

Office of Government Ethics

91 x 37 -- 12/09/91

Letter to the Acting Deputy Director of an Agency Division dated December 9, 1991

This responds to your request for an opinion concerning a possible conflict of interest on the part of [an employee] in [your] Division of the [agency]. [The employee] formerly was your subordinate. Your inquiry originally was a joint request from you and [the] Acting Director of [your] Division. [The former Acting Division Director] has since left the [agency].

Background

As I understand the facts as you have described them, [the employee] was the head of a branch within [a] Division, which [the former Acting Division Director] headed from January to May, 1991. You were [the former

Acting Division Director's] deputy. [The employee's] duties principally involved the supervision of data collection, analysis and report preparation by program staff and contractors. One such contractor is [Company A]. At the time in question, [Company A] had three contracts with your division, two of which were handled in [the employee's] branch. The value of these three contracts was approximately 1 million dollars, and they accounted for one-half of the amount your division spends annually in contracting with private research companies. You believe that [Company A's] annual revenues are approximately 84 million dollars. [Company A], which is headquartered [nearby], employs over 600 people throughout the United States.

[The employee's] wife is an employee of [Company A]. In fact, they met while working together on a contract [Company A] had with the [agency] to

conduct a survey. She participates in a [Company A] Employee Stock Ownership Plan under which she receives stock, the amount of which is based upon the company's profits. As of December 31, 1990, she owned 53.69 shares of common stock (out of 600,000 outstanding shares) worth \$912.73. She has not worked on any contract with your division since August 1990, a month before her marriage to [the employee].

In June 1990, approximately four months after [the employee] first began dating his future spouse, he sought advice concerning possible conflicts of interest. He apparently received advice from a variety of sources

which resulted in the execution of a recusal in August 1990 "from all project management decisions involving [Company A]" After execution of the recusal, [the employee] did not participate in any matter involving the selection of [Company A] as a contractor, but he continued to evaluate the performance of his subordinates on their work in connection with [Company A] matters. Moreover, from what you have described, it appears that [the employee] continued to work on matters which generally involved [Company A], such as the review of work products submitted by [Company A] and the acquisition of funding from another Federal agency for the administration of a [Company A] contract.

In February 1991, [the former Acting Division Director] learned of this situation and discussed the matter with [an individual], who at that time was the [agency's] Designated Agency Ethics Official. On March 6, 1991, [the DAEO] issued an opinion which stated that, in the absence of a waiver under 18 U.S.C. § 208(b), [the employee's] duties must be changed or he must be reassigned to another position within the [agency], or possibly even terminated. After receiving this opinion, [the former Acting Division Director] relieved [the employee] of his duties as Program Director and assigned him to unspecified duties in his immediate office.

Subsequently, the [agency's] General Counsel and [the DAEO] issued a joint memorandum, replacing [the DAEO's] earlier memorandum. This joint memorandum stated that [the employee] could properly continue to design surveys and research and prepare contract specifications if three remedial steps were taken. First, [the employee] would have to execute a new recusal from particular matters in which [Company A] was directly involved. Such matters were defined to include any RFP or evaluation of bids after [Company A] has bid or has indicated an intention to bid; any award made to [Company A]; and any RFP or evaluation of bids for a follow-on contract made to an earlier [Company A] contract (unless [Company A] has failed to bid or has been eliminated.) Additionally, the recusal would contain an acknowledgement that [the employee] had a continuing obligation not to disclose confidential information about [agency] matters to his wife. Second, the [agency] would have to obtain a letter from [Company A] indicating that [the employee's] spouse would not be assigned to work on any [agency] matters and that [Company A] would not seek any confidential information through her. Finally, the General Counsel would have to issue a waiver which would permit [the employee] to act in matters not covered by his recusal.

The materials you have provided indicate that the matter has been

resolved in accordance with the recommendations of the General Counsel. In particular, [the employee] executed a recusal as described above, [Company A] provided a letter describing their agreement to assign [the employee's] spouse to other matters, and the General Counsel issued a waiver. [The employee] has been detailed to a different office and is not currently under your supervision. You are now asking whether the actions taken to avoid a conflict of interest were adequate.

Applicable Conflicts of Interest Statutes and Regulations

A criminal conflict of interest statute, 18 U.S.C. § 208, bars a Federal employee from acting in an official capacity in a particular matter in which "he, his spouse, minor child, organization in which he is serving as an officer, director, trustee, partner or employee, or any person with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest" The statute does not bar an employee from having any particular financial interest; it simply requires him to refrain from participating in matters which would affect such interests. In a case where a conflicting financial interest exists, an employee may act in his official capacity only

if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.

