



Highlights

Issues of Compliance

- The Board had no ADAEO. After the review the Board designated an ADAEO (5 C.F.R. § 2638.202(b)).
- During the review, the Board modified its annual written training plan to estimate employees required to be trained (5 C.F.R. § 2638.706).

Model Practices

- The emergent issue of pay banding concerning public filing was addressed effectively by the Board.
- All of the Board's employees receive verbal annual ethics training.
- The Board promotes an ethical culture by enclosing ethics materials with job offer letters.
- The Board provides mandatory post-employment counseling.
- Documentation of screening analyses fosters transparency and accountability.

OGE Suggests

- Periodically reexamine written financial disclosure procedures implementing § 402(d)(1) of the Ethics Act.
- To enhance transparency, document fully all those who receive annual training.

Report on the Ethics Program Review of the

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Conducted December 2005 Through January 2006

Executive Summary

As a result of the review the Defense Nuclear Facilities Safety Board's (Board) ethics program is sound with respect to relevant ethics laws and regulations. The Board also fosters an ethical climate by implementing several model practices.

Areas of the Board's ethics program were not in full technical compliance at the beginning of the Office of Government Ethics' (OGE) review. However, these issues were resolved quickly and efficiently. For instance, the Board designated an Alternate Designated Agency Ethics Official (ADAEO) within three days of our exit conference.

OGE does offer the Board some suggestions to aid in strengthening the ethics program further.

- First, update the Board's written procedures relating to the collection, review, evaluation, and, if applicable, public dissemination of financial disclosure statements (§ 402(d)(1) of the Ethics in Government Act of 1978, as amended [Ethics Act]), as these procedures were last updated in 1993.
- Second, more efficiently track annual ethics training by having those employees who receive training, subsequent to an annual training session, certify that they have done so.

OGE may follow-up with the Board in six months to address any issues that may arise subsequent to the issuance of this report.

This report is being forwarded to the Board's Designated Agency Ethics Official (DAEO).

Introduction

OGE MISSION

OGE provides overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.

PURPOSE OF A REVIEW

An ethics program review identifies and reports the strengths and weaknesses of an executive agency's ethics program, which includes both substantive and structural aspects. For example, a review measures agency compliance with ethics requirements found in relevant laws, regulations, and policies. A review also evaluates the ethics-related systems, processes and procedures in place for administering the program. 5 C.F.R. § 2600.103(e)(1)(iii).

REVIEW AUTHORITY AND SCOPE

OGE has the authority to evaluate the effectiveness of executive agency programs in preventing conflicts of interest. These programs may include the financial disclosure systems, education and training, ethics agreements, advice and counseling, and the enforcement of ethics laws and regulations. Title IV of the Ethics Act and 5 C.F.R. part 2638.

Findings

PROGRAM STRUCTURE

The Board's ethics program is administered by the Office of General Counsel. The Deputy General Counsel has served as Designated Agency Ethics Official (DAEO) since 1999; prior to this he served as the Alternate DAEO (ADAEO). One legal specialist assists the ethics program. Both officials perform ethics duties on a part-time basis.

The current staffing level at the Board is adequate, given the DAEO's ability to manage resources efficiently. However, at the time of OGE's review the Board had not appointed an ADAEO (5 C.F.R. § 2638.202(b)). OGE notified the Board's ethics officials of this issue of non-compliance during the review and subsequently the Chairman of the Board swiftly designated the Board's General Counsel ADAEO, remedying the situation.

FINANCIAL DISCLOSURE SYSTEMS

The financial disclosure systems fully comply with all applicable laws and regulations. Written procedures relating to how the Board is to collect, review, evaluate, and, if applicable, make publicly available, financial disclosure statements filed by its employees were developed in 1993 and have not been updated since (§ 402(d)(1) of the Ethics Act). While all relevant procedures are followed by the Board, the document itself does not seem to be in use.

Report on the Ethics Program Review of The DNFSB

Even though the Board's financial disclosure operating procedures are technically compliant, OGE suggests that they be updated to ensure continuity in the case of any future personnel changes at the Board.

