

Office of Government Ethics

87 x 12 -- 09/09/87

letter to a Designated Agency Ethics Official dated September 9, 1987

This is in response to your August 7, 1987 letter, in which you request a formal advisory opinion under Subpart C of 5 C.F.R. Part 738 on the following issue: whether the Commission's Deputy Staff Director, whose services are being donated by a private corporation and who remains an employee of that corporation, should file a public financial disclosure report under Title II of the Ethics in Government Act of 1978. Because your request does not meet the test of 5 C.F.R. § 738.303 for the issuance of a formal advisory opinion, we will respond by way of this informal advisory letter.

In your letter, you explain that the Commission has statutory authority under section 5(h)(1) of Public Law 98-101 to solicit, accept and use "donations of personal services." The legislative history explains that, in addition to certain publicly paid personnel, the Commission is permitted to hire personnel out of private donations, and "such personnel would be subject entirely to the direction and control of the Commission and its staff director."¹ In addition, under its authority to accept donations, the Commission may accept donations of personal services of an employee of a private entity under any agreement with that entity.² Under this authority, the Commission has obtained the services of [an individual] from [a major] corporation, which pays his salary plus fringe benefits and expenses. The Commission has not placed [the individual] on its payroll, and he has not been sworn into office, yet he is serving on a full-time basis as Deputy Staff Director. You describe the Deputy Staff Director as the number two operating staff official at the Commission. He is supervised by the Staff Director, who is on the Government payroll, and he supervises numerous other staff members. [The individual's] predecessor was paid at a GS-18 level, and [his private employer is compensating him during his service as Deputy Staff Director] at a rate of GS-16 or above.

The Ethics in Government Act of 1978 and the implementing regulations at 5 C.F.R. Part 734 require each officer or employee in the executive branch whose position is classified at GS-16 or

above, and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification, to file a public financial disclosure report.³ Accordingly, we need to determine whether, under the circumstances you have described, the Deputy Staff Director is an officer or employee for purposes of the Act.

The term "employee" is not defined in the conflict of interest laws or the Ethics in Government Act. On the assumption that it was intended to cover the employer-employee relationship as it is understood in other areas of the law, this Office and the Office of Legal Counsel, Department of Justice, have looked to the definition of employee in the civil service laws at 5 U.S.C. § 2104 and § 2105.⁴ The laws state that a person is regarded as an officer or an employee of the United States if he (1) is appointed by a Federal officer or employee; (2) is engaged in the performance of a Federal function under law; and (3) is subject to the supervision of a Federal officer or employee.

A second source of guidance on this issue is OGE's informal advisory memorandum 82 x 22, which discusses the applicability of the conflict of interest statutes to members of Federal advisory committees and outlines the factors to consider in determining whether such individuals are employees of the Federal Government. The main principle discussed therein is that a Government employee is a person who serves in an independent capacity and not as a representative of an outside group. This relates to the second criteria discussed above, which indicates that to be a Government employee one must be performing a Federal function. One serving in a representative capacity is to present the views of a non-governmental organization or group which he represents and is not a Government employee.⁵

Applying the principles of 5 U.S.C. § 2104 and § 2105 and our advisory memorandum to the facts you have presented, the current Deputy Staff Director would be considered a Government employee. Although he was not technically appointed to the position, he meets the other criteria of 5 U.S.C. § 2104 and § 2105. He is engaged in the performance of a Federal function as the number two operating staff official at the Commission and is not serving as a representative of the company which is paying his salary, or of any other group. In addition, he is filling what would generally be considered a Government employee position. In fact, his predecessor was a Government employee who was paid by the Commission at a GS-18 rate of pay. As for the third

criteria, [the individual] is subject to the supervision of the Staff Director, who is a Government employee paid at Level I on the Executive Schedule. Looking at the totality of these factors, we conclude that [the individual] should be considered an "employee" for purposes of the public financial disclosure requirements as well as the conflict of interest statutes.

As an employee of the executive branch, [the individual] should have filed the public financial disclosure report (SF 278) within thirty days of assuming his position at the Commission. He will also be required to file annual reports during his period of service at the Commission and a termination report within thirty days after his departure from the Commission.

Sincerely,

Donald E. Campbell
Acting Director

¹ S. Rep. No. 98-68, 98th Cong., 1st Sess. 38(1983).

² Id. at 39.

³ 5 C.F.R. § 734.202(c).

⁴ 1 Op. off Legal Counsel 20 (1977).

⁵ See generally OGE informal advisory memorandum 82 x 22, pp. 4-5.