other preconditions of the IPA. Nor can we offer an opinion as to the propriety of the proposed assignment as a programmatic matter for either [the Department] or the [second] Department. Our following comments relate solely to the application of the conflict of interest statutes discussed herein to such an assignment.

18 U.S.C. § 208

The first consideration is whether 18 U.S.C. § 208 might restrict [the employee's] performance of duties during the proposed assignment. Absent an exception, that statute provides that a Federal executive branch employee cannot participate personally and substantially, in an official capacity as a Federal employee, in a particular matter wherein he or certain others (whose interests are imputed to him by the statute) have a financial interest that would be directly and predictably affected. Included are the financial interests of an organization or entity that he serves as an employee. Although [the employee] would, by the terms of the IPA, remain a Federal employee during the proposed assignment, the State would be an organization that he may also be serving as an employee. In addition to reimbursing [the Department] for his salary and benefits, the State may share in the supervision of [the

employee's] duties, and he would apparently be performing the responsibilities of a State official.¹

The Office of Legal Counsel (OLC) at the Department of Justice determined in a 1996 opinion to the FBI (relying in part on a related 1994 opinion) that a Federal employee's service in an official capacity with an outside organization would create a conflict under certain circumstances, whereby its financial interests are imputed to him by 18 U.S.C. § 208.² This occurs because the Federal employee is performing official duties for his Federal agency when carrying out the responsibilities of the outside organization, and in doing so, he is participating personally and substantially in an official capacity in particular matters that may directly and predictably affect the outside organization's financial interests, which are imputed to him by the prohibition in 18 U.S.C. § 208. According to those two OLC opinions, the resulting conflict can only be relieved by (1) statutory authority for such official outside service or a release of fiduciary obligations by the outside organization (either of which establishes the Federal employee's primary allegiance to the United States), or (2) a waiver of the prohibition in 18 U.S.C. § 208, as permitted by section 208(b).

We note that both of the cited OLC opinions concerned official Federal service on the board of directors of an outside organization, rather than as an outside organization's employee, which would be [the employee's] affiliation (assuming that he may be considered an employee of the State, under the terms of the IPA discussed above). Both types of affiliations, however, are encompassed by 18 U.S.C. § 208 in its imputation of the financial interests of an outside organization to a Federal employee. As

¹ For purposes of our conflict analysis, we will treat this assignment under the IPA as creating an employment relationship with the State. We are not deciding that issue, however, as it is outside the scope of our interpretive authority.

² See Memorandum for Howard M. Shapiro, General Counsel, FBI, from Beth Nolan, Deputy Assistant Attorney General, OLC (November 19, 1996). See also the opinion referenced therein and attached thereto, Memorandum for Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury, from Walter Dellinger, Assistant Attorney General, OLC (June 22, 1994).

an employee of an outside organization, one has a duty of loyalty to that employer, which may be compromised when he is faced with the dilemma of "serving two masters" by reason of also serving as an employee of the Federal Government.

It would seem to make little difference that the loyalty owed to the outside entity is in the capacity of a regular employee rather than of a director, as was the case in the cited OLC opinions. While one's fiduciary duty to an organization as a director may be different from one's duty as its employee, we believe, nonetheless, that the same rationale underlying the cited OLC opinions controls. In the 1996 opinion to the FBI, OLC found specifically that the "prohibition in 18 U.S.C. § 208 extends to any official action by a government employee that affects the employee's financial interests or those of other specified persons or entities, *such as* (emphasis added) an organization for which the employee is a director." We read that to include official action by a Federal employee as either a director or an employee of an outside organization.³

In any event (assuming that [the employee] would be serving the State as its employee, thereby creating a conflict similar to that described in the 1996 OLC opinion to the FBI), it seems clear that the IPA constitutes sufficient statutory authority for a Federal employee's official service with a State government to resolve this dual role under 18 U.S.C. § 208. As noted earlier, OLC recognizes an exception where there is statutory authority for the assignment. Both the 1994 and 1996 OLC opinions require that, in order for statutory authority to resolve the conflict, the statute must expressly authorize the outside assignment, thus making it essentially *ex officio* and establishing primary loyalty to the United States. We believe the IPA provides sufficient

³ This is also confirmed in the final substantive paragraph of a 1998 OLC opinion: "Finally, you also ask us to confirm your view that an employee's service in an official capacity as the chair of a working committee or subcommittee of a standard-setting organization, to the extent the position imposes no fiduciary duty and creates no *employer-employee relationship* (emphasis added), would not implicate 18 U.S.C. § 208. We agree that service in such a position would not itself trigger the statute." See Memorandum for Marilyn L. Glynn, General Counsel, OGE, from Beth Nolan, Deputy Assistant Attorney General, OLC (August 24, 1998).

authority in that regard.⁴ The IPA contains specific authority for assigning a Federal employee to a State or local government, under conditions whereby he remains a Federal employee, while at the same time acquiring the attributes of an employee of a State or local government. The result is that a Federal employee on an IPA assignment to a State or local government owes primary allegiance to the Federal Government, and therefore the concerns under 18 U.S.C. § 208 are eliminated by the IPA itself.

