

Office of Government Ethics

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Letter to the Head of an Agency dated September 5, 1991

Thank you for your letter of August 16, 1991, concerning your ethics agreement for recusal from matters which could affect your pension plan with [a corporation]. We understand that you believe it appropriate to review the necessity for a recusal from matters affecting the company sponsor because, subsequent to your ethics agreement, you discovered that the plan does not hold stock in the company.

As stated in our formal opinion which you referred to, 83 OGE 1, a Government employee ordinarily will have a financial interest in matters affecting a pension's sponsoring organization if the pension is a defined benefit plan, or if the plan holds stock of the corporation or is managed by employees of the sponsoring organization. You have ascertained from the plan administrator that the pension plan does not invest in securities of [the corporation] or its affiliates, and that the company has no input in the investment manager's selection of individual securities. However, the plan's description clearly states that it is a defined benefit plan. With defined benefit plans, as the above-cited opinion notes, "matters affecting the sponsoring company may well affect the company's ability to maintain adequate funding levels or to pay benefits when due, with the result that the Government employee has a financial interest in such matters under [18 U.S.C.] § 208(a)." Our experience has been that even so-called "fully funded" pension plans depend on the company's continued ability to provide the funds required.

Moreover, our review of the plan's description indicates it is under the general management of an administrative committee of three members appointed by the corporation's board of directors. If the administrative committee is composed of company employees, their general management authority ties the plan to the sponsoring company, because, in the words of the above-cited opinion, they are "acting as representatives of the sponsoring organization, and their management of the plan may be affected by developments in matters affecting that organization."

The Department of Justice agreed with our opinion 83 OGE 1. Significantly, the opinion concludes that "the typical pension

plan is so intertwined with the sponsoring organization that a Government employee holding vested rights in the plan must be deemed to have a financial interest in matters affecting the organization. We feel that the burden is properly on the Government employee participating in a pension plan to show otherwise." The characteristics of your pension are such that we believe it does present a potential conflict under 18 U.S.C. § 208, based on this opinion.

Recusal is normally a preferred method of resolving such a conflict, because by removing yourself from participation, you eliminate the possibility of an actual criminal violation, as well as the appearance of impropriety. This was the general nature of the ethics agreement which we understood you had undertaken and which we represented to the Senate. However, you are concerned now that [the corporation] could force your recusal by simply intervening in matters before you. If this is a real possibility, we would have no objection to alternative resolution of the potential conflict under 18 U.S.C. § 208 by means of a waiver. Your contention that your small interest in the plan would cause any impact on the value of your pension to be insubstantial tends to support the propriety of granting such a waiver, if the official authorized by 18 U.S.C. § 208(b)(1) desires to do so.

We do believe that either recusal or waiver with respect to matters affecting [the corporation] is required, under the circumstances, since you have indicated that divestiture of the pension interest is not permitted.

Sincerely,

Stephen D. Potts
Director