
Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated March 21, 1997

Your letter of February 14, 1997, asked for our interpretive guidance on the Standards of Conduct provision at 5 C.F.R. § 2635.807(b), concerning the circumstances under which employees may refer to their official title and position in connection with outside writing. We understand from your letter that the Alternate Designated Agency Ethics Official for [your agency], sent an electronic message in October 1996 to an [agency] deputy assistant administrator, discussing whether two published articles by an [agency employee] were in compliance with the above-cited regulation. This internal advisory memorandum was subsequently obtained by journalists and Members of Congress, some of whom have challenged its accuracy.

We believe that [the Alternate Designated Agency Ethics Official] provided sound advice to the deputy assistant administrator concerning the articles published by [the employee]. As the advice suggested, [the employee's] newspaper editorial may have given more prominence to his [agency] title and position than to other biographical information, and it may not have included a sufficient number of other biographical details. Similarly, the use of [the employee's agency] title and position in connection with an article that was published in a journal could have displayed a more prominent disclaimer that the views expressed were not necessarily those of the [agency] or the United States. Such a disclaimer is required by the governing regulation to be satisfactory to the employee's agency, and therefore, will entail precisely the kind of analysis of the

particular facts that [the Alternate Designated Agency Ethics Official] demonstrated.

HISTORICAL BACKGROUND

While you may already be fully aware of the context in which these rules operate, we will reiterate some key points for your use in the event you are called upon to further explain the propriety of [the Alternate Designated Agency Ethics Official's] ethics advice.

Limitations on use of an executive branch employee's official title and position in connection with outside writing, at 5 C.F.R. § 2635.807(b), are part of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) (5 C.F.R. part 2635) which were issued by the Office of Government Ethics (OGE) and became effective on February 3, 1993, but similar concepts have applied since at least 1965. The current Standards of Conduct regulation was promulgated after an extensive rulemaking process, which included consultation with the Department of Justice and the Office of Personnel Management, publication of a proposed rule at 56 *Fed. Reg.* 33778 on July 23, 1991, public and Governmentwide comments, and publication of a final rule at 57 *Fed. Reg.* 35006 on August 7, 1992.

This regulation is based on Executive Order 12674 of April 12, 1989, which established 14 fundamental principles of ethical conduct, and required that OGE implement those principles by regulation. The Executive order directed that all employees in the executive branch shall respect and adhere to those fundamental principles, to ensure that every citizen can have complete confidence in the integrity of the Federal Government. Those principles include the precepts that employees shall not use public office for private gain, and that

employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards.

Similarly, the predecessor order, Executive Order 11222 of May 8, 1965, directed employees to avoid, among other things, any action which might result in or create the appearance of using public office for private gain, or of adversely affecting the confidence of the public in the integrity of Government. The 1965 Executive order was implemented with regulations on employee responsibilities and conduct, published by the Office of Personnel Management in 1966, at what was then 5 C.F.R. part 735, and section 735.201a thereof reiterated the precepts noted in the 1965 Executive order.

APPLICATION OF THE RULES GENERALLY

As the language of both Executive orders suggests, issues involving use of public office cannot always be resolved by the application of precise rules that define for each set of circumstances exactly what steps an employee should take to avoid creating an appearance of misusing official title or position. Rather, the regulation establishes standards, followed by illustrative examples, and encourages employees to seek further advice from their agency ethics officials, as outlined at 5 C.F.R. § 2635.107.

Although the critical comments from outside the executive branch which you enclosed with your letter suggest that the Standards of Conduct rules should more precisely guide an employee as to exactly what steps to take in avoiding violations, we often hear the opposite criticism that the rules are already too detailed and voluminous. We believe that the rules strike a proper balance between detail and flexibility, so that the basic ethics principles can be applied to specific facts. Trusting employees to use common sense and to seek advice in applying

general principles to individual circumstances is also consistent with current tenets of Government reinvention initiatives.

In addition to the responsibility of employees to seek advice, agency ethics officials have a duty, under 5 C.F.R. § 2635.106(b) and subpart B of 5 C.F.R. part 2638, to initiate timely counseling and guidance when they perceive a possible misunderstanding or misapplication of the rules, which was apparently the basis for [the Alternate Designated Agency Ethics Official's] advisory message, and to initiate any appropriate corrective action. Indeed, [the Alternate Designated Agency Ethics Official] might have been derelict in his duties, had he failed to offer the advice that he gave.

APPLICATION OF THE STANDARDS TO OUTSIDE WRITING

The Standards of Conduct provide helpful guidance at 5 C.F.R. § 2635.807(b) on use of official position and title in connection with outside writing, which is quoted in your letter and in [the Alternate Designated Agency Ethics Official's] advisory memorandum. The pertinent text reads:

Reference to official position. An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

- (1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States.

