Office of Government Ethics
85 x 9 -- 07/12/85

Letter to the Head of an Agency dated July 12, 1985

This letter is in response to a memorandum I received from [an officer of your agency] regarding [an Inspector General's investigation involving] an allegation of possible misuse of Government property by [the officer]. I have read his memorandum to you and the report of the Inspector General and do have some comments on the issues. First, however, I would like to make my procedural position in this matter clear.

The Ethics in Government Act established this Office in order to provide overall supervision of the ethics program of the executive branch. We do this by providing guidance and assistance to executive branch agencies in interpreting the standards of Executive Order 11222, the criminal conflict of interest statutes at 18 U.S.C. §§ 202-209, Titles II and IV of the Ethics in Government Act, and the regulations promulgated pursuant to each authority. Under this scheme, it is the head of each agency who is responsible for the actual administration of the agency's ethics program.

This matter for the most part involves an alleged misuse of a Government vehicle and a driver. There are a number of provisions of law and regulation which apply to this issue. In general, there is a standard of conduct which prohibits an officer or employee from using any Government property for other than official purposes. (See 5 C.F.R. § 735.205 and [a citation to the same provision in the agency standards of conduct].) More specifically, there are statutes governing the use of a Government-owned or leased vehicle. (See 40 U.S.C. § 491 (1), 31 U.S.C. §§ 1344 and 1349.)

In both the standards of conduct and the statutes, the concept of "official purpose" is used. What "official purpose" is, of course, depends upon statutory authority. If an act is carried out within the parameters of some statute by a person authorized to do so, it is an official act. If it is not, it is not an official act. The question always turns on the extent of the legal authority involved.

Determining whether participation at a particular event is

official or not is admittedly not always easy. We believe, however, there are some popular kinds of events held in the Washington area that should not be considered official for the purpose of using any Government-supplied personnel, equipment or facilities. These would include events that are purely social and the invitation is extended on that basis, regardless of whether the invitation was sent to an employee's home or office, or whether or not his or her official title was used on the address, and regardless of whether the individual voluntarily talked "business" with another guest at the event. Also included as unofficial are purely political events. It is improper to use appropriated funds to attend political fundraisers or party meetings. Any expenses must be borne by the individual or the political party or committee. Events to which people are invited because of such things as their ethnic, home state, religious or educational background and not to carry out a function of their agency are also personal to the individual and not official. Finally, a private or non-profit fundraiser of any kind is not official because Government employees may not lend their official status to such endeavors. If they participate, it is on a personal, not official basis.

On the other hand, an employee invited to a meeting or an event to discuss some program administered by his or her agency or matters in which the agency is involved and interested can justifiably determine the meeting is official. It is the receptions, where no official program is involved and no attendance for foreign protocol is required, we know to be bothersome, and we can only hope agencies and employees exercise sound judgment and observe all standards of conduct. We believe the prudent approach would be to err on the side of it being personal rather than official when there is a significant question regarding an event.

More specifically, when Congress provided that appropriated funds may be expended for motor vehicles used only for an official purpose, it stated that an official purpose, except for persons holding very specific positions, did not include transporting employees between their domiciles and places of work. Therefore, no appropriated funds can be used for such transportation and such transportation would consequently not be official under any standard. (See 62 Comp. Gen. 438, June 3, 1983.)

The statutory penalty for willful misuse is a minimum

suspension of 30 days without pay. (31 U.S.C. § 1349.) Where willful misuse is not found, a recovery of the appropriated funds used for a nonofficial purpose is generally required. This is true especially in instances where an employee is advised improperly about his or her use of Government property. The appropriated funds expended on the misuse must be returned to the Federal Government and procedures consistent with past GAO decisions followed. The head of the agency is responsible for determining and requiring the appropriate remedy. You will have to make a determination with assistance of counsel whether that authority can be exercised by you or the Commission as a body.

The Ethics in Government Act provides that one of the responsibilities of the Director of the Office of Government Ethics is to order corrective action on the part of agencies and employees which he deems necessary (section 402(b)(9)). It is my opinion that your agency needs more explicit written guidelines and appropriate training concerning when the use of a Government vehicle is appropriate. The six recommendations in the memorandum from [the officer in question] are all necessary and appropriate procedures that should be established in your agency. The thrust of the six recommendations, along with other appropriate measures, should be adopted as soon as possible. You are requested to provide me with a copy of those written guidelines within 30 days.

One other issue which we believe should also be addressed by [your agency] is the fact that dinners and receptions are gifts for purposes of the standards of conduct. If [your agency] has statutory gift acceptance authority and believes that an employee's attendance at a specific dinner or reception is official then such dinner or food offered by the host can be accepted under that statutory authority. Otherwise, any employee accepting the food and drink must observe the gift standards. The basic restriction is that an employee may not accept anything of value from a person or organization who does business with or is seeking to do business with his or her agency, is regulated by the agency, or can be substantially affected by the performance or nonperformance of the employee's duties. We have interpreted this to include as prohibited sources such groups as a trade or industry association when all or a substantial majority of its members are prohibited sources under those standards. Further, the applicable standard exception to this restriction covers food and refreshments of nominal value on infrequent occasions in the course of a luncheon, dinner or other meeting. This Office has, without an agency's request for more expansive exceptions,

interpreted that narrowly to mean such things as working meetings which continue through a mealtime, luncheons or dinners where the employee is the guest speaker, and coffee and pastries brought in for breaks during long meeting sessions.**1** We do not believe that this exception, standing alone, allows employees to allow prohibited sources to purchase their lunches or dinners at restaurants where some business might be discussed.

We note that [your agency's] standards of conduct governing [officers and] employees do not provide for anything other than the standard exception. [citation deleted; see 5 C.F.R. § 735.202(b)(2).] Our assumption is that [the agency] has also not established any procedures to approve the use of its gift acceptance authority in these instances, and such decisions are made by the recipient. Until some procedure or regulation is established, it would seem to us that there are many events and dinners that [agency officers] and employees should be paying for themselves, if they choose to attend. If you are interested in pursuing this matter, you might wish to review the regulations recently published by the SEC on this subject. We believe they provide a realistic and thoughtful treatment of an issue which should not be ignored by any [agency such as yours]. Their regulations provide both accountability and flexibility. (50 Fed. Reg. 23286 (1985).)

Sincerely,

David H. Martin
Director

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1 Please note specifically the example following point 6 on page 463 of OGE advisory memorandum 84 x 5 issued 5/1/84 and amended 8/24/84 and the
footnote on page 482 of OGE advisory letter 84 x 10 issued 6/14/84. Both are attached for your reference.