

OFFICE OF GOVERNMENT ETHICS

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**Memorandum to Designated Agency Ethics Officials,
General Counsels, and Inspectors General
dated September 20, 2004**

The Office of Government Ethics (OGE) recently reissued its summary of the post-employment restrictions in 18 U.S.C. § 207, so that ethics officials would have up-to-date information when they counsel employees who are planning to leave Government service. DAEOgram DO-04-023, July 29, 2004. It is equally important, however, to remember that certain ethical requirements apply to employees even before they leave Government, *i.e.*, while they are still seeking future employment.

As recent events illustrate, there can be serious consequences if an employee violates the criminal restriction on participating in a particular matter affecting the financial interests of a prospective employer, 18 U.S.C. § 208. See *United States v. Druyun* (E.D. Va. 2004) (plea agreement), <http://www.navair.navy.mil/nawcwg/command/counsel/downloads/ethics/druyunpa042004.pdf>. Indeed, cases involving prospective employers frequently are represented in OGE's own annual surveys of criminal prosecutions and civil penalty actions under the Federal conflict of interest laws. *E.g.*, DAEOgram DO-04-019, July 6, 2004 (two out of ten reported cases in 2003). Apart from the prospect of prosecution, employment discussions by Federal officials recently have been the subject of scrutiny by Congress and the media. *E.g.*, Cahlink, "Closing Doors," *Government Executive*, July 15, 2004. Therefore, this is an opportune time to highlight some important issues that can arise when an employee is seeking employment outside the Government.

Overview of Restrictions

The basic provisions governing seeking employment are set out in subpart F of the Standards of Ethical Conduct, which implements not only the criminal restrictions in 18 U.S.C. § 208 but also the broader restrictions imposed by Executive Order 12674, § 101(j).¹ Pursuant to 5 C.F.R. § 2635.604(a), an employee "shall not participate personally and substantially in any particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom the employee is seeking employment." For these purposes "seeking employment" includes not only the kinds of bilateral employment negotiations that would implicate section 208, but also certain unilateral expressions of interest in employment by the employee. Specifically, in addition to actual negotiations, as described in section 2635.603(b)(1)(i), seeking employment also includes unsolicited communications by the employee regarding possible employment, as described in section 2635.603(b)(1)(ii)², and any response by the employee, other than rejection, to an unsolicited overture from a prospective employer, as described in section 2635.603(b)(1)(iii).

¹ Section 208 provides, in pertinent part, that an executive branch employee may not participate personally and substantially in any particular matter in which, to his knowledge, "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." Section 101(j) of Executive Order 12674 provides: "Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities."

² This is subject, however, to two important exceptions: an employee has not commenced seeking employment if his communication is solely for the purpose of: (1) requesting a job application, or (2) submitting a resume or employment proposal to a person affected by the employee's duties only as part of a class. 5 C.F.R. § 2635.603(b)(1)(ii)(A), (B). Note that regulations do not contain any special exception for the "mass mailing" of resumes, as this suggestion was expressly rejected in the preamble to the final rule. 57 *Federal Register* at 35028.

It is important for employees to be reminded that the regulations cover not only direct communications between the employee and the prospective employer but can also include communications through an agent or intermediary, such as a headhunter. See 5 C.F.R. § 2635.603(c). Additionally, employees should know that their recusal obligations under the rules are unaffected by such subjective factors as whether they think they are "just testing the waters" or "not really serious about the job"; in fact, OGE has reported one case in which the Department of Justice proceeded against an employee under section 208 even though the employee ultimately declined the offer of employment. DAEOgram DO-02-003, February 12, 2002 (*United States v. Filchock*). Finally, employees should be advised that, once their employment discussions result in an actual agreement or arrangement for prospective employment, they must continue to recuse from particular matters in which their prospective employer has a financial interest. 18 U.S.C. § 208(a); 5 C.F.R. § 2635.606(a).³

Rejection of Employment

Employees occasionally receive unsolicited overtures from prospective employers. An employee is not necessarily seeking employment, within the meaning of the rules, simply as a result of such an unsolicited contact. However, an employee is deemed to be seeking employment if he makes any response "other than rejection" to an unsolicited communication from a prospective employer. 5 C.F.R. § 2635.603(b)(1)(iii).

Sometimes employees will have questions about what kind of response is sufficient to constitute "rejection." In this connection, the regulations provide that "a response that defers discussion until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or

³ Note that an agency also has the discretion to impose a recusal obligation after an employee has stopped seeking employment with a particular person, even if employment discussions concluded without any arrangement or agreement for employment. See 5 C.F.R. § 2635.606(b). An agency designee may impose a period of disqualification based upon the determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking outweighs the Government's interest in the employee's participation in a particular matter. *Id.*

resume nor rejection of a prospective employment possibility." 5 C.F.R. § 2635.603(b)(3). The regulation provides two related examples to illustrate the distinction between a rejection of employment and a mere deferral of discussions to the foreseeable future. 5 C.F.R. § 2635.603(b) (examples 1 and 2).

