

OFFICE OF GOVERNMENT ETHICS

01 x 8

**Letter to a Designated Agency Ethics Official
dated August 23, 2001**

This is in response to your letter of July 24, 2001. In your letter, you ask whether certain conduct by an attorney in your agency "created a situation in which her impartiality could be questioned" and whether she should have disqualified herself from certain particular matters or sought an authorization to participate, pursuant to 5 C.F.R. § 2635.502. We note that the attorney involved in this inquiry also wrote to us subsequently to express her views concerning certain aspects of your letter, and our response herein addresses certain issues raised in her letter of July 30, 2001.

According to your letter, the attorney at your agency participated in certain [Government] cases while she had a romantic relationship with a person who was a witness in the cases. This witness also was an employee of the respondent in the cases and held an officer position in the [organization] that filed the charges. All the cases now are closed. You state that the attorney never disclosed her relationship to your agency until it was discovered during an investigation by your [agency's] Office of the Inspector General (OIG). This investigation is ongoing, and the OIG is considering whether to refer this matter to state bar authorities. Furthermore, your agency is considering whether to inform the parties to the cases about the relationship, and you also indicate that certain agency decisions about "disciplinary action" have been deferred pending completion of the OIG investigation.

As you know, section 2635.502 requires employees to disqualify themselves from certain particular matters where there has been a determination that a reasonable person with knowledge of the facts would question the employee's impartiality. The obligation to recuse --or to seek an authorization from the agency to participate-- pertains to particular matters involving specific parties in which a member of the employee's household has a financial interest or in which someone with whom the employee has a "covered relationship" is a party or represents a party.

With respect to the present matter, you acknowledge that the individual with whom the employee had a romantic relationship was not

a member of the employee's household and that the employee did not otherwise have a "covered relationship" with the individual, within the meaning of section 2635.502(b)(1).¹ In this connection, we note that the Office of Government Ethics (OGE) specifically declined to expand the definition of "covered relationship" to include someone with whom the employee has a "close personal friendship," such as a "boyfriend" or "girlfriend." 57 Fed. Reg. 35006, 35026 (August 7, 1992).² Therefore, even if it were now determined, in hindsight, that a reasonable person with knowledge of the circumstances would have questioned the attorney's impartiality, we cannot say that she violated the impartiality rule.

The impartiality rule does provide a process, however, whereby employees may resolve any impartiality questions they may have about circumstances that do not involve a covered relationship or the interests of a member of their household. Section 2625.502(a)(2) states that "[a]n employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter." Moreover, when the rule was first promulgated, OGE specifically indicated that the circumstances addressed by this provision "could well include an employee's assignment to a particular matter to which a boyfriend, girlfriend, or other close friend is a party." 57 Fed. Reg. at 35026.

In this case, of course, the employee did not seek assistance from an agency designee pursuant to section 2636.502 (a)(2). It is not clear whether she declined to do so because she had actually determined that a reasonable person would not question her

¹We have no reason to question your factual conclusion or the assertion of the attorney herself that the individual with whom she has a personal relationship is not a member of her household. Under certain circumstances, of course, a person with whom an employee has a personal relationship very well could be deemed a member of the employee's household, for example, if they shared a residence. Moreover, an employee could have a covered relationship with a personal friend if they had a "business, contractual or other financial relationship," such as co-ownership of certain property. 5 C.F.R. § 2635.502(b)(1)(i).

²We note that the attorney at issue in this matter argues that the individual with whom she had the personal relationship was not a "party" to the cases. In view of our resolution of your question on other grounds, it is not necessary for us to decide whether, on the basis of all the relevant facts, the individual was a party or the representative of a party, within the meaning of section 2635.502. We would say, however, that OGE historically has not taken a narrow or strictly legal view of what it means to be a party to a particular matter under section 2635.502.

impartiality.³ In any event, OGE has consistently maintained that, although employees are encouraged to use the process provided by section 2635.502(a)(2), "[t]he election not to use that process cannot appropriately be considered to be an ethical lapse." OGE Informal Advisory Letter 94 x 10(2); see also OGE 97 x 8 ("obligation" to follow process where covered relationships involved, but employees "encouraged" to use process in other circumstances); OGE 95 x 5 ("not required by 5 C.F.R. 2635.502 to use the process described in that section" where no covered relationship with person who is party or represents party); OGE 94 x 10(1) (employee may "elect" to use process in section 2635.502(a)(2), but "election not to use that process should not be characterized, however, as an 'ethical lapse'").

As we have noted in the past, we "recognize that some might find section 2635.502 of our Standards of Conduct troubling as applied in an individual case." OGE 97 x 8. On the other hand, only recently this Office was asked to explain to a Congressional committee why section 2635.502 was not *unreasonably strict*. Ultimately, OGE remains committed to the goal of maintaining reasonable and objective standards of employee conduct, which can provide "clear notice of the rules" and limit the potentially overbroad or "overzealous application of ethical principles." OGE Informal Advisory Letter 97x 12.

Finally, the attorney involved in this matter has asked that we address in our advisory letter "whether the remedial actions proposed by the Agency, notifying the parties to the litigation and reporting

³As OGE has indicated on another occasion with respect to section 2635.502(a)(2): "When considering whether there would be any question regarding the impartiality of [an employee's] participation in a particular matter, the employee may seek assistance from his supervisor, an agency ethics official, or the person specifically designated by his agency to address appearance concerns ('agency designee'). Because the relevant facts will vary in each situation, the Office of Government Ethics (OGE) depends on the employee's agency to provide whatever assistance the employee needs in this regard; OGE is not able to decide for an employee or an employee's agency whether a reasonable person would question the impartiality of the employee's participation in any given particular matter." OGE Informal Advisory Letter 95 x 5.

this matter to State bar authorities, are warranted in the present situation." OGE has neither the expertise nor the authority to judge appropriateness or necessity of these possible agency responses, inasmuch as they relate primarily to duties and responsibilities under relevant state bar rules and other authorities beyond the scope of the Federal ethics rules and statutes.

We hope this has been helpful.

Sincerely,

Marilyn L. Glynn
General Counsel