

Office of Government Ethics
91 x 17 -- 05/17/91

Letter to a Designated Agency Ethics Official
dated May 17, 1991

Your memorandum of April 1, 1991, requested our review of background information concerning [an employee's] involvement in a project that was recently awarded a grant by [your agency].

You state in your memorandum that [the employee] is a special Government employee under 18 U.S.C. § 202(a) who works less than 60 days per year. You further state that [the employee] also serves in a volunteer capacity as the Executive Director of [a foundation], a non-profit, tax-exempt educational organization. [Your agency] recently awarded a \$250,000 grant to the Foundation in support of a project to commemorate [an anniversary].

After reviewing the information you provided, it appears that the two conflict of interest statutes of immediate concern are 18 U.S.C. §§ 205 and 208. Briefly, section 205 prohibits a Federal employee from representing another person before any department, agency or court, including a commission, in connection with any covered matter in which the United States is a party or has a direct and substantial interest. For purposes of section 205, a "covered matter" includes an application, request for ruling, determination or other particular matter.

The restrictions of section 205 are limited for special Government employees serving no more than 60 days in the immediately preceding period of 365 days. Under these circumstances, the restrictions apply only to covered matters involving specific parties in which the employee, at any time, participated personally and substantially as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise.

Section 208(a) bars a Federal officer or employee, including a special Government employee, from participating personally and substantially as a Government employee in a particular matter, such as evaluation and approval of a grant application, that affects the financial interest of an organization in which he is serving as officer, director, trustee, general partner, or

employee.

With regard to these two statutes, the critical factor in examining [the employee's] case, is whether he participated personally and substantially in this project. Because the term "participate personally and substantially" appears in several conflict of interest statutes, including sections 205 and 208, we have found it useful to look to the definitions of these terms as they appear in 5 C.F.R. § 2637.201(d). To participate "personally" means directly and includes the participation of a subordinate when actually directed by the Government employee in the matter.

"Substantially" means that the employee's involvement must be of significance to the matter or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of "substantial" participation should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

In your memorandum you state that "[h]e [the employee] denied ever having any involvement in the project as a Government employee." However, after reviewing the information you provided, it is unclear whether [the employee] participated personally and substantially in this project as a Government employee. We noted several instances in your memorandum and the supporting documentation that suggest that [the employee] may have participated personally and substantially in this project in his [official] position.

First, the minutes from a Finance Committee Meeting, which [the employee] attended in his official position and as a member of the Committee, state that the Finance Committee "[a]pproved the allocation of \$250,000 for the [Project], contingent upon the project's sponsor being able to raise the remaining funds (\$1,750,000) from other sources." Based on these minutes it would be difficult to conclude that [the employee] did not participate personally and substantially as a member of the Finance Committee.

You state in your memorandum that, although [the employee]

attended the Finance Committee meeting, he did not speak in favor of the grant. You further state that, because a quorum was not present, a vote was not taken and that "[m]atters were approved by the Chairman noting that there were no objections." Although he did not speak in favor of the grant, it is not clear whether [the employee] participated in discussions about the project at this meeting and whether these discussions influenced, either intentionally or not, other [officials] at the meeting.

Second, the mail ballot distributed to the [officials], which put the project to a vote, stated that the ". . . staff has had considerable consultation with [the employee], and has weighed the pluses and minuses of undertaking this [project]. . . ." It is not clear whether [the employee] consulted with the [agency] staff officially or as the Executive Director of the Foundation.

You state in your memorandum that consultation was primarily among [the employee], the Staff Director and the Director of Government Affairs and that discussions mainly concerned the project schedule, general [project] information, and identification of documents that could be obtained for the [project]. Furthermore, you state that the staff weighed the pluses and minuses in private amongst themselves without any influence from [the employee].

Because you did not state that [the employee's] discussions with [agency] staff only concerned factual information about the project, it is unclear whether he rendered advice on the project at any time as a special Government employee, even if only on one occasion.

Third, you state in your memorandum that [the employee] attended a Finance Committee meeting [in his official position]. During this meeting, the committee voted to accept the minutes of the January Finance Committee meeting, at which the grant was originally considered. Did [the employee] participate in this vote and what impact did the vote have on the project?