Both SF 278 filers and OGE Form 450 filers are cognizant of the filing deadlines and requirements. This can be attributed to follow-up reminders of deadlines for both public and confidential systems, a good relationship between ethics officials and the Board's employees, and a checklist for completion of the SF 278 that accompanies the memorandum notifying employees of the requirement to file.

Public Financial Disclosure

OGE examined all 43 public financial disclosure reports filed in 2005; 35 incumbent, six termination, and two incumbent/termination reports were filed. All 43¹ reports were filed by the appropriate deadline, and all were reviewed and certified by the Board in a timely manner. Our examination found no substantive problems and few minor technical problems.

During our review, OGE discovered that many of the Board's public filers will not be required to file for the next two years. Upon further inquiry it was found that the Board has the authority by law to set their own pay rates.

Traditionally, slightly more than half of the public filers have been pay Band V employees who have filed public reports because their rate of basic pay was at or above 120% of the minimum rate of basic pay payable for grade 15 of the General Schedule (5 C.F.R. § 2634.202(c)).

However, because the Board factors in the market for pay of scientists in the field of nuclear safety when determining the rate of pay for Band V, a fluctuation has occurred that caused Band V to no longer reach the threshold for public filing (§ 2634.202(c)). In addition, market forces may again cause Band V to reach the public filer threshold. This fluctuation between the status as a public filer and non-public filer, if it were to continue, would cause confusion to the employees and a burden on the Board's ethics program.

For at least the next two years, Band V employees will not be required to file publicly, as they are \$523.00 and \$533.40 under the public filer threshold for 2006 and 2007 filing periods, respectively. The DAEO informed OGE that pay Band V employees will now undergo an analysis to determine whether they have to file OGE Form 450s, based on individual duties. The results of the DAEO's analyses are as follows; of the 23 Band V employees for 2006, 9 will file confidential reports and 14 will not file any financial disclosure reports. This constitutes a 61% drop in public filers from 2005.²

¹ Of these were five Presidentially-appointed, Senate-confirmed (PAS) reports and the DAEO's report, which were forwarded to OGE in a timely manner.

² This is based on the total of 23 Band V employees who usually would have filed publicly, not the total number of public filers from 2005.

Report on the Ethics Program Review of The DNFSB

OGE later advised the Board that any analysis of a former public filer's status should include consideration as to whether the employee should continue to file publicly based on an equal classification determination in accordance with § 2634.202(c). This step will add a measure of transparency to the process by making it clear that the possibility of continued public filing, due to position, was considered by ethics officials.

For now the situation is remedied, but given the unpredictability of the market forces used in determining the rate of pay for Band V, the rate could again rise to a level that would require Band V employees to file public reports. Because the criteria for who files public reports is set by statute,³ only Congress can fully address the issue of how a public filer is defined.

However, pay banding is becoming more common within the Federal Government and OGE considers the applicability of the current definition for public filers in relation to pay banding an emergent issue. Therefore, we will work further to provide guidance on how former public filers, whose positions have not changed, are to be treated when their rate of basic pay no longer requires them to file.

Confidential Financial Disclosure

All 14 confidential financial disclosure reports filed in 2005 were examined. All 14 reports were filed by the appropriate deadline, and all were reviewed and certified in a timely manner. OGE's examination found no substantive problems and few minor technical problems.

There were two instances where OGE Optional Form 450-As were filed in four consecutive years. Eligible filers may only use OGE Optional Form 450-A for a maximum of three consecutive years before they are required to complete a new OGE Form 450 (5 C.F.R § 2634.905(d)(4)). This issue was addressed during OGE's review and the DAEO has assured OGE that further use of OGE Optional Form 450-A will be restricted to three consecutive years.

ETHICS AGREEMENTS

The Board's execution of ethics agreements appears to exceed applicable regulatory requirements. Both PAS and non-PAS officials are required to carry out ethics agreements where appropriate. Two Board members required ethics agreements; one resulted in divestiture and resignation and the other resulted in divestiture. The agreements were complied with and OGE was notified in a timely manner.

