

Office of Government Ethics

96 x 6--03/19/96

Letter to a Designated Agency Ethics Official dated March 19, 1996

This responds to your letter dated February 7, 1996, requesting a formal advisory opinion on behalf of a Federal employee who is currently serving as [head] of your agency. Your request consists of two separate but related questions regarding the permissibility of [the employee], in his personal capacity, engaging without compensation in certain partisan political activities on behalf of a private organization.

Although your request for formal guidance does not meet the criteria delineated in 5 C.F.R. § 2638.303, we are providing you with the information below to assist you in considering the ethics issues that are raised by [the employee's] proposed activities. You noted in your letter that [the employee] has received advice from his staff and the Office of Special Counsel (OSC) on his engaging in certain partisan political activities. Therefore, our discussion will not concern itself with any regulations affecting the political activities of Federal employees.

Question One

First, you asked whether [the employee] could serve as the Chairman or in any other active leadership position on behalf of a private partisan organization. As a general matter, [the employee] is not prohibited from serving as Chairman of the [organization] or in any other active leadership position. [The employee] must, however, continue to comply with all applicable ethics requirements and duties while serving, in his personal capacity, on behalf of [the organization].

These ethics requirements include, but are not limited to, the following items.

18 U.S.C. § 205

As you know, section 205 bars Government employees, except in the performance of their Government duties, from acting as "agent or attorney" 1 for anyone before an agency or court of the United States in a covered matter 2 in which the United States is a party or has a direct and substantial interest. In general, the statute restricts representational

activities before the Government. While the statute has several exceptions, none appear to be relevant to this discussion.

As a general matter, several elements must be met for section 205 to apply in a particular case. First, the employee must be acting as an agent or attorney for anyone, other than himself. The services must be representational in that they must be designed to influence rather than to seek information or provide behind-the-scenes assistance. Next, the employee's representations must be made before any department, agency, court, or other specified entity. Finally, the representation must be made in relation to a particular matter in which the United States is a party or has a direct and substantial interest. These are all necessarily factual determinations.

Your first question was limited to whether [the employee] could serve as Chairman or assume an active leadership position with [the organization]. As indicated above, section 205 is principally concerned with [the employee's] representational conduct or communications on behalf of another, such as [the organization], and does not prohibit him from holding a particular position within a private organization. We therefore conclude that section 205 does not prohibit [the employee] from holding a position as Chairman or some other leadership position for [the organization].

Conflicting Outside Activities

[The employee] is under an ethical obligation not to engage in any outside activity or employment that is prohibited by statute or that would materially impair his ability to perform his official duties as [head of the agency], by requiring his disqualifications under subpart D or E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). It does not appear, on its face, as if [the employee's] official duties would conflict with his proposed outside activities. Your agency is, however, in the best position to make this determination. However, [the employee] should be advised about the impartiality implications of his outside activities, especially with respect to any covered relationships he may form under 5 C.F.R. § 2635.502(b)(1), upon assuming an active role in [the organization]. Moreover, [the employee] must comply with any of [the agency's] own agency-specific statutes and regulations, if any, that may ban the holding of certain financial interests or affiliations by [agency] members in addition to the general prohibition on his participation, in an official capacity, in any particular matter in which he has a disqualifying financial interest under 18 U.S.C. § 208.

Restrictions on the Receipt of Compensation

Certain Presidential appointees to full-time noncareer positions are prohibited from receiving outside earned income for outside employment or activities performed during that appointment. See Executive Order 12674, § 102. It is our understanding that [the employee] will not be receiving any compensation for his proposed outside involvement with [the organization].
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B.Question Two

You asked whether [the employee] would violate 18 U.S.C. § 205 or any other Federal ethics requirements by attending, in his personal capacity as [the organization] Chairman, partisan political meetings held in the White House or in other Federal facilities, that are attended by Federal employees of the Executive Office of the President or other Federal agencies, who are themselves acting in their personal capacities. As background information, you stated that some of the issues that would be discussed during such meetings would include, but not be limited to, the following: (1) fundraising strategies, (2) organizational matters at the State and local levels, (3) voter registration and education strategies, and (4) the identification of issues of particular interest to [the organization's constituency] and how to deal with them during the campaign.

