

Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated March 17, 1992

Your letter of March 2, 1992, requested a formal opinion as to whether a stock interest of an employee at [your agency] should be considered to conflict under 18 U.S.C. § 208 with his Government duties and, if so, whether we would recommend a waiver or find that it also presents a residual conflict under appearance standards. We understand that this employee was directed by the [agency] to divest himself of his 407 shares of stock worth approximately \$15,000 in [a corporation], because it was determined to present a conflict with his duties involving review of acquisition proposals. Your letter also indicated that [the corporation] is a likely bidder on contracts at the [agency] and that [the corporation] has recently expanded its operations such that the employee's supervisors are no longer able to insulate him by recusal from matters potentially involving that company. In response to [the agency's] divestiture order, the employee filed a grievance, by which he seeks withdrawal of the order to divest and submission of a request to the Office of Government Ethics (OGE) for a ruling as to whether divestiture is necessary.

While OGE does have authority to issue formal opinions, as outlined in 5 C.F.R. part 2638, subpart C, that mechanism is reserved for matters of general applicability or of first impression. [5 C.F.R. § 2638.303.] The issues presented do not appear to be unique or of significant precedential value. We are especially reluctant to serve as an appellate body in matters of individual employee grievances. Under the decentralized Government ethics program in the executive branch, as outlined in 5 C.F.R. part 2638, agency ethics officials have the authority and are expected to make those routine judgments required to interpret and execute the criminal conflict of interest statutes and the regulatory standards of ethical conduct. At the same time, agencies are required to consult with OGE prior to granting waivers under 18 U.S.C. § 208. Therefore, we will, in this instance, offer the following suggestions and comments.

You have correctly noted that 18 U.S.C. § 208 prohibits personal and substantial participation in Government matters which could have a direct and predictable effect on an employee's

financial interests, such that there is a real possibility of gain or loss. The statute details what is encompassed by the concept of "participation" to include decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.

The facts which you have summarized indicate that the employee's position requires him to provide independent reviews of acquisition proposals to affirm their feasibility, suitability, and conformity to regulations, as well as the validity of their cost estimates and cost/benefit analyses. We understand that the results of these reviews determine in large measure whether proposals will be funded for procurement at budget review time and whether procurement requests will be approved, since the employee's staff chief takes the reviews into consideration when he briefs top management officials as part of the agency's procurement program. In addition, the employee reviews statements of work during this process.

Based on these facts, we agree with your conclusion that these responsibilities involve participation which is personal and substantial, that is, direct and of significance to the procurement matter. Additionally, your conclusion appears to be correct that the outcome of these matters could have a direct and predictable effect on [the corporation], so long as it is considered a potential bidder. Therefore, we concur in your determination that a conflict of interest may exist under 18 U.S.C. § 208(a).

As to how best to avoid this conflict, we encourage agencies to accommodate employees whenever possible by allowing recusal in those specific instances where the financial interest might be affected. However, if it is not possible to permit recusal without disqualification from matters so central or critical to the performance of assigned duties that the employee's ability to perform in his position would be materially impaired, or if recusal would adversely affect the efficient accomplishment of the agency's mission because of its frequency or the difficulty of reassigning responsibilities, then other resolutions must be explored. Reassignment of the employee may be another option, but that, too, may not always be feasible or may adversely affect efficient accomplishment of the agency's mission. Attachments to your letter noted that recusal was no longer practical in this case and that there was no position available for reassignment within the employee's component which would fully insulate him from the potential conflict with his financial interest in [the corpora-

tion].

An agency does have inherent authority to require employee divestiture of conflicting financial interests. See 5 C.F.R. § 735.204, which prohibits employees from holding financial interests that conflict substantially, or appear to conflict substantially, with Government duties and responsibilities. When divestiture is found to be reasonably necessary by the agency, an employee may, prior to divestiture, request that OGE issue a certificate of divestiture, which, if issued, will protect him from tax consequences by deferring recognition of capital gains. See 5 C.F.R. part 2634, subpart J [section 2634.1001].

Another option is for the agency to consider granting a waiver under 18 U.S.C. § 208(b)(1), if it can conclude that under the circumstances the financial interest is not so substantial as to be deemed likely to affect the integrity of services expected from the employee. In reaching a decision that the interest is not so substantial, the agency should consider the nature and value of the financial interest, as well as the type and nature of services which the employee is required to perform. Those considerations should be judged objectively, and, therefore, the reputation of the individual employee is not a determinative factor, as you noted. The financial interest need not be of a de minimus value to be eligible for waiver, so ownership of stock worth \$15,000 could be considered for possible waiver. What is required before granting a waiver is that the agency must conclude, after examining all the circumstances, that the interest meets the statutory test of insubstantiality noted above.

In this instance, it would not be an abuse of your statutory discretion, in our opinion, if you were to find that this stock interest does meet the insubstantiality test and, therefore, to grant a waiver under 18 U.S.C. § 208(b)(1). Of course, the standards of conduct concerns of Executive Order 12674 must also be considered before deciding to grant a conflict of interest waiver, such as the residual appearance of a conflict. However, our opinions have indicated that before-the-fact exposure which occurs through the waiver process can significantly dispel or eliminate any residual appearance concerns. Additionally, it is only those appearances of conflict which would be perceived by a reasonable person with knowledge of the relevant facts which should militate against granting an otherwise proper waiver under 18 U.S.C. § 208(b)(1).

Ultimately, we must defer to you and ethics officials at the [agency] in deciding whether, after examining all the facts in light of our comments, a waiver will be granted. If you still decline to grant a waiver and maintain that divestiture is reasonably necessary, then OGE will entertain a properly substantiated request for a certificate of divestiture to defer the recognition of any capital gains.

Sincerely,

Stephen D. Potts
Director