During our review, we also encountered several instances of screening arrangements pursuant to seeking employment activities, as well as screening arrangements resulting from potential conflicts of interest for members of the Board. In the case of the Board members' screening arrangements, the DAEO files evidence of every matter screened, including his judgment about the propriety of the members' participation. This commendable model practice ensures that members are protected from inadvertent participation in a particular matter that may result in a violation of one or more of the ethics laws or regulations.

³ 5 U.S.C. app. § 101(f)(3)

Report on the Ethics Program Review of The DNFSB

Also, documentation of this kind provides a level of transparency and accountability that protects the agency.

EDUCATION AND TRAINING

The education and training element of the Board's ethics program is generally compliant with the provisions of 5 C.F.R. part 2638. Indeed, in many instances the Board goes beyond mere compliance by using model practices. By exceeding compliance, the Board conserves resources in other program areas. For example, effective employee education can reduce the possibility for ethics violations by employees.

However, the Board's written plan for annual ethics training in 2006 did not estimate the number of employees required to receive training or what kind of training they would receive (§ 2638.706(b)). Also, the creation of annual training plans seemed sporadic at best, with the most recent plan on file before 2006 being a plan from 2001. OGE reminded the DAEO that a written plan must be developed each year for the Board's annual training program (§ 2638.706(a)).

After OGE field work was completed, the Board's existing written annual ethics training plan for 2006 was edited to include estimations of employees required to receive annual training and the type of training they would receive (§ 2638.706(b)). OGE was also assured by the DAEO that this plan would be updated each year (§ 2638.706(a)). Due to the otherwise exceptional nature of the Board's ethics training program and the quick action taken to come into compliance, OGE feels the Board's initial non-compliance with § 2638.706 has been remedied.

Initial Ethics Orientation Program

The Board's initial ethics orientation (IEO) program is in compliance with § 2638.703 and goes beyond compliance in many areas with model practices that heighten the Board's efforts to instill ethics in employees as soon as possible.

IEO begins at the Board as soon as a prospective employee is offered a position. Enclosed within job offer letters is the OGE pamphlet: "Conflicts of Interest and Government Employment" and a copy of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). This easy and effective practice makes employees cognizant of ethics issues before they begin work at the Board.

IEO continues on the first day of work, as part of the Board's Human Resources Employee Orientation Schedule, with the OGE video "Integrity in Public Service: Earning the Public's Trust." After the video, the DAEO spends 30 minutes individually training employees on the Standards of conduct. Human Resources then certifies that all of the activities on the Employee Orientation Schedule are completed, including IEO.

Annual Ethics Training Program

The annual ethics training session takes place at one of two annual site-rep conferences. These conferences bring Board employees from the different regions to a central location to

conduct much of the Board's business, including annual ethics training. Those employees from the regions who do not attend the site-rep conference at which ethics training is conducted are given a recording of the training to watch.⁴ Other employees who fail to attend the main annual ethics training but work at the Board's headquarters meet personally with the DAEO to receive annual ethics training.

To track annual ethics training, the Board has employees sign a staff directory. While this system is sufficient, we noted that 13 public filers and 3 confidential filers did not sign the staff directory that was used to track annual training for 2005. The DAEO assured OGE that these employees did receive annual ethics training either individually or at make-up sessions. To ensure transparency, OGE suggests that the Board document fully all those who receive annual training.

PAS officials may choose to attend the annual training session if they wish but the Board's DAEO also gives them personalized training. Ethics issues are also often discussed at Board meetings, which the DAEO or the General Counsel (now also the ADAEO) almost always attend.

Before attending annual ethics training, the Board's employees are expected to complete, on their own, the OGE training module "Misuse of Position." During the main ethics training, the DAEO engages employees in a question-and-answer session in which employees are called on by name to answer questions from the training module. Knowledge that they will be called on by name, coupled with the possibility of being embarrassed in front of co-workers and supervisors, seemed to be ample encouragement for the Board's employees to take the "Misuse of Position" module. Further, Board employees seemed engaged during annual ethics training, not only did they answer questions but employees also asked follow-up questions. OGE did observe that handouts made available during training would give employees something tangible to take away from annual ethics training, including contact information for ethics officials or other pertinent information the ethics staff may wish to include.

