OFFICE OF GOVERNMENT ETHICS

04 x 12

Letter to a District of Columbia
Assistant General Counsel
dated September 9, 2004

This is in response to your letter of August 5, 2004. You have requested advice from the Office of Government Ethics (OGE) concerning whether 18 U.S.C. § 205 would prohibit an employee of the District of Columbia from participating, in his personal capacity, on the Metropolitan Washington Council of Governments (COG).

From your letter we understand that as an assistant general counsel for the District of Columbia, you received a question from [an employee] with the District of Columbia concerning his continued participation on the COG. The COG is a regional organization of Washington area local governments, including the District of Columbia. According to its web site, it is an independent, nonprofit association and is supported by contributions from its participating local governments, Federal and state grants and contracts, and donations from foundations and the private sector.

Representatives to the COG are appointed each year by the participating local governments and by caucuses of state legislative delegations from the region. The District of Columbia employee who is the subject of your question represents his home jurisdiction of [a nearby city and state] on the COG. This representation is in his personal capacity, not in his official capacity as an employee of the District. The District of Columbia also has a representative on the COG. In your letter you express a concern that the [nearby city and state] and the District of Columbia may have divergent views on particular issues that come before the COG and that by representing the people of the [nearby city and state] on these issues the employee may violate section 205(b)(2). Further, you ask whether a recusal by the employee on issues that affect the District of Columbia would remove any section 205(b)(2) concerns.

This Office is charged with providing "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive

agency . . . ." 5 U.S.C. app., § 402(a). We do not provide advice to, or concerning, current or former employees of the legislative or judicial branches of the Federal Government or current or former employees of the government of the District of Columbia, absent unusual circumstances. We do not believe your situation presents such circumstances. Nevertheless, OGE has answered a variety of questions for executive branch employees and executive branch ethics officials regarding the application of 18 U.S.C. § 205(a)(2). Because this part of the statute is similar to 18 U.S.C. § 205(b)(2), which pertains to District of Columbia employees, the analysis that we apply to questions about section 205(a)(2) may be instructive for your analysis of this question under section 205(b)(2).

In general, section 205 restricts certain representational activities. 18 U.S.C. § 205(a)(2) prohibits an officer or employee of the United States from acting as an agent or attorney for anyone (other than the United States) before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest. Similarly, 18 U.S.C. § 205(b)(2) prohibits an officer or employee of the District of Columbia from acting as an agent or attorney for anyone (other than the District of Columbia) before any department, agency, court, officer, or commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest.

When we analyze the questions we receive about section 205(a)(2), we look first at whether the employee is acting as an agent or attorney for anyone other than himself. In a previous opinion,[1] we noted that section 205 does not prohibit self-representation. A Federal employee could present his own views before the Federal Government in connection with a covered matter even if those views are the same as those held by an organization of which the employee is a member. But that employee could not communicate those views to the Federal Government as the representative of the organization. Such activity is prohibited by section 205(a)(2).

In order for section 205(a)(2) to apply, the employee's services also must be representational. Section 205(a)(2) does not bar behind-the-scenes assistance, nor does it bar

[1] OGE Advisory Opinion 94 x 15.

communications which are merely ministerial in nature, such as seeking information.[2] Section 205(a)(2) does prohibit communications made in connection with a matter in which there is some controversy or at least potential for divergent views.

Next, the representation must be made before one of the entities specified in the statute. If the entity before whom the representations are made is not one of the specified entities, then section 205 does not apply.

Finally, the representations must be made in relation to a covered matter in which the United States is a party or has a substantial interest. A covered matter is defined in the statute at section 205(h) as "any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation charge, accusation, arrest, or other particular matter." This definition would exclude a broad policy matter directed to the interests of a large and diverse group of persons,[3] but it would include, for example, an individual's request for ruling on a specific issue.

Unlike the term "covered matter," there is no statutory definition of "direct and substantial interest" as that term is used in section 205. In OGE Advisory Opinion 94 x 7, this Agency looked at the meaning of the phrase as it was used in other criminal conflict of interest laws, such as 18 U.S.C. §§ 203 and 207. This approach may also be useful for you in analyzing whether the District of Columbia has a direct and substantial interest in a covered matter.

For additional assistance, you may want to look at OGE Advisory Opinion 96 x 6. In that opinion, we advised a Federal ethics official on the applicability of section 205(a)(2) to a Federal employee in a situation somewhat similar to the District of Columbia employee. Although this analysis is not binding on you, the opinion may serve as a useful reference. All of our advisory opinions are on our web site at *www.usoge.gov*.

Unfortunately, our advisory opinions do not address two of the primary issues raised by your question. The first issue is whether the COG is a "department, agency, court, officer, or commission" under section 205(b)(2). The second issue is whether, even if the COG is not one of these entities, the

[2] OGE Advisory Opinion 96 x 6.
[3] OGE Advisory Opinion 94 x 15.

employee is acting as his home jurisdiction's agent before the District of Columbia representative on the COG. You will need to resolve those two issues in order to advise the employee.

We trust that the foregoing information will be of some assistance to you.

Sincerely,

Stuart D. Rick
Deputy General Counsel