

## **Office of Government Ethics**

**91 x 9 -- 02/22/91**

### **Letter to a Designated Agency Ethics Official dated February 22, 1991**

This is in response to your letter of January 16, 1991, asking for opinions about questions that have arisen at two regional offices of [your agency]. You enclosed with your letter two memoranda, one from [one] Regional Office dated January 3, 1991, and one from [a second] Regional Office dated January 3, 1990.

The question from the [first] Regional Office involved two private attorneys who represent clients before the Regional Office. According to the information you forwarded, each attorney hosts an annual Christmas or holiday party. One attorney invites personal friends, management clients and members of the staff of the Regional Office to his party. The other attorney invites union clients and members of the staff of the Regional Office. Food and drink are served at each party. At the time of the parties in question, each attorney had cases pending before the Regional Office. It would appear to be a reasonable possibility, although it was not specified, that clients attending the parties might have cases pending before the Regional Office, or be regulated by the [agency]. In your letter you stated that an appearance of a conflict of interest could ensue from attendance at such gatherings, and that the Regional Director foresaw the potential problem and issued a memorandum advising the employees of the prohibition. A copy of the Regional Director's memorandum was not included with the materials you forwarded, nor were the terms of the prohibition specified.

For the reasons discussed below, the attorneys hosting the parties are prohibited sources. In the absence of an applicable exception, and none was apparent in the facts provided, [agency] employees should not accept food or drink at these parties. This Office addressed the acceptance of food or drink from prohibited sources in its memorandum 87 x 13. In addition, attendance at such parties where the primary invitees are clients, who are regulated by the [agency], and [agency] employees strongly suggests the appearance of a conflict of interest.

First we should examine the basis for the restriction on

accepting food or drink from a prohibited source. Pursuant to section 101(d) of Executive Order 12731, an employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance duties. This language is identical to section 101(d) of Executive Order 12674. Section 201 of Executive Order 11222, the predecessor of Executive Order 12674, was similar and provided:

(a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which --

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency;

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

Model implementing regulations are located at 5 C.F.R. §735.202. The model regulation at subsection (a) prohibits an employee from accepting anything of monetary value from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;

(2) Conducts operations or activities that are regulated by his agency; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

Individuals or organizations who fall within groups outlined by

subsection (a) may be termed "prohibited sources" for the purpose of this discussion. The [agency] in its own regulation on standards of employee conduct added an additional category of prohibited sources, i.e., a person who "is a party to or has an interest in any case, proceeding, or other matter before the Agency." Clearly the attorneys hosting the parties fall within these categories, and are, therefore, prohibited sources.

If the attorneys hosting the parties are prohibited sources, then employees of the [agency's] Regional office are prohibited from accepting anything of monetary value from these attorneys including food and drink unless there is an applicable exception. The allowable exceptions are for gifts from family members, personal relationships that are clearly not motivated by business factors, or during the ordinary course of a luncheon or dinner meeting or inspection tour where an employee may properly be in attendance. It does not appear that these exceptions apply here. Nothing in the information you supplied indicates that either a family or personal relationship was involved. Nor could the parties be considered meetings at which employees were properly in attendance since the Regional Director had sought to prohibit participation by staff of the Regional Office.

Next we need to examine whether mere attendance at a holiday party may constitute an appearance of a conflict of interest. This is a question within the judgment of the agency after consideration of all of the circumstances in each case. The following may be helpful during that consideration.

The model standards of conduct regulations at 5 C.F.R. § 735.201a provide in relevant part:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create, the appearance of:

.....

(b) Giving preferential treatment to any person;

(d) Losing complete independence or impartiality;

(f) Affecting adversely the confidence of the public in the integrity of the

## Government.

Arguably clients invited to the holiday parties might get the impression that the attorney-host maintained a personal relationship with the regulating agency, and, therefore, the clients would be better served perhaps by using that attorney than others. The clients might also believe the attorney-host received preferential treatment, and that [agency] attendees might not be completely impartial where either the attorney-host or one of his clients was concerned. If the clients had these perceptions, the confidence of the public in the integrity of the Government could be adversely affected. Based upon this reasoning [agency] employees who participated in cases before the agency would avoid giving the appearance of a conflict of interest by not attending holiday parties of the type you described.

The second question is from the Director [of the second Regional Office]. The Director's son has accepted a position with a private law firm in [the city] that is involved with approximately 25 cases per year with the Regional Office. The son was to begin working with the firm in June or September 1990 and, upon graduation from law school, was to continue as a full time associate in September 1991. I understand that the son would not be in the [department of the firm that has cases involving the Regional Office]. The Director asks when he should recuse himself.

The restriction in 18 U.S.C. § 208 prohibits an officer or employee from participating personally and substantially in a particular matter in which he, his spouse, or minor child has a financial interest. (Emphasis added.) Although the information provided does not indicate the son's age, I assume, since he would have graduated from both college and law school, he is not a minor child. Thus, the statute would not be applicable.

There is, however, the question of an appearance of a conflict of interest. The appearance problem is more acute because it involves the Director of the Regional Office. However, the Regional Director recognized this. If the Director is to act on the basis of a perceived appearance of a conflict of interest, I would recommend that he do so at the time when the son and the firm make an agreement that will result in the son's permanent employment. If such time has already passed, I would

suggest that the Director recuse himself, if he has not already done so, after receipt of this opinion.

Sincerely,

Stephen D. Potts  
Director