

OFFICE OF GOVERNMENT ETHICS

98 X 16

Letter to an Agency Inspector General's
Office dated October 15, 1998

This is in response to your letter of September 21, 1998, requesting an opinion from the Office of Government Ethics (OGE) on two issues involving the application of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635. We note that your questions relate to an investigation that your office was asked to conduct by the Inspector General of [a Federal agency], and that your office discussed this matter with OGE's Deputy Director for Government Relations and Special Projects, prior to sending your letter to OGE. Our response to your two questions is provided below.

QUESTION ONE

Do Federal ethics regulations prohibit the acceptance of lunch by Federal officials attending a conference co-sponsored by a private sector firm and the agency that employs those officials, when the officials subsequently personally repay the cost of the lunch?

As you know, subpart B of the Standards of Conduct prohibits an employee from soliciting or accepting, directly or indirectly, any gift from a "prohibited source" or given because of an employee's official position. See 5 C.F.R. § 2635.201. Moreover, the gift rule defines the term "gift" broadly to include almost anything of monetary value, subject to certain limited exclusions and exceptions. See 5 C.F.R. §§ 2635.203(b) and 2635.204. Because we understand from your letter that the lunches in your question were provided by a prohibited source of the officials' employing agency, the first step in our analysis will be to identify whether any of the exclusions or exceptions would apply to the acceptance of these lunches.

Gift Exclusions

As noted, certain items or things of value are excluded from the definition of the term "gift" as used in the Standards of Conduct. In short, these excluded items can be accepted by an employee no matter who the donor is because they are not considered to be gifts under the Standards of Conduct. Most relevant to our discussion here, these excluded items include "[a]ny gift accepted by the Government under specific statutory authority." See 5 C.F.R. § 2635.203(b)(8). Specifically, this includes "[t]ravel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353" in connection with an employee's

attendance at certain meetings or similar functions, or "[o]ther gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute." See 5 C.F.R. §§ 2635.203(b)(8)(i) and (ii). Finally, we note that there is an exclusion for "[a]nything for which market value is paid by the employee." See 5 C.F.R. § 2635.203(b)(9). "Market value," as used in the Standards of Conduct, means the retail cost the employee would incur to purchase the gift. See 5 C.F.R. § 2635.203(c).

You would have to apply the facts of this situation to ascertain whether the lunches could fall under any of the gift exclusions we noted above. If the officials' employing agency had previously accepted these lunches under some specific statutory authority, then the officials' subsequent acceptance of the lunches would not violate the gift rule. Alternatively, if the officials had paid in advance the market value of the lunch, their acceptance likewise would not violate the gift rule. However, if the private firm provided the lunches directly and no other gift exclusion applied, then the lunches would be considered "gifts" under the Standards of Conduct. Accordingly, the next step in your analysis would be to determine if these otherwise prohibited gifts could be accepted under one of the gift exceptions.

Gift Exceptions

There are several exceptions to the gift rule that permit an employee to accept an otherwise prohibited gift. Most of the exceptions in the gift rule are not relevant to this discussion. However, two exceptions are noteworthy. The exception at section 2635.204(a) permits an employee to accept certain unsolicited gifts having an aggregate market value of \$20 or less per occasion. This exception does not apply to gifts of cash or investment interests or gifts that add up to over \$50 in value in any calendar year from any single source.

Additionally, section 2635.204(g) contains an exception that permits an employee to accept the gift of free attendance at a widely attended gathering.¹ This section also permits an employee to accept a gift of free attendance provided by a sponsor at a speaking or similar engagement, when an employee is assigned to

¹ A gathering is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present. For example, this includes an event that is open to members from throughout an interested industry or profession or in which those in attendance represent a range of persons interested in a given matter. See 5 C.F.R. § 2635.204(g)(2).

participate as a speaker or panel participant or otherwise to present information on behalf of the agency. This section defines the term free attendance to include food and refreshments provided to all attendees as an integral part of the event. See 5 C.F.R. § 2635.204(g)(4). To use the exception for widely attended gatherings, the agency must first determine that the employee's attendance is in the agency's interest because it will further the agency's programs and operations. Once again, you would have to apply the facts of this situation to ascertain whether the lunches could fall under any of the gift exceptions we noted above.

Disposition of a Prohibited Gift

Finally, there is one other provision in the gift rule that may be relevant to this discussion because it allows an employee to dispose of certain gifts that otherwise could not be accepted under the gift rule. This provision, contained in section 2635.205(a), permits an employee to simply pay the donor the market value of the gift after its receipt. However, to avoid possibly violating the gift rule, an employee is required to make a prompt payment of the cost of the gift, under his or her own initiative. In this case, prompt payment would occur if the payment were made at the time the officials ascertained the value of the lunches, and need not have occurred at the actual time the lunches were accepted by the officials. We note that an employee may always consult with his or her ethics official prior to disposing of an otherwise prohibited gift.

QUESTION TWO

Do Federal ethics regulations prohibit the payment by a private sector firm of the costs of a conference co-sponsored with a Federal agency? Do Federal ethics regulations prohibit the use of Government vehicles to attend such a conference?

Co-sponsorship Issues

As a general matter, the co-sponsorship of a conference with a private entity is governed by an agency's organic statutes. For the most part, this is not a question of individual employee conduct governed by the Standards of Conduct but rather is one that involves the interpretation of an agency's statutory authority. The seminal question to consider in situations involving co-sponsorship with an outside entity is whether the agency has the legal authority to enter into such an arrangement. See OGE Informal Advisory Letter 85 x 16. Whether an agency has such legal authority is normally the agency's call, and OGE will not substitute its own judgment for that of the agency. If such

authority does exist, the arrangement with the private entity is governed by the breadth of that legal authority as well as consideration of any applicable legal restrictions and appropriations law requirements. Therefore, in answer to your second question, the Standards of Conduct do not prohibit the payment by the private sector firm of any agency obligations connected with a co-sponsored conference.

Use of Government Vehicles

Your second question also concerned the use of a Government vehicle to attend a conference. There is a specific rule issued by the General Services Administration (GSA) that governs the use of Government vehicles. See 41 C.F.R. subpart 101-38.3. With respect to the use of Government property, the Standards of Conduct do provide a more generic provision in section 2635.704(a) that makes it an employee's duty to use, or allow the use of, any Government property (such as a Government vehicle), for only "authorized purposes." This section defines the term "authorized purposes" to mean "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation."

As a general matter, OGE is not in a position to render a determination on whether the use of Government vehicles is prohibited in a particular case. While section 2635.704(a) does impose a general duty on employees to protect and conserve Government property, this section does not determine whether certain activity is "authorized" or attempt to list the specific purposes for which the use of Government property may be authorized. One must look at sources outside of OGE's jurisdiction, such as the above-cited GSA regulation or any department-specific regulations, for specific restrictions on using Government property. Accordingly, if an employee uses a Government vehicle for other than official purposes (e.g., in situations where the agency has not authorized its use), the employee may have violated the Standards of Conduct and any applicable Government rule regulating the use of motor vehicles.

We hope that this analysis has been helpful to you. If you have any questions about this response, please do not hesitate to call my staff.

Sincerely,

Marilyn L. Glynn
General Counsel