

## **Office of Government Ethics**

**88 x 16 -- 10/27/88**

### **Letter to Counsel for a Governmental Commission dated October 27, 1988**

This is in response to your request for comments on a draft memorandum dealing with a proposed arrangement under which an employee of [a governmental commission] is to serve on a committee advising a commission grantee with respect to a program that is funded in part by a commission grant. The memorandum sets forth guidelines for the employee's participation on the advisory committee and specifically cautions regarding attempts by the grantee to influence evaluation of grant performance or funding of the program involved. This particular caution, coupled with the fact that the employee's title is [manager to evaluate grants] raises the basic question of whether the employee should be assigned to serve on the advisory committee.

The first issue to be addressed is whether the anticipated service will place the employee in a relationship to the grantee that would preclude him from performing his official duties as the commission's [manager to evaluate grants]. Under 18 U.S.C. § 208, an employee may not participate personally and substantially in any particular matter, such as evaluation of a grant, that affects the financial interests of an organization in which he is serving as "officer, director, trustee, partner or employee." Depending on how the particular advisory committee is constituted, service on an advisory committee to a private entity could create an employment relationship with that organization. As noted in OGE 82 x 22, an individual who serves on a Federal advisory committee may, simply by virtue of that service, become a Federal employee. Although the draft memorandum indicates that the employee's service to the advisory committee is to be performed in his official capacity, the fact that other members of the advisory committee receive compensation could be relevant to a determination of whether such service creates an employment relationship.

Even if service on the advisory committee were found not to create an employment relationship, the Standards of Conduct, should be considered. Under 5 C.F.R. § 735.201a, commission employees are required to avoid any action which might result in or create the appearance of giving preferential treatment to any

person, losing complete impartiality and making a Government decision outside official channels. Although mere membership in an organization is not within the prohibition of 18 U.S.C. § 208, we have advised that employees who are members of an organization seeking an agency grant should generally be required to recuse themselves from taking official action on that grant application. See OGE 86 x 19. That same guidance would apply to matters of grant administration and to relationships with a grantee created by such undertakings as serving in an advisory capacity. In this particular case, we fail to see how the employee could both serve on the advisory committee and fulfill his grant evaluation duties without giving the appearance of losing impartiality or giving preferential treatment.

Paragraph 11 of the draft memorandum deals with the possibility that some of the advisory committee meetings may involve discussions of program dealings with the commission or strategy to be used in applying for supplemental grants. This raises the additional concern that the employee may be perceived as making decisions about the grant outside official channels. It also highlights the potential problems in assigning any commission employee to serve on the advisory committee. Given the commission's relatively small staff, any commission employee's participation in such discussions could not help but raise questions about favorable treatment and possible misuse of confidential information.

We would suggest that the commission reevaluate whether the [manager to evaluate grants] or, for that matter, any commission employee should be assigned to serve on the grantee's advisory committee. In the event the commission decides to assign an employee who does not have responsibilities relating to the grant, the cautions contained in paragraphs 5, 10, 12 and 13 would appear to be unnecessary. The advice contained in paragraph 7 regarding acceptance of food and refreshments should be rephrased to reflect more accurately the standards set forth in OGE 87 x 13. While the memorandum recognizes that the applicable exception is for food and refreshment of nominal value provided on infrequent occasions in the ordinary course of a business meeting, the paragraph suggests that any but a lavish meal provided to all advisory committee members would fall within the exception and that the employee could attend and partake of refreshments provided at any reception sponsored by the grantee.

Sincerely,

Frank Q. Nebeker  
Director