18 U.S.C. § 208(b)(1).

As the above language indicates, the prohibition applies when the financial interest involved is that of the employee, his spouse, or his employer. The statute does not contain any definition of the term "financial interest." However, it seems clear that the statute does not specifically prohibit an employee from acting in matters affecting the financial interest of a spouse's employer. Of course, there may be circumstances where an employer's interest could reasonably be considered the financial interest of the spouse as well. For example, where the spouse of a Government employee is employed by a Government contractor and the spouse will receive a bonus or promotion if the contractor is

successful in obtaining a Government contract, the spouse has a financial interest in the prospective contract.

The application of section 208 may be waived in a case where the financial interest involved is not so substantial that it would be deemed likely to affect the integrity of an employee's services to the Government. This is necessarily a case-by-case determination, properly made by the agency involved. In reviewing such matters, agencies should also take into consideration the extent to which the employee's actions might amount to an appearance of a conflict of interest prohibited under Executive Order 12674, as amended. Section 101(n) of that Executive Order states that employees must avoid actions which create the appearance that they are violating a statute or any ethical standard promulgated pursuant to the Order.

Steps Taken by the [Agency] to Eliminate Potential Conflict of Interest

From the information you have provided, it seems clear that [the employee's] spouse, by virtue of her stock acquisition and ownership arrangement, has a financial interest in contracts that [Company A] may have with the [agency]. However, the fact that she is not an officer of the corporation and will not work on any [Company A] contracts or procurements involving [the employee's] division considerably reduces the appearance of a conflict of interest. Moreover, her [stock ownership interest] in the company is relatively insubstantial (\$912.73).

On the other hand, [the employee's] direct involvement in matters affecting [Company A] would certainly raise questions about preferential treatment and lack of impartiality. Therefore, we agree that a recusal would be appropriate in this case. Any such recusal should, at a minimum, ensure that [the employee] refrain from participating in matters which specifically and directly involve [Company A]. The recusal [the employee] executed on the advice of the General Counsel appears to encompass most such matters. However, because there appears to have been a misunderstanding about the scope and meaning of [the employee's] earlier recusal from "project management decisions affecting [Company A]," there may be some confusion about the exact scope of this new recusal.

Assuming

that [the employee] could resume duties which may involve [agency] contracts with [Company A], we recommend that, if he has not already, [the employee] receive a full briefing on the meaning of his recusal so that he clearly understands that he may not participate in the types of matters described in your incoming request, e.g., review of work products produced

by [Company A] under contract with the [agency], arranging for [agency] clearances necessary to release [Company A] work, and recommending levels

of funding for [Company A] multiple year contracts. We also suggest that the [agency] examine carefully whether [the employee] could continue to carry out the responsibilities of his position as Program Director in a meaningful way in light of [the earlier] recusal, if he were to be reassigned to [a particular] program.

You also appear to be concerned with the types of matters that are not governed by the recusal, i.e., [the employee's] continuing responsibility to participate in survey design, and to supervise the development of work statements, specifications, delivery schedules, and evaluation criteria for RFPs on which [Company A] might bid. We do not disagree that involvement in such matters might affect [Company A] in cases where it is likely that [Company A] would bid on a particular RFP.

The General Counsel addressed this issue by issuing a waiver pursuant to 18 U.S.C. 208(b) which would permit [the employee] to act in such matters. The propriety of issuing the waiver was delineated in the General Counsel's memorandum of April 15, 1991, as follows:

before any resulting RFP issued it would go through multiple levels of review designed, among other things, to assure that the work statements, etc., are not "loaded" even unintentionally, so as to favor one bidder over another.

In our view, the integrity of [the employee's] services in these matters is unlikely to be compromised by his wife's employment with [Company A]. The chance that he could or would do anything to significantly advantage [Company A] is small, and the likelihood that any advantage to [Company A] could redound to his wife's benefit, let alone his own, is smaller.

Based upon this reasoning, and the fact that full disclosure of the interests involved had been made, the General Counsel concluded that a waiver under 18 U.S.C. § 208(b) was appropriate in this case.

The issuance of a waiver is a matter within the responsibility of the agency involved, based upon the agency's analysis of the financial interest and the services expected of the employee. In the absence of a clearly erroneous determination, we do not believe it would be appropriate for this Office to substitute our judgment for that of the agency.

In this case, insufficient facts have been presented which would compel us to conclude that the [agency] should not have granted the waiver. However, if additional facts are present which we have not considered in making this determination, we recommend that you bring them to our attention as soon as possible.

Sincerely,

Stephen D. Potts
Director