

Office of Government Ethics
89 x 19 -- 12/08/89

Letter to an Employee dated December 8, 1989

Your letter of February 9, 1989, inquired whether a conflict of interest under any statute or regulation might result from accepting membership and training in the National Defense Executive Reserve (NDER), which was established by the Defense Production Act (DPA) at 50 U.S.C. App., § 2160(e).

You state that the [agency] maintains a unit of the NDER and that a potential recruit, a former [Government official], expressed reluctance to join because of potential violations of conflict laws and regulations. We have ascertained informally from officials at other agencies which have units of the [NDER] that members who participate in on-the-job training with these agencies may be called upon to interact with agency personnel. As to whether such activity might result in violation of conflict of interest statutes or regulations, the relevant inquiry is whether participants might be viewed as serving in a Government employee status, since that is the sine qua non for application of conflict statutes and regulations. Characteristics of employment status, as noted in 5 U.S.C. §§ 2104 and 2105, include appointment by a Federal official, participation in the performance of a Federal function, and being subject to supervision of a Federal official.

If the participants strictly limit their activities to the receipt of information and training, they might avoid employee status by not becoming involved in the performance of a Federal function. However, to the extent that training takes the form of on-the-job interaction with agency employees, such as the providing of advice or assistance by the Reserve members on a matter pending before the agency, we are unable to conclude that members of the NDER can be categorically excluded from an employment status. Indeed, the current section of the DPA which authorizes establishment and training of the NDER (50 U.S.C. App., Section 2160(e)) contemplates that conflict of interest statutes may be construed to apply, since it provides for a process of exemption from such statutes for participants in the NDER.

A former Government employee who participates in training

must also be cognizant of the post-employment restrictions in 18 U.S.C. § 207. If the former employee is simply sharing expertise or providing technical assistance requested by the agency, he may avoid violating section 207. If, however, he engages in advocacy, then the criminal constraints of section 207 must be observed.

Because the activities of NDER members in training will vary, the applicability of conflict of interest statutes and standards of conduct must perforce also vary, as indicated above. In reaching these conclusions that the conflict of interest statutes and regulations may apply in some instances to NDER personnel in a training status, we have consulted with the Department of Justice. We have also informally discussed these issues with ethics officials at [the agency with overall responsibility for administering this provision of the DPA] and [your agency].

Sincerely,

Donald E. Campbell
Acting Director