Fourth, the minutes from an [agency] meeting, which [the employee] attended as [an official], indicate that the [agency] unanimously adopted revised budgets for several projects. In your memorandum, you state that these project budgets included the [project we are discussing]. Did [the employee] participate in adopting these revised budgets and what impact did this action

have on the project?

Finally, I am concerned with [the employee's] statement that ". . . his interaction with the [agency] would be limited to getting other [officials] involved in the [project]. . . ." The information provided does not indicate whether he would be acting as [an official] or Executive Director. If he will be acting as [an official], what impact will getting the other [officials] involved have on the project?

Beyond the conflict of interest statutes discussed, you must also consider the [agency's] standards of conduct regulations. The [agency] has formally adopted the model standards of conduct at 5 C.F.R. § 735, which are based on Executive Order 11222. The two sections of primary concern are 735.302 and 735.303.

Section 735.302 prohibits a special Government employee from using or giving the appearance of using his Government employment for his own or another person's private gain, especially one with whom he has family, business, or financial ties. Section 735.303 prohibits a special Government employee from using non-public information, obtained as a result of his Government employment, for his own or another person's private gain. This prohibition applies to actions taken directly by the special Government employee or through counsel, recommendation, or suggestion to another person, especially one with whom he has family, business, or financial ties.

With regard to these standards of conduct, I am concerned about several points made in the information you have supplied. As previously discussed, [the employee] indicated to you that he plans to get other [officials] involved in the [project]. Unless he acts officially, [the employee] cannot use his Government employment to encourage the other [officials] to participate in the project. At a minimum, it might appear that [the employee's] only connection with the other [officials] is through his Government employment and that the Foundation would gain from the other [officials'] involvement in the [project].

Similarly, you should also consider whether the Foundation used [the employee's] position as [an official] in its effort to solicit funding from private sources. Finally, I am concerned with your statement that the Foundation Director may have inserted [the employee's] name in the grant application "with the intention of strengthening the project."

You also state in your memorandum that [the employee] provided guidance on the content of the grant application to the Director of the Foundation. Although you state that [the employee] did not write any part of the application, I am concerned that he may have had information about the [agency's] resources that was not publicly available and that may have been useful in preparing the application. (You indicated in the memorandum that the Finance Committee discussed the [agency's] available resources at [a meeting, which the employee] attended.)

Because you indicated that [the employee] is considering resigning from the [agency] if there are any problems with his acting in this dual role, you may want to consider the post-Government employment restrictions set forth in 18 U.S.C. § 207. The applicable restrictions of section 207 can be found at 207(a)(1) and 207(a)(2).

Section 207(a)(1) is a lifetime restriction which commences upon an employee's termination from Government service. Under this section a former employee, including a special Government employee, may not knowingly make, with the intent to influence, any communication to or appearance before an employee of the United States on behalf of any other person (except the United States) in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee and in which the United States is a party or has a direct and substantial interest.

Section 207(a)(2) is similar to the lifetime restriction of 207(a)(1) except that it is of shorter duration, two years from the time the employee terminates his Government service, and the particular matter must have been pending under the employee's official responsibility within the one-year period prior to terminating his Government service.

From the information you provided, it appears that the grant and the project are particular matters involving a specific party in which the United States is a party. For purposes of section 207(a)(1), if [the employee] resigns from his position as [an official], you will, again, need to determine whether he participated personally and substantially in the project while he was employed by the United States. For purposes of section 207(a)(2), you will need to determine whether the project is under [the employee's] official responsibility. Simply because he may have recused himself in a matter does not take the matter

from his official responsibility.

Please note that these post-employment restrictions prohibit communications to and appearance before the Government, but they do not prohibit "behind the scenes" assistance.

This letter identifies several issues that need clarification prior to making any determinations concerning the conflict of interest statutes or the standards of conduct. As the [agency's] Designated Agency Ethics Official, you must determine whether [the employee] participated personally and substantially, at any time, as a special Government employee, in the project. You must also determine if the project is under his official responsibility as [an official]. Finally, you must determine whether he used his Government position or information obtained as a result of his Government employment for his own or the Foundation's private gain. In the meantime, [the employee] should recuse himself as [an official] from participating in any matters involving this project, and he should consider having someone else represent the Foundation's interests before the [agency].

I hope this discussion is useful to you in your efforts to clarify the circumstances surrounding this case.

Sincerely,

Stephen D. Potts
Director