As a general matter, this Office cannot opine on whether [the employee's] involvement in any of these meetings might violate any Federal ethics statutes and regulations including section 205, because these are essentially factual determinations that will depend upon the particular facts of each meeting. These facts will include what specific issues and subjects were discussed during each meeting, who was in attendance at the time of these discussions, and who actually participated in any meeting discussions. However, some general guidance is provided to you below.

18 U.S.C. § 205

As we noted earlier, section 205 is a representational prohibition. A representation may be either oral or written, but it must be made with the intent to influence 4 . As a general matter, [the employee] should take great care in avoiding any situation in which he may argue a position on behalf of [the organization] in a covered matter before any Federal employee in which there are potentially differing views or conflicting interests. While [the employee] may perform services for [the organization], including attending meetings, working on [organization] committees, voting on organizational resolutions, or otherwise serving as an officer of [the organization], these actions should not entail representational communications with the United States on behalf of [the

organization], regarding a covered matter in which the United States is a party or has a direct and substantial interest.

As indicated above, section 205 will limit some of [the employee's] activities on behalf of [the organization]. For example, [the employee] could not urge or request a Federal employee to take or refrain from taking official action on behalf of [the organization], in dealings with the Federal Government pertaining to covered matters in which the Government may have potentially differing views or conflicting interests. However, this prohibition does not restrict [the employee] from acting on behalf of [the organization] in purely ministerial contacts such as requesting public documents or other information that are routinely made available to the public by an agency. 5

It is best, however, that [the employee] keep you fully informed of his activities on behalf of [the organization], so that you may provide him with appropriate ethics counsel to ensure his continued compliance with section 205 and other ethics requirements.

Government Property and Official Time

[The employee] cannot use his public office for his own private gain or for the private gain of friends, relatives, or persons with whom he is affiliated in a nongovernmental capacity. [The employee] should be advised that he may not advance the interests of [the organization] through the use of his official position or authority at the [agency].

Additionally, [the employee] has a duty to use Government property only for authorized purposes. Section 2635.704(b)(2) of the Standards of Conduct states that the use of Federal property would be authorized when the use is for those purposes for which Federal property is made available to members of the public (e.g., public reading rooms, use of national park recreation areas) or in accordance with law or regulation (e.g., use of Government vehicles).

Similarly, [the employee] must use his official time in an honest effort to perform official duties and not to advance the interests of the [organization], except as may be permitted by law and regulation. He should also not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in performance of that subordinate's official duties or those authorized in accordance with law or regulation.

Fundraising

We understand that one of the subject areas that [the employee] could be involved in concerns fundraising. Under the Standards of Conduct, [the employee] may engage in charitable fundraising activities in a personal capacity if he does not use his official title, position, or authority to further that effort or personally solicit funds or other support from subordinates or from anyone known to him to be a prohibited source.

In conclusion, [the employee] has an obligation to comply with all Federal statutes and regulations governing employee conduct, including OSC's regulations affecting the political activities of Federal employees. Additionally, [the employee] must follow all ethical requirements contained in the conflict of interest statutes, applicable ethics laws, and the Standards of Conduct provisions, including the requirement to avoid even the appearance of using public office for private gain. As we noted earlier, it would be advantageous for [the employee] to keep you fully informed of his outside activities on behalf of [the organization] so that you can ensure that his proposed activities remain consistent with applicable ethics laws and regulations.

I hope this discussion is useful to you in your efforts to advise [the employee] on the application of ethics requirements to his proposed outside activities.

Sincerely,

Stephen D. Potts
Director

1 Although the term "acts as agent or attorney" is not defined in the statute, it generally has been regarded as encompassing representational activities on behalf of another. The term was also used in a prior version of 18 U.S.C. § 207, and in that context was generally construed as applying in cases where the Government and the person being represented would have differing or potentially differing views. See , e.g. , OGE Informal Advisory Letter 80 x 4.

2 A "covered matter" is described at 18 U.S.C. § 205(h) as including "any judicial or other proceeding, application, request for a ruling, or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."

3 Additional compensation restrictions can be found at 18 U.S.C. § 209 and 5 C.F.R. §§ 2636.301, 2636.305, and 2636.306.

4 See OGE Informal Advisory Letter 86 x 9.

5 See OGE Informal Advisory Letter 85 x 12.