

Office of Government Ethics
86 x 14 -- 11/05/86

Letter to a DAEO November 5, 1986

This is in response to your letter of September 12, 1986, requesting an advisory opinion from this Office on a question concerning the outside activities of an employee of [your agency].

In your letter, you stated that [the employee] wants to publish a newsletter. The majority of the articles for the newsletter would be related [to the agency]. The [agency-related] articles would contain information readily available to the public. [The employee] would work on the newsletter on her own time and would receive a nominal fee from subscribers to cover printing and mailing costs. You stated that three years ago [the employee] helped found [an association of managers in a field related to the functions of the agency], which soon folded. Although originally the newsletter was to be an official function of [the association], when this did not materialize [the employee] put out four issues of the newsletter on her own. [The employee] sought but did not obtain approval to publish the newsletter as an official [agency] publication.

You concluded that any appearance problems are minimal, since [the employee] receives no compensation but only reimbursement of postage and printing expenses.

After examining the model governmentwide and [agency] standards of conduct and applying them to the facts as presented, we have determined that there are some additional issues you may wish to consider in rendering your opinion on the situation.

In reaching your conclusion, you cited [the agency's equivalent to 5 C.F.R. § 735.203(c)].

You also referred to the model standard of conduct regulation of the Office of Government Ethics, Office of Personnel Management, on outside employment and other activities, which provides, in pertinent part:

Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law,

the Executive order, this part, or the agency regulations. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of OPM or Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the agency head gives written authorization for use of nonpublic information on the basis that the use is in the public interest

(5 C.F.R. § 735.203(c) (emphasis added).) In your words, section 735.203(c) "clearly places the critical emphasis on the public and available nature of the information drawn upon."

Although 5 C.F.R. § 735.203(c) draws the distinction you mentioned, according to another subsection of this regulation:

An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expenses, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of conflicts of interest;

5 C.F.R. § 735.203(a) (emphasis added). The [agency's equivalent regulation] is nearly identical to 5 C.F.R. § 735.203(a), except that the [agency] regulation is more stringent in explicitly prohibiting an employee from engaging in outside employment or other outside activity "which might result in a conflict or apparent conflict between the private interests of the employee and the official Government duties and responsibilities." It was under the authority of the regulation at 5 C.F.R. § 735.203(a) that [the agency] enacted [its] more detailed aforementioned standard of conduct.

Thus, it seems that under [the agency's equivalent of 5 C.F.R. § 735.203(c)], [the employee] may be prohibited from receiving money for printing and mailing expenses for the newsletter, because it would constitute something of monetary value for a writing, the subject matter of whose articles are substantially [agency-related].

In addition to the [agency] regulation you cited, the [agency] regulation, which also implements 5 C.F.R. § 735.203(a), includes among its list of incompatible outside activities those "outside activities that may be construed by the public to be the official acts of [the agency]."

Under [the agency's regulation], publication of the newsletter may be prohibited because it could readily be construed by a reasonable member of the public to be an official act of [the agency]. Although the sample newsletters you furnished us do not use [the name of the agency] as part of the title, they do contain numerous references to [agency] topics, such as [agency] publications, [agency] regions, and [agency] forms. The newsletters do not carry any disclaimer stating that they are not official [agency] publications.

Under 5 C.F.R. §§ 735.203(a) and 735.202(a) and [equivalent agency regulations], there may be an actual conflict or appearance problem because [the employee] may be receiving something of monetary value in the form of reimbursements from Federal and state entities whose operations or activities are regulated by [the agency]. We have insufficient information to reach a definite conclusion in this regard, since we are uncertain about the marketing scheme for the newsletter. If regulated entities are among the subscribers, there could be conflicts problems. It is also unclear whether [the employee] occupies a position of decisionmaking authority with [the agency]; if so, concerns about an actual or apparent conflict of interest are heightened.

Under 5 C.F.R. § 735.201a(a) and [the equivalent agency regulation], an employee is prohibited from engaging in any action which might result in or create the appearance of using public office for private gain. According to this Office's long-standing interpretation, these prohibitions mean that no other private person or entity can profit from an employee's official activity. From the facts you disclosed, it is difficult to determine whether the operations of any private organization

would be enhanced or made more profitable because of [the employee's] proposed newsletter activities.

Under 5 C.F.R. § 735.205 and [the equivalent agency regulation], an employee is prohibited from directly or indirectly using Government property for other than officially approved activities. Although you have stated that [the employee] would publish the newsletter on her own time, it is a distinct possibility that some of the information-gathering for the newsletter would occur on Government time and over the Federal Telecommunications System. It is also unclear whether any Government office equipment such as typewriters, copy machines, or paper would be used in the publication process.

We hope our having raised these issues will be helpful to you in formulating your opinion. It is also important, of course, for you to consider any prior applications by [your agency] of your standards of conduct and particularly of [the agency's equivalent of 5 C.F.R. § 735.203(c)] in analogous situations.

Sincerely,

David H. Martin
Director