While the IPA's specific authority for intergovernmental assignments eliminates the potential criminal conflict under 18 U.S.C. § 208, the question remains whether that resolution satisfies the needs and expectations of the Federal Government and the State. The nature of your question suggests that [the State] might wish to have [the employee's] services without the encumbrance of a higher duty to the Federal Government. That may not present a problem, however, if [the employee's] official duties at [the Bureau] provide affirmatively that he is to serve in the capacity of Superintendent of the State Police. If that is the case, his primary duty to the United States would not preclude his full services to the State as its employee, with the necessary authority inherent in that State position. This is a matter to be specified in an agreement contemplated under the IPA between [the Department] and the State concerning the terms and supervision of [the employee's] duties while on detail.⁵

⁴ See also the 1998 OLC opinion cited in footnote 3, which found sufficient basis, by inference, for service on a board of directors, where a statute's purpose of providing for a Federal employee's participation in certain matters with an outside entity would otherwise be thwarted. Similarly, precluding service as an employee of a State government would, in our view, frustrate the purpose of the IPA in authorizing the reimbursable assignment of a Federal employee to a State government for work of mutual concern and benefit, especially when the agreement contemplated by the IPA so specifies.

⁵ The appointing official at [the Department] for [the employee] could also consider granting a waiver under 18 U.S.C. § 208(b)(1), certifying that the State's financial interests (which are imputed to [the employee]) are not so substantial as to be deemed likely to affect the integrity of services expected of him by [the Department]. The 1998 OLC opinion cited in footnote 3 suggests, however, that reliance on the waiver
(continued...)

18 U.S.C. § 205

The other criminal statute that may most likely be implicated by the proposed assignment of [the employee] by [the Department] is 18 U.S.C. § 205(a)(2). That statute generally prohibits a Federal employee from acting as an agent or attorney for anyone before any department, agency, court, or certain other Federal entities concerning any particular matter in which the United States is a party or has a direct and substantial interest, except in the "proper discharge of his official duties." The question arises whether [the employee] could represent the interests of the State Police, as their Superintendent, to the [second] Department (or to a court, if a lawsuit is instituted) in connection with the Division's investigation of the State Police for possible violations [of a Federal statute]. All elements of 18 U.S.C. § 205(a)(2) would appear to be met by that representation, unless it could be considered the proper discharge of [the employee's] official Federal duties. As suggested above in the discussion of 18 U.S.C. § 208, that may be an accurate description, assuming that the IPA assignment by [the Department] affirmatively authorizes such representational contacts and so specifies in the IPA agreement with the State.

Where an assignment under the IPA necessitates representation of the State or local government to the Federal Government as an integral part of the statutory scheme administered by the Federal employee's agency, OLC has found such representation to be within the proper discharge of the Federal employee's official duties.⁶ At page 504 of their opinion, OLC also observed that nothing in the background or legislative history of section 205 suggests that Congress intended substantially to limit the uses Federal agencies may make of their employees. We understand, therefore, that section 205 should not be read to proscribe the ability of agency heads in determining that it would be mutually beneficial for an assignment under the IPA to include representational activity before the Federal Government.

⁵(...continued)
procedure might not be consonant with the statutory scheme, where Congress itself has resolved the possible conflict between duties to an organization and duties to the United States.

⁶ See 4B Op. O.L.C. 498 (1980).

Informal contact with OLC has confirmed this interpretation, where the head of the Federal agency making the IPA assignment has determined that such representational activity is of mutual benefit to the Federal Government and the State, is to be undertaken as part of the assigned Federal employee's official duties, and is affirmatively made a part of those duties, preferably as an express provision in the IPA agreement.⁷ The IPA itself provides authority for the agency head's determination in that regard. A decision that representation may or may not be a part of the Federal employee's official duties is a matter within the sound judgment of the Federal agency head making the IPA assignment. In this connection, we recommend that [the Department] ensure that the [second] Department has no objection to this assignment, since its interests may be affected.

CONCLUSION

These are the primary conflict of interest statutes that we believe should be considered in connection with the proposed IPA assignment of [the employee]. As indicated previously, we are in a position to opine only with regard to the conflict statutes, and not to suggest the propriety of the proposed assignment from any other standpoint. I hope our analysis proves useful to you.

Sincerely,

Stephen D. Potts
Director

⁷ According to OLC, this reasoning also applies to the related provision in 18 U.S.C. § 203(a)(1)(B), which prohibits compensation for representational activity similar to that proscribed by 18 U.S.C. § 205(a)(2). Therefore, reimbursement of the Federal employee's pay or other expenses by the State under the IPA would not be precluded, where representation before the Federal Government has been determined by the agency head to be appropriate.