

Office of Government Ethics

93 x 30 -- 10/22/93

Letter to the Executive Director of a Federal Commission dated October 22, 1993

Your letter of September 14, 1993, requested our advice concerning the status of the seven members who serve on [your] Commission. You noted that the statute which established the Commission declared that the members shall not be considered employees of the United States except for certain laws governing workers' compensation and tort claims. Additionally, it appears to have designated at least some of the members as representatives of outside interests. However, the statute also authorized Federal compensation for Commission members, and they are appointed to a term of office and their recommendations affect Government policy in [an] area of research. You indicate that the legislative history is silent on this issue of employment status.

Informal Advisory Letter 82 x 22, which this Office issued in 1982, remains our best guidance on who should be considered a Government employee. As discussed in that letter, we would ordinarily view Federal compensation as automatically creating a status of Government employment. However, the Commission's situation is unique because of the clear statutory language to the contrary. We concur in your analysis that this statutory language overrides and that members should, therefore, not be treated as Government employees for purposes of most ethics requirements.

The fact that they are appointed by Federal officials for a term of office or that they make recommendations on policy does not alter that conclusion. We are aware of several other Federal commissions and boards composed of members appointed for specified terms who make policy recommendations but who are, nonetheless, not considered employees. These factors standing alone do not create an employment status.

Consistent with the conclusion that members should not be treated as employees, you are correct that they need not complete financial disclosure reports, except to the extent that the White House may require an initial report in connection with appointment. Additionally, we would not consider the regulations on standards of ethical conduct at 5 C.F.R. part 2635 to apply directly to Commission members. We believe that you have taken other appropriate

precautions to prevent conflicts and appearances of impropriety by asking members to recuse themselves from certain matters and by requiring internal disclosure of their affiliations and interests which might result in bias.

While only the Department of Justice can determine definitively whether someone will be considered an employee for purposes of the criminal statutes on conflict of interest (18 U.S.C. §§ 203-209), we believe the conclusion that they are not covered by these laws flows logically from the strong statutory language that Commission members are not employees for **any** purposes other than those specified. We must point out that other criminal statutes apply more broadly to "public officials," which the Department of Justice has interpreted to include members of boards and commissions even though they are not considered Federal employees. Examples of such statutes are 18 U.S.C. § 201, which proscribes bribery and the acceptance of certain gratuities, and 18 U.S.C. § 219, which prohibits acting as an agent of a foreign principal, absent an exemption.

In sum, we concur with your analysis and present procedure for the seven Commission members. Please let me know if we can provide additional guidance.

Sincerely,

Stephen D. Potts
Director