Additional Training

The Board also provides other training as ethics issues arise. This includes the use of the Board's Intranet and e-mail directory to bring to light emergent ethics issues. Two specific examples OGE observed concerned the Hatch Act and holiday parties hosted by Government contractors. Additional training as needed keeps the Board's employees aware of ethics issues.

ENFORCEMENT

The Board does not have an Office of Inspector General (OIG). Therefore, the role of investigating misconduct, in general, lies with the Board's Office of General Counsel. Investigations of possible violations of the Standards or criminal conflict of interest laws may then be delegated by the General Counsel to the DAEO. Given the possibility of a DAEO investigating employees for possible ethics violations, OGE was concerned that Board employees would be reluctant to come to the DAEO for ethics advice.

⁴ OGE attained a copy of this recording and the review team watched the annual ethics training for 2005.

However, it seems that Board employees are well aware that the only way to protect themselves from ethics violations is to seek their DAEO's consultation. This point is made to employees during IEO and annual ethics training. Evidence of employees seeking advice and carrying out ethics agreements suggested that employees are not deterred from seeking advice, despite the DAEO's investigatory duties. This, coupled with past instances of administrative and criminal investigations, for both ethics and non-ethics related issues, makes it seem that the Board is prepared to enforce both the Standards and the criminal conflict of interest laws.

Nonetheless, there were no cases of violations of the Standards or criminal conflict of interest laws in either 2004 or 2005. If there were to be alleged ethics violations, the DAEO would begin any prospective ethics investigation by listening to and documenting a complaint or other cause, then steps would be taken to verify the accuracy of the concern that ethics laws or regulations may have been violated. If the concerns proved to be material, facts would continue to be collected and verified. An investigation may result in administrative action, referral to the Department of Justice (DOJ), or nothing. The DAEO or the General Counsel (now also the ADAEO) would refer any alleged violations of the conflicts of interest laws to DOJ for prosecution and notify OGE of the referral.

ADVICE AND COUNSELING

In 2005, the DAEO issued approximately six written opinions. These opinions pertained to future employment; outside activity, gifts, and the use of the agency seal. The advice provided was concise and appeared to be consistent with the applicable laws and regulations.

The majority of the opinions were recusals for future employment with a prohibited source. The ethics officials required the disclosure of future employment activities that may conflict with the mission of the agency. Upon disclosure, a recusal or waiver was issued. This policy was not just limited to activities involving prohibited sources, but also included employment with the Department of Energy (DOE).

In most situations, employment with another executive branch component would not be a conflict of interest; however, the Board's DAEO and employees decided, in light of impartiality concerns (5 C.F.R. § 2634.501), that disclosure is prudent given the Board's oversight authority of DOE.⁵

In addition to written advice and counseling, the DAEO often counsels employees verbally. While the Board does not have a written procedure for when advice should be formally given in written form or informally in oral form, the DAEO's practice is to write a memorandum for both advice that may not be clear cut and advice to Board members. If a request for advice via e-mail or telephone is simple, verbal advice is given. This system seems efficient for the size of the Board.

⁵ The Board's OGE Desk Officer spoke with a former DOE Ethics Official, who was an OGE employee at the time of our review, regarding this policy. He indicated that he was not aware of this concern, but it was understandable that the agency would take such precautions to protect the integrity of its mission.

Of special note is the Board's practice of giving post-employment counseling to all employees leaving the Board. During this one-on-one session the DAEO discusses post-employment conflict of interest issues pertinent to the Board and the employee's Government position (18 U.S.C. § 207). This practice is another example of how the Board goes beyond statutory and regulatory requirements to create an ethical climate.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

The Board has not accepted travel payments from non-Federal sources in recent years (31 U.S.C. §1353). While the DAEO informed OGE during the review that there is no explicit policy of not accepting payment under this authority, as a matter of practice, the Board has a preference for officially funded travel. Further, we learned that there are very few offers of travel made by outside entities. OGE has received the required semi-annual reports of travel payments accepted from non-Federal sources in a timely manner. In this area, the Board appears to be in compliance with all applicable laws and regulations.