

Office of Government Ethics

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**Letter to an Agency Ethics Advisor
dated April 11, 2000**

This responds to your letter dated March 1, 2000, in which you ask the Office of Government Ethics (OGE) for its advice as to whether an employee at your agency would be barred from serving as the chair of an agency oversight group because of his spouse's employment. According to your letter, the group the employee chairs is overseeing a study of ways to improve [certain] facilities [in] a certain [area]. The employee's spouse performs administrative duties as Executive Director for some nonprofit organizations with members that do business [in that area]; for one of these organizations, the employee's spouse is doing administrative tasks in connection with its attempts to get Congress to provide funding for your agency to do [certain] projects [in that area].

Under 18 U.S.C. § 208, an executive branch employee may not participate personally and substantially in any "particular matter" in which, to the employee's knowledge, the employee has a "financial interest," if the matter will have a "direct and predictable effect" on that financial interest. For purposes of section 208, the financial interests of the employee's spouse will serve to disqualify the employee to the same extent as the employee's own interests.

As used in 18 U.S.C. § 208, the term "particular matter" includes:

only matters that involve deliberation, decision, or action *that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.* The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons (emphasis added).

5 C.F.R. § 2640.103(a) (1). Determining whether a matter before the oversight group is a "particular matter" for purposes of section 208 will require a case-by-case review of each matter

before the group. Your letter does not provide sufficient facts to determine whether the employee would be participating in particular matters as chair of the oversight group. In general, if the oversight group's deliberations are limited to the consideration of broad policy options directed to the interests of a large and diverse group of persons, then section 208 would not be implicated. On the other hand, if the group were to consider matters that distinctly affect the interests of specific groups or persons, then these matters may be "particular matters." For example, the oversight group may consider or make recommendations on specific ways of limiting commercial use of a particular facility [in the area]. This type of matter would more than likely involve a "particular matter" since it would appear to be sufficiently focused on the interests of a discrete and identifiable class of persons (i.e., the users of that particular facility). For similar reasons, the consideration of whether new rules are needed for specific commercial users of the [area] could also be a particular matter under section 208.

Additionally, for section 208 to apply, the employee must be acting in matters having a "direct and predictable effect" on his or his spouse's "financial interest." See, e.g., 2 Op. O.L.C. 151, 155 (1978). As used in section 208, the term "financial interest" refers to the potential for gain or loss as a result of Government action on a matter. See OGE Formal Advisory Opinion 83 OGE 1. Section 208 does not require that the amount of gain or loss be of any particular size or likelihood. However, there must be a real, as opposed to a speculative, possibility of benefit or detriment. *Id.* Whether a particular matter will have a "direct" effect on an employee's financial interest will depend on whether "there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the interest." 5 C.F.R. § 2640.103(a)(3)(i). Whether any matter will have a "predictable" effect on an employee's financial interest will require "a real, as opposed to a speculative, possibility that the matter will affect the financial interest." 5 C.F.R. § 2640.103(a)(3)(ii).

The fact that the employee's spouse is employed by organizations that may be affected by particular matters in which the employee has been assigned to participate would not, in and of itself, require the employee's disqualification under section 208. However, a disqualification would be necessary in this case, for example, if a particular matter before the oversight group could affect the ability or inclination of the spouse's employers to pay her salary. In your letter, you stated that half of the salary of the employee's spouse is paid by the organization that is asking Congress to give your agency more funding, but that the spouse does

not receive any bonuses or other form of compensation for any particular legislation, and that the spouse's pay is not commensurate with any particular legislative goals or funding for your agency. You have not otherwise indicated how a financial interest of the employee's spouse might be affected by a particular matter before the oversight group.

Finally with respect to section 208, we note that even in those circumstances where the employee has a disqualifying financial interest in a particular matter, the employee may still be able to participate in the matter. For example, the conflicting interest could be remedied by having the employee request and obtain an individual waiver from his appointing official pursuant to section 208(b)(1).