Nevertheless, OGE's experience indicates that employees still may benefit from additional practical guidance in this area. There are no required "magic phrases" that can and should be used in all circumstances, but agency ethics officials still may want to provide employees with practical suggestions for ways in which they can handle situations that can be awkward.⁴ So, in addition to using the examples found in the regulation, ethics officials might advise employees that they can politely but firmly communicate rejection with responses along the lines of "All my time and attention right now are devoted to my Government job, and I am not in a position to discuss employment," or "I am not really planning on leaving Government in the near future but I will keep you in mind in case I ever change my mind." Some employees may prefer simply to cite ethics considerations as a reason for rejecting employment discussions, which is perfectly acceptable, provided that they do not merely defer the discussions until the completion of some assignment affecting the prospective employer, as explained in example 2 following 5 C.F.R. § 2635.603(b); thus, responses such as the following would be appropriate: "The ethics rules do not permit me to discuss possible employment with you while I am working on your contract/grant/case/etc., so I am afraid my answer has to be 'no.'"

Notification of Recusal

Employees comply with any recusal obligations under section 208 and subpart F by avoiding participation in any particular matter in which their prospective employer has a financial interest. Frequently, however, employees ask whether they must advise their supervisors or other agency personnel

⁴ As OGE stated in the Preamble to the final rule: "If the employee makes it clear to the prospective employer that he or she has no interest in considering the employment overture at the present time and has no plans for such consideration in the foreseeable future, the employee may couch his or her rejection in whatever language the circumstances and etiquette require." 57 *Federal Register* 35006, 35029 (August 7, 1992).

about their employment contacts and any resulting recusal obligations. OGE recognizes that this is a sensitive area and that many employees do not want to alert their supervisors unnecessarily or prematurely to a job search. At the same time, an agency has legitimate interests in regulating the flow of work among its employees and preventing situations that could result in actual or apparent conflicts of interest.

These questions are addressed in 5 C.F.R. § 2635.604(b). Under this provision, an employee who becomes aware of the need to recuse from a matter affecting a prospective employer "should notify the person responsible for his assignment." *Id.* (emphasis added). If the employee is responsible for his own assignments, he "should take whatever steps are necessary to ensure that he does not participate in the matter." *Id.* These provisions fall short of a mandatory notification duty, but they do point employees in the direction of common sense.⁵ As described in OGE Informal Advisory Letter 95 x 7: "While there is no requirement that an employee notify a supervisor or other agency official of the need to be disqualified from assignments affecting a prospective employer, notification permits a supervisor to minimize any disruption of the agency's mission by arranging assignments accordingly. Moreover, an employee may, as a practical matter, have to explain his avoidance of certain duties."

Where employment negotiations have resulted in an actual agreement or arrangement for future employment, employees may have financial disclosure obligations. Employees who file SF 278s or OGE Form 450s must disclose any such agreement or arrangement in existence at any time during the reporting period. 5 C.F.R. §§ 2634.306(a); 2634.907(a)(5). It is a good practice for ethics officials to remind 278 filers that such information is required on their termination reports, as this item is sometimes overlooked.

⁵ In certain circumstances, an agency ethics official may require written documentation of a recusal, and such documentation also may be required as written evidence of compliance with an ethics agreement under 5 C.F.R. part 2634. 5 C.F.R. § 2635.604(c). Additionally, certain procurement officials are subject to written notification requirements with respect to employment contacts, under the Procurement Integrity Act. 41 U.S.C. § 423(c).

Waivers

Questions sometimes arise concerning whether an employee may be permitted to participate in a particular matter affecting a prospective employer, notwithstanding the disqualification requirements in subpart F. The OGE regulations recognize two different mechanisms that may apply in such situations: a "waiver" under 18 U.S.C. § 208(b), if the employment contacts have already reached the stage of bilateral negotiations or have resulted in an arrangement for prospective employment, within the meaning of the criminal statute; and an "authorization" under 5 C.F.R. § 2635.605(b), if the contacts fall short of actual negotiations but still amount to seeking employment, within the meaning of 5 C.F.R. § 2635.603(b)(1)(ii) and (iii). Although the standards and procedures for the two mechanisms differ, the present memorandum will focus on section 208(b) waivers, because that is the area that has engendered the most questions for OGE.⁶

Under section 208(b)(1), the official responsible for an employee's appointment may grant a waiver of the recusal requirement if he makes a certain written determination in advance of the employee's participation in the matter. The standard for this determination is that the affected financial interest "is not so substantial as to be deemed likely to affect the integrity" of the employee's services.⁷ OGE has provided guidance concerning such determinations in 5 C.F.R. § 2640.301(b). One important point, which is sometimes overlooked, is that the deciding official must consider not only

⁶ Ethics officials should remember, however, that an authorization under section 2635.605(b) will not suffice for situations covered by the criminal statute, *i.e.*, where the employee is actually "negotiating" or has an "arrangement" for prospective employment. See 18 U.S.C. § 208; 5 C.F.R. § 2635.605(a) (waiver for negotiations); 5 C.F.R. § 2635.606(a) (waiver for arrangement).

