

## **Office of Government Ethics**

**85 x 10 -- 07/15/85**

### **Letter to a DAEO dated July 15, 1985**

This responds to your [letter] request for advice regarding (1) the existence of a "financial interest" under 18 U.S.C. § 208(a); (2) the use of the waiver authority of section 208(b); and (3) the resolution of any appearance of a conflict of interest or other impropriety in connection with a pending case within [your] Department. The relevant facts of the case, as you have presented them, are summarized as follows.

[Your agency's] Project X is responsible for procuring a complex system that is produced only by company A, one of the largest [such] contractors in the United States with annual sales [to the Government] approaching \$2 billion. Pursuant to annual Congressional authorizations and appropriations, Project X each year contracts with company A to purchase a given quantity of these [systems]. It does so in a two-step contract under which company A first constructs and delivers components of the [system] for Government testing and acceptance. In the second phase, company A assembles the components into the finished system at a Government facility. Although total annual expenditures under these contracts generally range from \$500 million to \$700 million, the final assembly performed by the contractor at the Government facility represents about \$30 million of that sum each year. The contracts at issue are written on a fixed-price incentive basis, generating increases or decreases in company A's profit depending upon the quality of the system, its reliability and cost. At the Government facility company A assembles, inspects and tests the finished system; provides engineering services to analyze problems discovered during final inspection and testing; and maintains configuration control documentation of the systems produced.

Mr. S is an employee of [your] Department at the assembly facility. He is being considered for promotion to the position of Staff Engineer (GS-13) at this facility at a salary of approximately \$40,000 per annum. In this position, which is subordinate to the Chief Engineer, Executive Officer and Commanding Officer, Mr. S would be responsible for recommending whether parts or components that have not passed inspection should be repaired or reworked by the contractor, or whether a

waiver to a specification would be appropriate; developing quality assurance programs and policies for operations at the facility; initiating work statements for follow-on contracts; performing technical studies as requested by other field activities or the Project; and initiating studies for performance under the Special Studies task of company A's contract.

Mrs. S is employed by company A at the same facility. She was employed by the contractor there prior to her marriage to Mr. S. Her salary is \$32,000. Mrs. S's duties involve administrative control and coordination of all documentation relating to the systems assembled and delivered under the contract. This includes such data as manufacturing drawings, maintenance publications, training manuals, and other related technical literature used in the manufacture, maintenance and use of the systems. She deals frequently with Government personnel in the buildings where the final assembly takes place. She also participates as a member of the [special Board] composed of contractor and [Department] personnel, where she chairs the meetings and makes recommendations regarding changes to technical documents whenever necessary to keep them current with the systems being produced.

Under the portion of the contract involved here, company A is basically required to provide the capability to assemble, test and inspect a specified number of [its systems] each month. The \$30 million value attributed to this final phase of the work is almost exclusively made up of labor costs, and the number and mix of contractor employees required is governed by the number of systems funded and purchased by the [Department] each year. The administrative work performed by Mrs. S is essentially constant, since it involves technical documentation describing the hardware models produced, whether those be in quantities of 10 or 12 systems per month.

You go on to state that Mr. and Mrs. S do not deal with one another, and in the event that Mr. S is promoted, as proposed, the Government and the contractor would each take additional steps to ensure that this continues to be the case.

First, from the facts as you have presented them, we are of the opinion that Mr. S has a financial interest in the implementation of the Project X contract resulting from his spouse's employment with company A.

18 U.S.C. § 208 is a criminal statute dealing with the conduct of a Government employee in his role as its servant or representative, as distinguished from his conduct in a private capacity. Section 208 does not disqualify anyone from holding a particular Government position; instead it requires disqualification in certain governmental matters. Its restraint, therefore, comes into play on a case-by-case basis. In part, subsection (a) of section 208 prohibits a Government employee from participating personally and substantially as a Government employee in any particular matter "in which, to his knowledge, he, his spouse . . . has a financial interest." The term "financial interest" is not defined.