Beyond section 208, subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635, has procedures requiring employees to take appropriate steps to avoid the appearance of loss of impartiality in the performance of their official duties. Under these administrative rules, where an employee knows that a person with whom he has a covered relationship is or represents a party to a particular matter involving specific parties, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee.¹ 5 C.F.R. § 2635.502(a).

Among the persons with whom an employee has a "covered relationship" is a person who is a member of the employee's household; an employee also has a "covered relationship" with a person for whom the employee's spouse is an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. 5 C.F.R. § 2635.502(b). The employee in this case would have a "covered relationship" with his spouse if she, as she presumably is, is a member of his household. In addition, he would have a "covered relationship" with the organizations for which his spouse serves as Executive Director or as an employee.

¹ If the employee were granted a waiver pursuant to section 208(b)(1) to participate in a matter, such a decision constitutes a determination under 5 C.F.R. § 2635.502 that the Government's interest in having an employee participate in a particular matter outweighs any questions concerning an employee's impartiality. Accordingly, the process in subpart E would have been satisfied for participation in that matter.

Generally, it is first up to the employee to consider whether a reasonable person with knowledge of all the relevant facts would question his impartiality if he were to act in any specific party matters in which his spouse or the organizations are parties or represent parties.² Your letter does not provide us with any facts which indicate that either the employee's spouse or the private organizations are parties or represent parties in a particular matter involving specific parties before the oversight group.

However, when circumstances involving potential appearance problems arising from a particular matter involving specific parties are brought to the agency designee's attention by the employee, or when the agency designee learns of those circumstances, the agency designee may make an independent determination as to whether a circumstance presents an impartiality concern that would require the employee's disqualification. 5 C.F.R. 2635.502(c). As in the prior case, establishing the relevant facts is critical to determining whether an appearance problem exists. See OGE Informal Advisory Letter 93 x 25. OGE is not in a position to decide for an agency whether a reasonable person would question the impartiality of the employee's participation in a particular matter. See, e.g., OGE Informal Advisory Letter 95 x 5. Ultimately, an employee and the agency ethics official are considered the best arbiters of whether the circumstances of an individual case warrant recusal under section 2635.502. *Id.* at p. 20.

Because the relevant facts here depend on what matters are before the oversight group, we cannot speculate (in the absence of specific facts from you) on whether appearance problems are raised by the employee's participation as chair of the oversight group. However, we would expect that the potential of an appearance problem is greatly enhanced in this case where the employee is serving as the chair of the group and where his wife is Executive Director of four organizations whose members do business [in a certain area]. Additionally, we would view the potential for an appearance problem to be further heightened where matters before the group are likely to have a special, distinct, or disproportionate effect on any of the private organizations who represent users of the [certain area].

² We note that the same process of weighing appearance considerations should be used by an employee in cases not involving a covered relationship where the employee is concerned that his impartiality may be questioned. See 5 C.F.R. § 2635.502(a)(2).

In contrast, we would view those matters before the group that would have a more generalized effect on users of [a broader area] as less likely to create such an appearance concern. Similarly, matters that would affect only users other than those represented by the private organizations, would not raise the same degree of appearance concerns. In addition, we would note that even where the employee or agency designee has made a determination that a reasonable person would question the impartiality of the employee's participation in a particular matter, the designee has broad discretion to authorize the employee's participation in that matter, applying the criteria set forth in section 2635.502(d).

In sum, the employee is not necessarily precluded from acting in matters before the oversight group solely because his spouse receives a salary for service as the Executive Director of local nonprofit organizations having interests in matters before the group. Whether it is permissible or appropriate for the employee to participate, however, will necessarily require a factual specific analysis of whether the employee's actions in individual particular matters before the group are in compliance with section 208 and the Standards of Conduct.

We trust this analysis will be helpful. If you need additional assistance, please do not hesitate to call my Office.

Sincerely,

Stephen D. Potts
Director