⁷ Agencies also may issue waivers pursuant to 18 U.S.C. § 208(b)(3), which provides a somewhat more liberal standard but which is applicable only to special Government employees serving on an advisory committee within the meaning of the Federal Advisory Committee Act. See 5 C.F.R. § 2640.302.

the financial interests of the employee--e.g., the effect, if any, of the particular matter on the employee's own employment prospects--but also the interests of the prospective employer itself in the particular matter. See 5 C.F.R. §§ 2635.605(a); 2640.301(b)(2).

OGE historically has given particular scrutiny to proposed waivers in employment negotiation situations.⁸ In general, where a waiver would cover the financial interests of a person other than the employee, OGE has indicated that the deciding official "should examine the relationship of the person to the employee." 60 *Federal Register* 47207, 47222 (Sept. 11, 1995) (preamble to proposed part 2640); see 5 C.F.R. § 2640.301(b)(2). The relationship of an employee with a prospective employer can be especially sensitive.⁹ Employment negotiations often are seen as involving a "courtship" process, and there may be an appearance that an employee has a motive to ingratiate himself by being responsive to the interests of a prospective employer. In sum, OGE would expect that waivers for employment negotiations would be issued only in compelling circumstances.

Therefore, although it may be appropriate to grant waivers in some situations involving employment negotiations, agencies are urged to consider closely all the relevant facts in each case. This includes an evaluation of the nature and sensitivity of the particular matter (including any actual or anticipated controversy among competing interests), the employee's level of responsibility and the nature of the employee's role in the matter, the identity of the prospective employer and the magnitude of that person's stake in the matter, and any other circumstances that could bear on whether "the interest is not so significant that the employee can be relied upon to act or appear to act impartially in the matter." 60 *Federal Register* at 47221. See 5 C.F.R. § 2640.301(b)(1-6). Waivers covering

⁸ Agencies are required, where practicable, to consult with OGE before issuing waivers under section 208(b). Executive Order 12674, § 301(d); 5 C.F.R. § 2640.303. Agencies also are required to forward a copy of each completed waiver to OGE. *Id.*

⁹ Even in the case of an employee's relationship with a current outside employer, OGE has observed that: "[e]mployment interests often create ties stronger than mere stock ownership that might affect an employee's judgment." 60 *Federal Register* at 47222.

such situations should be well-supported factually and carefully articulated to explain the justification for the determination. Additionally, as described below, the White House has prescribed special procedures before waivers may be granted to certain high level officials who wish to negotiate for employment.

Special Considerations for High Level Officials

For the reasons discussed above, it should be all the more apparent that higher level officials need to be particularly careful in matters relating to waivers for future employment. As the White House Chief of Staff explained in a Memorandum issued earlier this year, "serious administration policy interests" may be implicated when a Presidential appointee confirmed by the Senate (PAS) undertakes a job search while acting on a matter "where his loyalty to the Government is subject to question." Andrew H. Card, Jr., Assistant to the President and Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies, January 6, 2004.

Agency officials are reminded, therefore, that no waiver may be granted to a PAS "for the purpose of negotiating for outside employment unless agency personnel have first consulted with the Office of the Counsel to the President." *Id.* This consultation requirement is in addition to the general requirement that agencies consult with OGE, where practicable, before issuing waivers under section 208(b). See Executive Order 12674, § 301(d); 5 C.F.R. § 2640.303.

Sometimes, a waiver is not deemed appropriate but recusal is still not desirable. OGE has encountered such situations particularly in connection with high level officials who have significant responsibilities for an entire agency or a major program within an agency. The official may serve as decisionmaker for a wide range of important matters, and the recusals required by the individual's job search--especially a lengthy search--could result in serious inefficiencies or gaps in the policy process. In such cases, there may be no practical alternative but to defer the job search until after the official leaves Government service or until a brief recusal period near the end of Government service.

Conclusion

OGE recognizes that seeking employment can be a sensitive subject, both for the employee involved and for the employee's

agency. Therefore, this Office stands ready to assist agency ethics officials in resolving any questions arising under the rules discussed above. OGE makes particular efforts to respond promptly to agency inquiries about waivers, as part of the consultation process described in 5 C.F.R. § 2640.303. Finally, it is important for employees themselves to be aware that their own agency ethics office is available to help them navigate the ethical issues that can arise in connection with a job search.