

05 x 2(2)

Letter to a Designated Agency Ethics Official
dated April 18, 2005

This is in response to your letter seeking our advice as to whether [a top official of your agency] is a "covered noncareer employee" as defined in 5 C.F.R. § 2636.303(a).

In an earlier request for our advice regarding another matter concerning the [official], you mentioned that "[a]ll [agency officials at this level] . . . are considered covered noncareer employees for purposes of the outside earned income limitations set out in 5 C.F.R. §§ 2635.804(b) and 2636.303(a)(4)." Under 5 C.F.R. § 2636.303(a)(4) a covered noncareer employee is defined, for purposes of the outside earned income limitations in the Ethics in Government Act, as an employee for whom the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule (currently \$107,550) and who is appointed to his position under appointment criteria "essentially the same as those for noncareer executive assignment positions."

With our response to your earlier request, we included a copy of OGE Informal Advisory Letter 04 x 10, which discusses the definition of covered noncareer employee. In that opinion, we concluded that, based upon the information provided by the agency involved, an employee similarly situated to [your agency official] would not be a covered noncareer employee under § 2636.303(a)(4).

In your current letter, you state that, after reviewing OGE 04 x 10, it is your opinion that the [official's] position does not fall under the definition of a covered noncareer employee at 5 C.F.R. § 2636.303(a)(4). However, you question whether the [official's] position might be covered by the definition of covered noncareer employee at 5 C.F.R. § 2636.303(a)(3). Under that provision, a covered noncareer employee is an employee who meets the same salary criteria described above for 5 C.F.R. § 2636.303(a)(4) and who is appointed to his position "under an agency-specific statute that establishes appointment criteria

essentially the same as those set forth in [5 C.F.R.] section 213.3301 . . . for Schedule C positions."

The [agency official's] annual salary of \$150,000 is greater than 120 percent of the minimum rate of basic pay for GS-15. Whether the [agency] statute under which the [official] was appointed establishes appointment criteria essentially the same as for a Schedule C position is not a question for which this Office would be the ultimate arbiter. That analysis would more appropriately be done by [your agency], as the agency to which the agency-specific statute applies. Nevertheless, based on information you have provided and discussions we have had with the Office of Personnel Management, it could be reasonable for [your agency] to conclude that the criteria for appointing the [official] are not the same as the criteria for a Schedule C position.

As we discussed in OGE 04 x 10, the criteria for Schedule C positions at 5 C.F.R. § 213.3301 focus on positions that are policy determining or involve a close and confidential working relationship with key appointed officials. You state in your letter that the [official's] duties include developing and implementing measurement systems and approaches to assess whether proposals and projects have met their stated goals. You further state that the [official] does not offer advice on the viability of the projects that [the agency] may fund. Thus, it does not appear that the [official] occupies a policy-determining position.

It is our understanding that the criteria for determining whether a position involves a close and confidential working relationship with key appointed officials start with whether the individual is appointed by the President or someone else who is appointed by the President, and whether the individual may be removed from office at the will of the appointing official. All [agency] officers are appointed by the agency's Chief Executive Officer, who is appointed by the President, in consultation and with the approval of the Board of Directors. [Citation deleted.] According to your letter, the [official] has an "at will" employment relationship and may be terminated if the appointing officials lose confidence in him. However, you have indicated through telephone conversations that [the agency's] intent was not to create a special relationship between the [official] and the appointing officials similar to a Schedule C appointment; rather, this situation is more akin to a regular "excepted" appointment in that [the agency] was simply using its

authority at [citation deleted] to appoint all of the agency's [officials at this level], without regard to the civil service laws or regulations.

As noted above, this Office would not be the ultimate arbiter of your question regarding the appointment criteria in [your agency's] agency-specific statute. Should you need further assistance in analyzing that law in comparison to the appointment criteria for Schedule C positions, we would encourage you to write to [the] Associate Director, Strategic Human Resources Policy, Office of Personnel Management, 1900 E Street, NW., Room 6566, Washington, DC 20415.

Sincerely,

Stuart D. Rick
Deputy General Counsel