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Memorandum dated August 1, 2007,
from Robert I. Cusick, Director,
to Designated Agency Ethics Officials
Regarding Misuse of Federal Position
to Help Another Person Get a Job

Over the years, the Office of Government Ethics has been asked questions about whether, or to what extent, an employee may assist an associate, either another Government employee or a private party, in efforts to obtain private sector employment. Typically, the questions center on when an employee may contact a prospective employer on behalf of his associate--by letter, email, telephone or otherwise.

We recognize that making employment contacts and recommendations is conventional business practice and is often unobjectionable. Nevertheless, executive branch employees are obligated to ensure that any contacts they make do not create the appearance of inappropriately using public office for private gain. Unfortunately, there are no bright line rules that apply in each situation, and each situation must be judged in light of all relevant circumstances. However, to assist you in providing advice, this memorandum outlines several factors that an employee should consider in deciding if an employment contact on behalf of someone else is appropriate.

Executive Order 12674 prohibits an executive branch employee from using his public office for private gain or creating the appearance of such use.¹ The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) implement this principle, in part, in Subpart G, "Misuse of Position."² Subpart G generally regulates the proper use of a Government employee's position--including official time, authority, resources and information. Section 2635.702(b) provides certain standards for the use of title and agency

¹ Executive Order 12731, Pt. 1, § 101(g) & (n); 55 *Fed. Reg.* 42547 (1990).

² 5 C.F.R. part 2365, Subpart G.

letterhead when an employee gives character or employment recommendations by letter,³ but other types of employment contacts (such as those made orally or by email) are not specifically addressed. Nevertheless, employment contacts will still be subject to section 2635.702, which generally prohibits an employee from using his Government position, title or authority in a manner that is designed to coerce or induce a benefit or to create a Government endorsement or sanction for the private gain of a friend, relative or other person with whom the employee is associated in a non-Governmental capacity.⁴ Creating the appearance that these ethical standards have been violated also is prohibited, and whether particular conduct creates such an appearance "shall be determined from the

³ See 5 C.F.R. § 2635.702 (b). Section 2635.702(b) permits an employee to sign letters of recommendation using his official title and Government letterhead "only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment."

⁴ 5 C.F.R. § 2635.702 provides that an employee may not use his public office for the private gain of someone "with whom [he] is affiliated in a nongovernmental capacity." As explained in the preamble to section 2635.702, the provision was drafted to avoid the implication that the prohibition applies to an employee's official actions in carrying out agency programs on behalf of people properly seeking agency assistance. 57 *Fed. Reg.* 35006, 35030 (1992). This provision is not intended to suggest an employee is always exempted from the misuse of position prohibition when he uses his Federal position to provide benefits to someone he knows in his Governmental capacity, such as another Government employee.

Of course, under the Standards of Conduct not all uses of one's Government position for the benefit of a Government associate constitute a misuse of position. Section 2635.702(b), for example, clearly allows an employee to use his title and Government letterhead to write an employment recommendation letter for a Government associate. Similarly, other employment contacts, beyond the standard letter of recommendation, may be appropriate.

perspective of a reasonable person with knowledge of the relevant facts.”⁵

It should be readily apparent that not all employment contacts will contravene these standards. The factors set forth below involve considerations such as the employee’s relationship with the prospective employer and the applicant. They are intended to help guide an employee’s analysis of whether an employment contact in a particular situation would lead a reasonable person to conclude that the employee misused his position. Please keep in mind that only some of these factors may be relevant in a particular case, and no single factor may be determinative.

1. Who initiated the employment contact?

If the prospective employer contacts an employee seeking his views on the suitability of someone for a position, then the likely inference may be that the prospective employer is merely seeking a reference. Similarly, a prospective employer may contact a Government employee to solicit suggestions for possible applicants. These situations may be less likely to create the appearance that the employee is using his position to imply a Governmental endorsement, or to induce or coerce a benefit for anyone, as he is merely responding to a request.

On the other hand, if an employee makes an unsolicited inquiry to a private sector employer to suggest that the prospective employer hire the employee’s associate, concerns might be raised that the contact was intended to coerce or induce the prospective employer to find a position for the employee’s associate. Of course, other factors will influence whether such concerns are justifiable.