The Supreme Court has held that if under the logic of all the circumstances relating to the potential outcome of a particular matter, there exists a substantial probability of financial gain or loss to the concerned public official, the requisite "financial interest" exists. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 529, 555-557 (1961).

The "direct and predictable effect" test set forth in the Federal Personnel Manual, Ch. 735, app. C, is another way of expressing the appropriate test of whether a financial interest exists. Our Office's opinion 83 OGE 1 of January 20, 1983, regarding the applicability of 18 U.S.C. § 208(a) to a Government employee's rights in a company pension plan is another attempt to articulate the same principle.

While the impact of the contract upon Mrs. S's salary may not be capable of being calculated, the interest, nevertheless, exists with the resulting probability of financial gain or loss to her spouse. Her employment efforts are generally geared to the contractor's goal of efficiently and effectively delivering tested systems to the [Department]. Similarly, while the duties (official acts) of Mr. S upon the overall operation of the contract (particular matter) may be practically immeasurable under the incentive pricing formula of the contract, he nevertheless has participated personally and substantially within the meaning of the terms of the statute.

Second, you have asked for our views on the propriety of granting a waiver under 18 U.S.C. § 208(b). Further, you suggest that the [Department] has nothing but the highest regard for the employee's impartiality and integrity.

Section 208(b)(1) provides that waiver of the restriction of section 208(a) may be granted upon a written determination that the disqualifying interest of the employee is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from the employee. (Emphasis added.) This standard clearly anticipates the exercise of discretion and personal judgment by the appointing official.

In the past, this Office has agreed with the Department of Justice's position that the standard for waiver as set forth in the statute suggests two lines of inquiry, focusing on (1) the financial interest involved and (2) the services expected of the employee. In our view, it is appropriate to consider any factors that develop either of these lines of inquiry when reaching a final determination of the waiver issue.

In the present case, the financial interest arises from an employment relationship. Normally, employment relationships create stronger and more personal ties than ordinary investment relationships such as stock ownership. Therefore, tenure, salary and nature of the employee's spouse's services to the contractor should be considered as significant factors in making a waiver determination. Similarly, the employee's anticipated services to the Government should also be examined. It is appropriate to consider both the likelihood that the integrity of the employee's services may be compromised, and the nature and significance of the services themselves.

From the facts given and the nature of the procurement activities involved, this Office is not in a position of making our own judgment concerning a waiver in this case, nor would it be appropriate for us to do so inasmuch as the responsibility for exercising such waiver authority resides in the [head of your Department] or his delegates pursuant to the provisions of section 503 of Executive Order 11222.

One cautionary point, however, is in order. It can be counterproductive, in our view, to focus on the reputation for personal integrity of the employee or his spouse. The integrity factor is extremely subjective and section 208 was enacted, in part, to eliminate such subjective judgments from the disqualification process. Heavy or frequent reliance upon an official judgment of the employee's personal integrity will detract from the public acceptance of the waiver process, as well as make it more difficult to deny waivers because of the possible negative

implication of a denial with respect to the integrity of the employee.

Finally, you ask whether in Mr. S's case there would be a residual appearance of impropriety.

In the past we have held (83 x 20) that a Federal employee's continued participation in a matter could give rise to an appearance of impropriety which could not be overcome by simply using the waiver powers granted to an agency under 18 U.S.C. § 208(b). However, we certainly agree with your submission's conclusion that before-the-fact "exposure" in a case such as this can significantly dispel the appearance of any conflict or other impropriety. Similarly, we feel that it is equally important to point out that any standard used in determining when an appearance of impropriety exists must emphasize the reasonableness of an act in light of all the facts surrounding the event. Any standard which applies a different test would seem to clash with the evidentiary requirements necessary to support an adverse action resulting from violation of the appearance standard.

We have not consulted with the Department of Justice on this reply.

Sincerely,

David H. Martin  
Director