
Office of Government Ethics

97 x 15

Letter to an Inspector General dated November 19, 1997

Your letter of August 26, 1997, requested that the Office of Government Ethics (OGE) review the acceptance by [your agency's] board members and employees of free attendance at various gatherings, the propriety of characterizing attendance at certain events as official business for which agency travel funds may be expended, and the advice given by the [agency's] Designated Agency Ethics Official (DAEO) concerning these matters.

BACKGROUND

We understand that the board members are considered executive branch employees, and therefore are subject to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, even though [some] are appointed under [an] Act ([citation deleted]) to provide representation for particular interests [with] the chairman to serve as a member-at-large.

Further, we understand from your letter that the duties of the board members, which substantially affect [an] industry, include determining coverage under the Act and related statutes, drafting and implementing regulations, and rendering policy decisions to administer these laws and regulations. Therefore, section 2635.202 and section 2635.203 of the Standards of Conduct prohibit gifts from entities in the industry to board members and certain staff employees, unless such gifts meet the criteria for acceptance under one of the exceptions in section 2635.204. Because such gifts to individual employees are

the focus of your concerns, our discussion herein is similarly limited. Nonetheless, for some gifts of food and entertainment in connection with attendance at events, the [agency] may wish to explore whether separate authority exists for acceptance by the agency itself rather than individual employees, or it may want to consider funding those items out of its operating budget.

At the DAEO's request, OGE previously advised her, by Informal Advisory Letter 93 x 18 of August 11, 1993, about the adequacy of the [agency's] procedures for approving acceptance of gifts of free attendance under the widely attended gatherings exception at section 2635.204(g)(2) of the Standards of Conduct. Your letter suggests that the DAEO's subsequent advisory memoranda to board members on the propriety of using this exception to accept free attendance at events sponsored by sources in the industry, as well as board members' written decisions to accept, have failed to address certain critical issues highlighted in OGE Informal Advisory Letter 93 x 18 and the Standards of Conduct.

**FREE ATTENDANCE AT WIDELY
ATTENDED GATHERINGS**

As described in section 2635.204(g)(4), an employee's free attendance at a widely attended gathering may include waiver of fees, as well as the provision of food, refreshments, entertainment, instruction, and materials furnished to all attendees as an integral part of the event. While this definition applies both to widely attended gatherings under section 2635.204(g)(2) and to other events on the days that an employee will be making an official presentation under section 2635.204(g)(1), only the widely attended gatherings basis for gift acceptance is discussed herein, as it alone was the subject of your inquiry.

To authorize an employee's acceptance of such free attendance at a widely attended gathering, an agency designee must first determine that attendance is in the agency's interest because it will further the agency's programs and operations. Where the offeror (or for an organization, a majority of its members) has interests that may be substantially affected by the employee's performance or nonperformance of official duties, section 2635.204(g)(3) requires the determination to be written, and it must find that the agency's interest outweighs concern that acceptance of free attendance may improperly influence the performance of official duties, or appear to do so. We understand that board members are currently the agency designees to make these determinations for themselves and their staffs, and that the DAEO advises them in this decision-making.

In detailing your concerns about the DAEO's advisory memoranda and board members' written decisions to accept free attendance, you contend that these documents generally failed to address various relevant factors in section 2635.204(g). For example, you suggest that the DAEO's advice may not have adequately discussed whether invitations were unsolicited, whether event sponsors were also the offerors of free attendance, the purpose and agendas for these events, who and how many participants were expected, and the monetary value of free attendance. Further, you indicate that her advice did not provide full justification for determinations that the agency's interest in acceptance outweighs appearances of improper influence.

Instead of individualized determinations, you point out that the DAEO sometimes reviewed several events in a single advisory memorandum, and simply concluded that acceptance was proper because of the importance for board members and their staffs to maintain contacts with industry representatives at such meetings. According to your letter, this advice, as well as board members' determinations, failed to account for board members' different statutory representational responsibilities,

and failed to discuss the pendency of policy and regulatory matters before the [agency] which would affect the industry. Additionally, you observe that, according to OGE Informal Advisory Letter 93 x 15 of June 28, 1993, it may be difficult to find that an employee's attendance is in the interest of the agency when an event is primarily social, as some of those that the DAEO reviewed might be characterized, rather than a conference or seminar.

