

Office of Government Ethics

92 x 22 -- 07/31/92

Letter to an Individual dated July 31, 1992

This is in response to your letter dated July 17, 1992, in which you request guidance regarding a possible contribution by a private company to a charitable organization.

You indicate that an employee of the company that wishes to make the contribution wrote a letter to various persons which allegedly libeled a Federal employee. You state that the Federal employee's agency determined that the allegations in the letter were unfounded. The Federal employee does not seek any compensation in this matter. Nevertheless, the private company wishes to make amends for the statements of its employee, including an out-of-court settlement. You indicate further that one possible way in which the company could make amends would be to contribute to a national charity. You ask whether Federal ethics regulations would prohibit the Federal employee from suggesting to the company that, if it wishes to make amends, it may do so by making such a contribution.

Although not expressly stated in your letter, we assume that the Federal employee referred to is an employee of the executive branch and therefore subject to agency regulations governing employee responsibilities and conduct which are based on the model rule at 5 C.F.R. Part 735. Of particular relevance to your question is section 735.202(a) which provides in part:

an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who: (1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency; (2) Conducts operations or activities that are regulated by his agency; or (3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

Section 735.202(a) of the ethics regulations thus prohibits an employee from soliciting or accepting, directly or indirectly, any gift from a prohibited source.

An initial question is whether the proposed company contribution to

a charity would be considered a "gift" under Federal ethics regulations. The term "gift" is not expressly defined in the currently effective standards of conduct which appear at 5 C.F.R. Part 735. However, section 2635.203(b) of the Proposed Rule on "Standards of Ethical Conduct for Employees of the Executive Branch," 56 Fed. Reg. 33778, 33795 (July 23, 1991), defines the term "gift" to include "any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value." In addition, section 2635.203(f)(2) of the Proposed Rule states that a gift which is solicited or accepted indirectly includes a gift

- (2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee
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Although these provisions of the Proposed Rule are not yet effective as a final rule, they are based on existing precedent and are instructive on this issue. Thus, a contribution to a charity made at the behest or suggestion of a Federal employee would be considered a gift under existing precedent even though the employee did not personally receive the contribution.

However, a contribution to charity made in connection with the settlement of a lawsuit or in satisfaction of potential legal liability might not be considered a gratuity or gift. Such an action could be viewed as a commitment made as part of a settlement agreement to resolve any potential legal liability and avoid litigation. You do not indicate whether the private company has been named as a party in a lawsuit or has had a claim of liability asserted against it in connection with the libel letter, or provide other background information on the involvement of the private company in this matter. Consequently, we are unable to evaluate whether the circumstances under which the contribution might be made could exclude it from the definition of a gift and thereby remove it from restrictions on gifts which might otherwise bar the Federal employee from suggesting that a contribution be made.

If the contribution were not made in consideration of the discharge of a potential legal liability, then it would likely be viewed as a gift subject to Federal ethics rules. Whether the Federal employee could suggest that such a contribution be made to a charity would depend upon whether the relationship of the private company to the agency of the Federal employee would make the company a prohibited source. As noted above, the company would be a prohibited source if it seeks official action from, does business with, is regulated by the Federal employee's

agency or has interests that may be substantially affected by the performance or nonperformance of the Federal employee's duties. Your letter does not identify the company or the Federal agency or describe the duties of the Federal employee. Thus, there is not sufficient information to analyze further whether the company may be a prohibited source thus barring the Federal employee from suggesting that such a contribution be made.

In addition, even if the contribution were not subject to the rules on gifts or, if found to be subject, acceptance was permissible because a prohibited source was not involved, it would nevertheless be necessary to evaluate whether the suggestion of such an action would present an appearance that ethics laws and regulations were violated. The facts presented in your letter are not sufficient to determine whether there might be an appearance problem. Some of the factors that would be relevant include the size of the contribution, the identity of the company and whether it has a business or other interest in the agency, and whether the employee has in the past or may in the future work on matters that may affect the company.

Finally, you should be aware that 18 U.S.C. § 209 prohibits any person or corporation from giving, and any Federal employee from accepting, any supplementation of salary "as compensation for" his or her Government services. The facts presented in your letter are not sufficient to evaluate whether the proposed contribution to charity might be subject to the prohibition of section 209.

Generally, the ethics official of the Federal employee's agency would be in a better position to evaluate questions of improper appearances, prohibited sources of a gift, and whether a contribution might be viewed as compensation for any official action or non-action by the Federal employee. The Federal employee may therefore wish to consult with the agency's ethics official before suggesting that such a contribution be made. In addition, the ethics official could be consulted with regard to any other agency-specific rules or policies that might be applicable. This Office would be able to provide the Federal employee with the name of the ethics official for the agency if the agency were identified.

I hope that this is responsive to your inquiry. If you have any questions concerning this letter, please feel free to contact my Office.

Sincerely,

Stephen D. Potts

Director