2. Does the employee have a relationship with the prospective employer independent of the Federal workplace?

If the employee’s only relationship with the prospective employer is through his Government service, then an employment contact may be more likely to raise questions about the improper use of his Government position for the benefit of his associate.

⁵ 5 C.F.R. § 2635.101(b)(14).

Employment contacts made to friends and former co-workers, or other former business acquaintances, are generally less likely to raise as many concerns about the employee's use of public office for private gain. In these situations, the independent relationship that the employee has with the prospective employer may help dispel the impression that the employee is exerting any influence associated with his Government job to help secure employment for his associate.

However, even if the employee has an independent relationship with the prospective employer, other factors, such as whether the prospective employer has business before the employee's agency, may still raise concerns about the use of public office for private gain. The employee should consider carefully whether the employment contact is appropriate.

3. Is the prospective employer affected by the operations of the employee's agency?

One of the most important factors that an employee should consider before making an employment contact is whether the prospective employer has business with his agency or is otherwise affected by agency operations. Such cases are particularly troublesome because the employee may appear to have leverage over the prospective employer, resulting in the impression that the prospective employer has no choice except to hire the person whom the employee is recommending.

Such a concern would be true particularly where the employee initiates the employment contact and has no other relationship with the prospective employer, except through agency business.

If the prospective employer has an item of business actually pending before the employee, an employment contact made by the employee will have a much greater likelihood of creating an appearance of the use of public office for private gain.

Generally, if an employee wants to initiate an employment contact with a prospective employer who would be considered a prohibited source, he would be wise to make the communication in writing so there is a clear record of what information was actually conveyed to the prospective employer. The employee will always want to ensure that the contact is in the nature of a recommendation, rather than any implied favor or demand.

4. Has the associate on whose behalf the employee is making the contact applied for a position with the prospective employer?

If the employee's associate has applied for a position with the prospective employer, then an employment contact may be more in the nature of a recommendation or reference, akin to written recommendations and references described in section 2635.702(b).

If the employee's associate has not applied for a position with the prospective employer, then the unsolicited employment contact may have the appearance of being a request for a favor by the employee, rather than a recommendation or reference in response to the associate's application.

5. What is the nature of the relationship between the employee and the person on whose behalf he is making the contact?

An employment contact made on behalf of a relative or friend with whom the employee has no business relationship may increase the risk that the employee appears to be using his Government position for the private gain of his associate. Accordingly, the employee should carefully consider whether or not making the employment contact would be prudent.

An employment contact made at the request of a person other than the prospective employer and on behalf of someone whom the employee does not know will almost always raise questions about whether the employee is using public office for private gain. Such contacts should be carefully considered in advance.

An employment contact made on behalf of a current or former Federal Government colleague or subordinate may appear to be akin to a written recommendation permitted by section 2635.702(b). In such cases, the employee would be able to comment based on personal knowledge how and why he believes the Federal colleague or subordinate would make a valuable contribution to the prospective employer.

6. Does the employee use Government resources to make the employment contact?

Using Government resources to make an employment contact may cause the communication to appear to be official Government business. Employees should keep in mind that a Government email address is a Government resource. Any use of one's Government email address to make an employment contact may contribute to the appearance that the Government endorses whatever sentiment

the employee expresses in his email. This may be particularly true if the employee also uses an electronic signature to close the email message.⁶

7. What will the employee convey in the employment contact?

The employee's choice of language may contribute to the appearance that the employee is using public office for private gain. When making an employment contact the employee should be cautious not to suggest that any kind of favorable treatment or negative consequences will result from the prospective employer's willingness to hire the employee's associate. This is especially true if the prospective employer is a prohibited source.

Conversely, if an employee merely conveys his views of the associate's qualifications, skills and character, there would be fewer concerns that the employee has used his public office for the private gain of another.

Again, there is no bright line that applies to each employment contact situation, and each situation must be judged in the context as a whole; no one factor is conclusive. Nonetheless, employees should be mindful of their obligation to avoid the appearance of using public office for private gain. We recommend that you counsel employees to seek advice if they are unsure whether an employment contact would be appropriate in a particular situation. And, as always, erring on the side of caution will often be the best approach if the contact falls within a gray area. If you have questions, please contact my Office.

⁶ Letters of recommendation or character references sent as an email attachment or in the main body of the email and that contain a signature block are governed by section 2635.702(b).