Our advisory letter 93 x 18 counseled that a one-time blanket finding by the [agency] of agency interest in accepting free attendance for any of the board members under section 2635.204(g)(2), involving unspecified future periodic meetings of [industry] organizations generally, was not proper. Such a determination, we advised, could not separately consider the nature and subject matter of each particular gathering, the actual sponsors, the agency's specific interest, and the potential for appearances of impropriety. An agency designee must perform a particularized inquiry in order to fulfill the specific regulatory requirements, such as ensuring that an event will meet the definition of widely attended, and balancing the agency's interest in attendance against the potential for improper influence. There is no requirement, however, in either section 2635.204(g) of the Standards of Conduct or in OGE advisory letter 93 x 18 that the DAEO or agency designee must discuss each of these factors in writing. The regulation dictates *consideration* of various factors in the decision-making process, but the only required written determination is the conclusion by an agency designee that the agency's interest outweighs the potential for improper influence or appearances thereof.

Although groups of events which you examined were sometimes submitted together by a board member and reviewed by the DAEO in a single memorandum of advice, the sponsors, locations, and event dates for each were indicated, along with certain other details such as the general nature of the meetings

and whether the expected attendees would be coming from the industry, Congress, or the Federal executive branch. Moreover, for each event and for each staff attendee, it appears that a board member prepared a separate written determination that the criteria were met for accepting free attendance. This contrasts sharply with the determination that was deemed inadequate in OGE advisory letter 93 x 18, where the basic details and an individualized factual basis were lacking, as were separate written decisions by an agency designee for each acceptance of free attendance. There is no prohibition on combining several events in one memorandum of advice from the DAEO, so long as specific events are being considered. Nor is the use of a form by board members to record their determinations of agency interest inappropriate, even though the justifying language remains constant, so long as a separate determination is made for each event and attendee.

While the DAEO's advice, along with board members' input to the DAEO and their written determinations, could be enhanced for some of these events by stating more details about their anticipated purpose and nature, and by specifying more of the factual analysis that was conducted, it appears from the text and references contained in the documentary exchange that in each instance the DAEO and board members considered the correct regulatory guidance for a determination that agency interest outweighs the potential for improper influence, or appearances thereof. As noted above, there is no requirement that the full analysis be recorded in writing, except for a conclusion that the agency's interest outweighs the potential for improper influence. If you uncover evidence that such an analysis was not made, the DAEO and board members need to be reminded of that requirement for future determinations. Absent such information, we must presume that the required analysis did occur, given the documentary evidence of individualized consideration, citation to and discussion of the correct regulatory

provisions, and separate determinations of overriding agency interest for each attendee and event.

Failure to acknowledge in the DAEO's advice or in agency designee determinations the existence of certain ongoing policy and regulatory matters pending before the [agency] that could affect the industry does not necessarily render these documents legally insufficient. It may be that routine or ongoing pending matters would not uniquely or substantially affect an individual sponsor of an event. Nonetheless, we agree that this should be enunciated more clearly in future agency designee determinations. The regulation requires that an agency designee consider the nature and sensitivity of *any* pending matters affecting the interests of the offeror, as well as the significance of the employee's role in such matters. Assuming that such matters may be pending from time to time, we recommend that the agency designee determination form be modified. Rather than stating that "there are no matters currently pending before the [agency] which would affect the interests of the Association," it may sometimes be more accurate to state that "matters pending are of a routine or general policy nature, which will not individually or uniquely affect the sponsor," prior to concluding that the agency's interest outweighs concerns of improper influence.

As to your concern that some events might primarily include management personnel, this does not foreclose a determination of agency interest in having any or all three board members attend, even though only one is appointed specifically to represent management interests. It may be important for all [board members] to acquaint themselves firsthand with the concerns of this segment of the industry, in order to more fully represent their own constituency and to otherwise perform their duties as board members. These decisions about when the agency has a sufficient interest in board members' attendance at

events require judgments that are properly within the province of the [agency] and its agency designees.

From the information contained in board members' inquiries and the DAEO's advisory memoranda, it is apparent that some of the widely attended gatherings for which board members have accepted free attendance involve significant social aspects. This does not necessarily preclude a finding of agency interest, though such a finding may be more difficult if the event is primarily social in nature. As noted in OGE Informal Advisory Letters 93 x 15 and 94 x 2, the focus of the widely attended gatherings exception is not on the nature of activities that take place at an event, but rather on whether the gathering is of mutual interest to those in attendance and will further agency programs and operations. Neither the preamble to the regulation nor the rule itself indicates that a social event cannot qualify as a widely attended gathering for which free attendance may be accepted. Ultimately, this is a question best left to agency designees and the DAEO.