Following this text is a note which appraises employees that some agencies may have policies requiring advance agency review of articles and other writings, to determine whether they contain an appropriate disclaimer and otherwise comply with the Standards of Conduct, such as avoiding disclosure of nonpublic information. Following that note are three examples of teaching, speaking and writing that illustrate how to avoid misuse of official title and position by including appropriate additional biographical data or a disclaimer acceptable to the agency. These details in the regulation clearly put employees on notice that they must be cautious in using or permitting the use of their official title and position, that use of a disclaimer in connection with an article in a scientific or professional journal must be satisfactory to their agency, and that they should weigh carefully how their title and position are used as part of a biographical summary.

Closely related is the standard on use of public office for private gain, at 5 C.F.R. § 2635.702(b), which directs that an employee “shall not use or permit the use of his Government position or title . . . in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another.” That section also notes that reference to one’s official title or position when writing in a personal capacity is appropriate only as permitted by 5 C.F.R. § 2635.807(b).

These principles are based not only on Executive Order 12674, as noted above, but also on advisory opinions issued by the Office of Legal Counsel (OLC) at the Department of Justice and by OGE, interpreting the regulations on employee responsibilities and conduct which the current Standards of Conduct replaced. Further assistance in interpreting the Standards of Conduct restrictions on use of official title and position can be found in the regulatory preambles that OGE published in 1991 and 1992 in the *Federal Register*, along with the proposed and final rules.

For example, the preamble at 56 *Fed. Reg.* 33791 (July 23, 1991) specifies that the restrictions apply to outside writing, regardless of whether an employee will receive direct compensation, because there is at least an appearance [otherwise] that official title or position is being used for private gain by enhancing the employee's opportunities or furthering the interests of the publisher, and because it may inappropriately suggest Federal endorsement of the activity. Likewise, the preamble at 57 *Fed. Reg.* 35039-35040 (August 7, 1992) discusses how the final rule resolved some of the comments received on the proposed rule. Instead of the original proposal that a disclaimer must appear on the same page as the employee's position or title, the final rule allows disclaimers that are "reasonably prominent." Further, it underscores that "an employee does have the responsibility to take steps to ensure that his or her title and position are not misused by others. . . ."

**ANALYSIS OF [THE ALTERNATE DESIGNATED AGENCY ETHICS
OFFICIAL'S] ADVICE**

We believe that the advice by [the Alternate Designated Agency Ethics Official] was appropriate, under the circumstances. It captured the intent and purpose of the rules as they apply to use or permitting use of an employee's official title and position in connection with outside writing.

Specifically, [the Alternate Designated Agency Ethics Official] was reasonable in concluding that the newspaper editorial appeared to give more prominence to [the agency employee's] official title and position than to the other biographical details. Such references should merely be incidental to a more complete background about the author. In this case, [the employee's agency] position was the first detail provided, with only one, or possibly two, additional items. The possibility that a misimpression might be created was of particular concern because, as [the Alternate Designated Agency Ethics Official] noted, the article discussed agency programs and policies, and could, therefore, more likely imply that the views expressed in the article were official. [The Alternate Designated Agency Ethics Official] was also not incorrect when he opined that the disclaimer in the journal article could have been more "reasonably prominent," rather than in print that was substantially smaller than [the employee's] biographical information. Under the regulation, disclaimers must ultimately be satisfactory to the employee's agency, and [the Alternate Designated Agency Ethics Official's] concern was not unfounded.

We do not agree with the outside comments suggesting that the Standards of Conduct should be applied more permissively to [the employee] because his views have special merit or may be critical of [agency] policies, nor do we agree that enforcement of the Standards of Conduct might restrict his freedom of speech. The regulation seeks only to prevent misuse of official title and

position, not to impinge on the fundamental right of free speech (*see* preamble to the final rule, at 57 *Fed. Reg.* 35040 of August 7, 1992). Moreover, the [Alternate Designated Agency Ethics Official's] advice applying the rules to this particular situation has not punished [the employee] or in any way limited his freedom to speak and write as he chooses. Instead, it seems to have been merely cautionary and informative.

Likewise, we do not accept the suggestion that [the Alternate Designated Agency Ethics Official's] advice has tarnished [the employee's] personal or professional reputation. It was appropriate advice, not only for [the employee], but also for the official at [the agency] to whom it was directed, as useful guidance for future similar situations. This Office expects that, pursuant to subpart B of 5 C.F.R. part 2638, ethics officials will carry out their proper functions of providing ethics advice, counseling and training to help prevent future ethics violations.

I hope this information will prove useful to you. Please let us know if we can offer additional guidance in this matter.

Sincerely,

Stephen D. Potts
Director