

## **Office of Government Ethics**

**96 x 11--07/05/96**

### **Letter to the General Counsel of a Department dated July 5, 1996**

This letter responds to an April 30, 1996 letter from you to [the] General Counsel of [a Federal agency], regarding a lawsuit initiated pro se by [an employee of that agency], an attorney, against [a] United States [Department]. As we understand your position, you believe that [the agency] should prohibit [the employee] from litigating the case. You provided us with a copy of your letter to [the general counsel of the agency], which makes clear that you intend to ask the Office of Government Ethics (OGE) to intervene in the matter in the event that [the agency] adheres to its position that: (1) [the employee] is allowed by law to bring the lawsuit; and (2) his actions are consistent with the Standards of Ethical Conduct for Employees of the Executive Branch.

While we appreciate your concerns, we recommend that you not pursue the matter. Our reasons, together with our understanding of the facts of the case, based on your letter and some additional information provided by [the agency], are set forth below.

#### **Facts**

The lawsuit initiated by [the employee] was filed in Federal district court and challenges a decision of the [department] which would allow [a] Corporation to use additional [Federal property] to expand its operations. The action seeks declaratory and injunctive relief based on alleged violations of [several Federal laws]. The Government prevailed in the district court. Both [the employee] and an organization that intervened as plaintiff after the suit was filed have filed notices of appeal.

One of the issues in the case is whether [a particular] permit is necessary for [a particular project]. [The agency], although not a defendant in the case, communicated to the court its position that [a particular] permit is not required. As indicated, the court ruled against [the employee]. By appealing, he apparently is taking a position contrary to his agency.

Your letter of April 30 asserts that [the employee's] participation in the lawsuit violates 18 U.S.C. § 205 and [the agency's] ethics regulations at [citation deleted]. The letter asks [the agency] to prohibit [the

employee] from continuing with the litigation and to take appropriate action against him.

[The employee] is a staff attorney at [the agency], a GS-14 or GS-15. He does not hold a "policy-making" position and his job does not involve him in issues related to the litigation. (Some time ago he may have worked in the general area, but not, apparently, on specific issues raised by the lawsuit.) [The agency] has physically separated him from [agency] staff involved in assisting [the department] in its defense of the lawsuit.

[Agency] ethics officials regard [the employee] as being conscientious about adhering to ethics standards. On several occasions he has sought ethics advice regarding the litigation and his role in it. While cautioning [the employee] about various ethics concerns that could arise -- primarily relating to misuse of position -- [agency] officials have advised [the employee] that, subject to these expressed concerns, his participation in the litigation is consistent with ethics statutes and standards.

#### **18 U.S.C. § 205**

Subject to certain exceptions, 18 U.S.C. § 205 prohibits a Government employee, except in performance of his official duties, from acting as agent or attorney for anyone before any department, agency, or court of the United States in connection with a "covered matter" in which the United States is a party or has a direct and substantial interest. The statute does not prohibit self-representation. E.g. , OGE Informal Advisory Letters 94 x 15 and 90 x 15, published in The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics .

Although [the lawsuit] was initiated by [the employee] acting pro se , your letter asserts that [the employee's] participation in the litigation violated 18 U.S.C. § 205 because in fact at different times he represented both [the agency] and the intervening plaintiff, [an organization]. Based on the information presented in your letter, however, we are unable to concur in this assessment.

You argue first that "[the employee] implicitly represented claims of the [agency] when he argued in his second Motion for Summary Judgment before the District Court that [a component of the department] did not adequately respond to several of [the agency's] concerns regarding the [effects of the particular project]." On its face, however, [the employee's] argument would seem to be no different from that which any attorney asserting a given position would make and could make without in fact acting as a representative or agent for the [agency] and without

purporting to speak for the [agency].

Your second argument is that "[the employee] represented claims of [the organization] by raising in his Complaint [and in motions] issues which [the organization] raised in its administrative appeal . . . but which he ([the employee]) did not raise in his own administrative appeal." In your view, [the employee] raised issues that he was not entitled to raise because of his failure to exhaust administrative remedies and, therefore, he was actually representing [the organization's] interests and not his own. Even assuming, however, that the principle of exhaustion is properly applicable, in our view, the fact that [the employee] may have raised issues that he personally was not entitled to raise would not necessarily suggest that he was acting on behalf of another party; it may be that the court simply made a mistake in not applying the principle. Without some evidence that [the employee] was in fact representing [the organization], we cannot agree that he has violated section 205.

### **Standards of Conduct**

Your letter also asserts that, by proceeding with an appeal in which he takes a position contrary to his agency, [the employee] is violating [agency] ethics regulations. Your letter provides--

[A section of the [agency] ethics regulations prohibits [agency] employees from taking any action which would result in or create the reasonable appearance of adversely affecting public confidence in the integrity of the government or [the agency] ([citation deleted]). [Another section prohibits employees from engaging in outside activities that would bring discredit upon the government or [the agency] or lead to relationships which would impair public confidence in the integrity of the government or [the agency] ([citation deleted]).

The cited [agency] regulations, however, are no longer in effect. Like other agency regulations issued under 5 C.F.R. part 735, they have been superseded by the uniform Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). See 57 Fed. Reg. 35006, 35006 (August 7, 1992).

The Standards of Conduct, codified at 5 C.F.R. part 2635, do not prohibit an employee, acting in his private capacity, from taking a position contrary to his agency or other Federal agencies. See *id.* For example, the current rule concerning outside teaching, speaking, and writing activities of employees, 5 C.F.R. § 2635.807, is fairly narrow. It does not preclude an employee from expressing his views -- whether pro or con -- on any matter. Rather, under certain circumstances, it prohibits

an employee from accepting compensation for speaking and writing about his agency's policies, programs, or operations. See 5 C.F.R. §§ 2635.807(a); 2635.807(a)(2)(I)(E)(2).

Another restriction in the Standards of Conduct precludes employees from engaging in outside activities that conflict with their official duties. 5 C.F.R. § 2635.802. As indicated, however, [the employee's] job does not involve him in issues related to the litigation, so this provision would not seem to be implicated. Finally, while there are other provisions in the Standards of Conduct that might preclude employees from engaging in outside activities under certain circumstances -- see, for example, section 2635.801 regarding activities that involve use of public office for private gain -- we are not aware of any basis for invoking this or related provisions under the facts of this case.

### **Conclusion**

We appreciate your concerns regarding public confidence. However, the information we have pertaining to the lawsuit, considered as against 18 U.S.C. § 205 and the current Standards of Conduct, does not persuade us to intervene with [the agency]. Moreover, in view of the fact that [the agency], as the employing agency, has the paramount interest in this matter, we think it appropriate to defer to its judgment that the litigation is not a significant threat to agency interests. 1

Sincerely,

Stephen D. Potts  
Director

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<sup>1</sup> We also note that taking disciplinary action against [the employee] for the reasons articulated in your letter could raise issues under the First Amendment. See generally *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563 (1968); *Sanjour v. E.P.A.*, 56 F.3d 85 (D.C. Cir. 1995).