Of course, we recognize that it is possible for an agency designee or a DAEO to interpret section 2635.204(g) of the Standards of Conduct in a manner that appears unreasonable. In such cases, however, OGE is not in a position to substitute its judgment for that of the designee or DAEO concerning the conclusion that the agency's interest in an employee's attendance at an event outweighs the concern that acceptance of free attendance may improperly influence the employee's performance of official duties, or appear to do so. An agency head may counsel the designee or DAEO about determinations of agency interest that appear unreasonable, or may take other appropriate action where he is dissatisfied with their exercise of judgment. In this instance, where the agency head is himself an agency designee, such counseling may be impractical. Therefore, if you believe that a board member's determinations of agency interest are unreasonable, even after implementation of the

suggestions herein by the DAEO, you may wish to consider referring the matter to the White House for appropriate action, since board members are Presidential appointees.

We understand from your letter that, by the [agency's] past delegation and practice, each board member is an agency designee for purposes of making agency interest determinations in connection with accepting free attendance at widely attended gatherings, for himself and his staff members. Apparently, they each also seek the DAEO's advice in these matters. As indicated in section 2635.102(b) of the Standards of Conduct, however, board members should not ordinarily be making these determinations for *themselves*, as an agency designee is authorized to make ethics decisions only with respect to *another* employee. Consistent with this rule and with our previous suggestions in OGE advisory letter 93 x 18, we recommend that the [agency's] chairman or the DAEO serve as the agency designee to make agency interest determinations for the board members who do not serve as chairman, though they could continue to perform that function for other employees on their own staffs. For the chairman, the Standards of Conduct require at section 2635.102(b) that, as agency head, he consult with the DAEO prior to making such determinations for himself. This results because the chairman is deemed by section 2635.102(i) of the Standards of Conduct to be the agency head for ethics purposes, even though the board may, in other matters, consider all members to serve jointly as agency head.

PROPRIETY OF OFFICIAL TRAVEL

Your review of selected travel expenditures by the board members and their staffs questioned whether some of their visits to field offices and attendance at various association functions, meetings, and conferences were necessary to carry out the mission of the agency. That review noted the frequency of official travel, despite the availability of alternative methods of

communication, and observed that trips often included more than one agency traveler, combined official and personal business, included desirable destinations, and sometimes involved functions where [industry] representation was small.

The discretion to decide what agency travel is necessary and appropriate as official business rests with the agency, subject to the limitations provided by various statutes, rules such as the Federal Travel Regulations, and opinions such as those of the Comptroller General and the Office of Legal Counsel at the Department of Justice. The ethical Standards of Conduct that OGE administers in 5 C.F.R. part 2635 also offer relevant guidance, in subpart G on misuse of position. Specifically, these rules provide that an employee shall not use his public office for his own private gain (section 2635.702) and that he has a duty to protect and conserve Government property, which he shall not use for other than authorized purposes (section 2635.704). Government property includes any right or other intangible interest that is purchased with Government funds. Authorized purposes are those which are permitted or approved by the agency, in accordance with law or regulation.

Whether a particular purpose is authorized or necessary is not within OGE's purview to determine, as we cannot decide for another agency what constitutes legitimate business in carrying out its mission. As noted by the DAEO in her advisory memoranda, board members may consider it necessary to meet in person periodically with individuals in the industry or with legislative and other Government officials, in order to stay abreast of their concerns and show an active interest. It is important to recognize, however, that a determination of agency interest in accepting free attendance at widely attended gatherings under section 2635.204(g), discussed above, does not decide this separate issue of whether the [agency] should expend official funds for travel to an event. Furthermore, whether the official nature of a particular event outweighs possible personal

motivation for travel is a question that OGE is not in a position to judge. One or more board members acknowledged appearance concerns in requests to the DAEO for advice about the propriety of certain planned official travel, and she responded with detailed legal guidance. She also properly advised that it is permissible to combine official business and personal trips, so long as the official business is not merely incidental or arranged for personal reasons.

Your review expressed concern that each board member has authority, by [agency] order, to approve travel for himself and his staff members. This is not inconsistent with OGE regulations which suggest, at example 3 following 5 C.F.R. § 2640.203(d), that an employee may approve his own travel authorization and payment without violating the criminal statute at 18 U.S.C. § 208 on conflicts of interest. Of course, it is important to ensure that board members do not abuse their discretion in choosing where and when to travel, and that they do not make these decisions based on personal wishes rather than the needs of the agency. If your investigation concludes that one or more of these Presidentially appointed board members has abused his discretion by approving travel plans which are not necessary to agency business or which involve primarily personal business, you should consider referring that matter to the White House for appropriate action.

CONCLUSION

Thank you for bringing these matters to our attention. By copy hereof, we are asking the DAEO to contact the [agency's] OGE desk officer about implementing our suggestions herein for improving the procedures for considering and approving acceptance of free attendance at widely attended gatherings.

Sincerely,

Stephen D. Potts
Director