



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

November 10, 2009
DO-09-030

MEMORANDUM

To: Designated Agency Ethics Officials

From: Robert I. Cusick
Director

Subject: The Kennedy Center for the Performing Arts

The U.S. Office of Government Ethics (OGE) has received many questions over the years concerning offers of free attendance at events sponsored by the Kennedy Center for the Performing Arts. In many cases, the offer is extended by the Kennedy Center for the Performing Arts and/or its Board of Trustees (collectively, the Kennedy Center). OGE has determined that Executive Branch employees may accept such offers from the Kennedy Center, consistent with the gift rules in the Standards of Ethical Conduct. This determination is limited to the Kennedy Center and should not be read as extending to all congressionally-established entities. *See* OGE Informal Advisory Letter 05 x 7.

The gift rules prohibit employees from soliciting or accepting either a gift from a prohibited source or a gift that is given because of the employee's official position. 5 C.F.R. § 2635.202(a). Both of these restrictions are limited to gifts from a "person," as that term is used in the definitions of "prohibited source" and "gift . . . because of the employee's official position." 5 C.F.R. § 2635.203(d), § 2635.203(e). The definition of "person," in turn, "does not include any agency or other entity of the Federal Government or any officer or employee thereof acting in his official capacity on behalf of that agency or entity." 5 C.F.R. § 2635.102(k). The question, therefore, is whether the Kennedy Center is an "agency or other entity of the Federal Government" for this purpose.

The Kennedy Center was established by Congress as a "bureau" of the Smithsonian Institution. 20 U.S.C. § 76h(a)(1). "The Smithsonian Institution has long been regarded as having a special relationship with the federal government," although the "precise nature" of that relationship may be difficult to specify. 12 Op. O.L.C. 122, 123 (1988). The Smithsonian has been described, variously and sometimes for various purposes, as a "Congressional agency" (20 Op. O.L.C. 124, 172 (1996)), an "independent establishment in the executive branch" (12 Op. O.L.C. at 127), a "trust instrumentality of the United States separate from the three main branches of the government," *id.*, and an entity within the District of Columbia government

(David P. Currie, *Centennial Tribute Essay: The Smithsonian*, 70 U. Chic. L. Rev. 65, 67-68 n. 14 (2003)). The Government Accounting Office has reported that “[a]lthough the Smithsonian is a trust instrumentality with a private endowment, it is largely funded by federal appropriations. In fiscal year 2006, the Smithsonian’s operating revenues were about \$947 million, of which about 65 percent were from federal appropriations.” GAO-07-1127, *Smithsonian Institution: Funding Challenges Affect Facilities’ Conditions and Security, Endangering Collections* 15 (Sept. 2007).

To the question whether the Smithsonian is a part of the Federal government itself, for purposes of intergovernmental immunity and entitlement to immunity from state insurance laws and licensing requirements with respect to the Smithsonian’s proposed gift annuity program, OLC found the answer “relatively clear.” See OLC Memorandum Opinion, *Immunity of Smithsonian Institution from State Insurance Laws* (April 25, 1997), available at http://www.justice.gov/sites/default/files/olc/opinions/1997/04/31/op-olc-v021-p0081_0.pdf. OLC determined that the Smithsonian “is best regarded as an instrumentality of the United States that is ‘imbedded in the structure of the government’ -- or a ‘constituent part’ thereof, see *United States v. New Mexico*, 455 U.S. [720, 736 (1982)] -- rather than as a private entity that merely acts on the Government’s behalf pursuant to contract or agency arrangements. The dominant federal governmental role in the Smithsonian’s governance, funding, operations, and oversight is critical in this regard. See 41 U.S.C. §§ 41-58 (1994).” *Id.*

The Kennedy Center itself has been deemed a Federal entity for various purposes. The Board of Trustees is composed entirely of either ex officio representatives from the executive and legislative branches or other members appointed by the President, as well as two members from the District of Columbia government. 20 U.S.C. § 76h. On at least one occasion, the Office of Legal Counsel has suggested that the Kennedy Center could be viewed as an agency under Congressional supervision. 20 Op. O.L.C. at 155-156. Even when granting the Kennedy Center increased autonomy, Congress still has described it as an “entity within the federal government structure,” albeit a “unique” entity. John F. Kennedy Center Act Amendments of 1994, HR. Rep. No. 103-453, pt. 1 (1994). The Kennedy Center is a “federal entity” under the Inspector General Act (with regard to its appropriated as opposed to its nonappropriated funds), 20 U.S.C. §76l(d); it is referred to as an “agency” with authority to publish certain regulations in the Federal Register, 40 U.S.C. § 6304; and it is a “Federal agency” for purposes of the Federal Tort Clams Act, 20 U.S.C. §76l(e)(2).¹

Among the duties of the Board of Trustees are the mandates to “promote and maintain the John F. Kennedy Center for the Performing Arts as the National Center for the Performing Arts . . . by developing and maintaining a leadership role in national performing arts education

¹ Additionally, Kennedy Center procurement decisions have been the subject of Government Accountability Office bid protest proceedings. *E.g.*, Century Elevator, B-283822, Dec. 20, 1999. Similarly, the Kennedy Center has been treated as a federal sector employer by the Equal Employment Opportunity Commission and the Federal Labor Relations Authority. See, *e.g.*, *Fenstermacher v. Christopher*, EEOC Appeal No. 01922787 (May 26, 1994), 1994 EEO PUB LEXIS 4075; *The Kennedy Center for the Performing Arts and Treasurers and Ticket Sellers Union, Local 868*, 45 F.L.R.A. 835 (1992).

policy and programs” and “by developing and maintaining a comprehensive and broad program for national and community outreach” and to “prepare a budget pursuant to sections 1104, 1105 (a), and 1513 (b) of title 31.” 20 U.S.C. § 76j. One court has stated that “[i]t is undisputed that the Kennedy Center is a entity of the United States government” and concluded that Kennedy Center benefits from sovereign immunity. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *see also Polcari v. John F. Kennedy Center for the Performing Arts*, 712 F. Supp. 230, 232 (D.D.C. 1989)(discussing Kennedy Center’s “national function” as cultural center and sole national memorial to the late President in the Washington area, as well as substantial Federal oversight and funding).

In sum, these factors and legal authority on the status of the Kennedy Center weigh heavily in favor of viewing the Kennedy Center as an “entity of the Federal Government” and any “officer or employee thereof acting in his official capacity on behalf of” the Kennedy Center for purposes of OGE’s gift regulations. Consequently, Executive Branch employees may receive gifts of free attendance from the Kennedy Center without violating the restrictions on gifts from a prohibited source or gifts because of official position.

This conclusion does not extend to gifts of free attendance at Kennedy Center events offered by persons other than the Kennedy Center and its trustees, officers and employees. An offer of free attendance from a source outside the Kennedy Center, even if that source is a sponsor of the specific Kennedy Center event to which the employee is invited, may be accepted only if it falls within other exceptions to the gift rules, such as those pertaining to widely attended gatherings or gifts based on personal relationships.