

Office of Government Ethics

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Letter to an Employee dated October 19, 1983

This is in response to your request for our approval of your plans to establish a trust for the benefit of past, present, and future employees of [a specific office within your agency (hereinafter office)]. After careful consideration of the materials you submitted and the applicable statutes and precedents, and after consultation with the Office of Legal Counsel at the Department of Justice, we are unable to approve the proposed trust arrangement.

The facts as you have presented them to us are as follows:

You are the Director of [the office]. [The office] conducts post-payment audits of Government expenditures for travel and transportation. The Office has approximately 200 employees.

You are also a settlor and one of two trustees of a charitable trust established under the laws of New York in 1966. As a trustee of [this trust (hereinafter New York trust)], you have the power, acting alone, to authorize charitable gifts from the trust fund.

Your proposal is to establish an employees' trust [for employees of your Office] by means of a founder's gift of \$5,000 from the New York Trust. The proposed employees' trust would have between three and seven trustees. You would designate the original three trustees, who would then select additional trustees by majority vote. The charter trustees would be responsible for establishing the employees' trust as a legal entity. Expenses of establishing the trust would be paid by the [New York] Trust for which you are a trustee.

The purpose of the employees' trust, as set forth in your proposal, would be:

to assist any present, former, or future employee of the [your office] in a time of need when such help can be considered a "charitable purpose" Such financial assistance might be for education, medical expenses, burial of relatives, summer camp for

children, the procurement of some item considered essential to the daily life or welfare of the individual and their family, etc.

The trustees would have authority to determine which requests for assistance should be granted and in what amounts. The employees' trust indenture would provide that neither you nor the [New York] trust would have any control over the actions of the employees' trust once it was established. Under the proposed arrangement, the employees' trust would be authorized to accept future gifts from the [New York] Trust, from you or your estate, and from any other individual, corporation, firm, or entity wishing to make a contribution, but not from individuals or organizations doing business with [your agency] or affected by the work of [your] office.

Our primary concerns about the proposed trust arrangement involve the prohibitions of 18 U.S.C § 209. The section provides in pertinent part:

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection --

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

Thus, section 209 establishes both a "recipient" and a "payor" offense.

Section 209 has four elements. It:

prohibits (1) an officer of the executive branch or an independent agency of the United States government from

(2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States.

United States v. Raborn, 575 F.2d 688, 691-92 (9th Cir. 1978).

In most cases, the first three elements are relatively straight-forward, and the focus of the section 209 inquiry is whether a payment is "compensation for services as an employee of the United States." In the case of the proposed employees' trust, however, consideration must also be given to whether the source of the contemplated payments is "other than the United States."

As stated above, the initial \$5,000 to fund the employees' trust would come, at your direction, from the [New York] Trust. It is our view that either you or the [New York] Trust must be viewed as the source of the grants and loans to individual employees. From either perspective, the third element of section 209 would be satisfied. It is well established that section 209 applies to charitable organizations.¹ Thus, payments from the [New York] Trust would be covered by the statute. Your status as Director of the [office] does not make a payment from you the equivalent of one from the United States. In theory, at least, a Federal employee's loyalty could be subverted as easily by a current supervisor as by an individual or firm in the private sector. One of the underlying purposes of section 209 is "that no government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." 33 Op. Att'y Gen. 272, 275 (1942).²

With respect to the fourth element of section 209, determining whether or not a payment is "compensation for services as an employee of the United States" requires an examination of all the surrounding circumstances, keeping in mind the purposes underlying section 209 and its predecessor, 18 U.S.C. § 1914. The intent of both the recipient and the donor may be important factors. When it is clear, for example, that a payment is for the performance of outside employment unrelated to Government service, section 209 is not offended. See, e.g., United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979). If, on the other hand, there is "any substantial relationship or pattern of dealings between the employee's agency and the payor, the likelihood is substantially increased that a court or other

deciding authority will find a violation." B. Manning, Federal Conflict of Interest Law 165 (1964). It is important to remember, however, that no one factor is determinative. There need not be a connection between the payor and the payee's agency to make out a violation. Nor need the employee be in a position to influence the Government on behalf of the payor. All that the statute requires is that a Government employee receive outside compensation for his or her Government work, not that there be actual or apparent influence. See Association of the Bar of the City of New York, Conflict of Interest and Federal Service 55-56 (1960). The totality of the circumstances must be examined in each case.

In our review of the proposed employees' trust we have, of course, taken into consideration your express disavowal of any intention to supplement the salaries of your subordinates. However, you have asked us to give our opinion, in advance, that payments made pursuant to the proposed trust arrangement would not be viewed as contrary to law. Under the circumstances of your request, we are not free to rely on your statements alone. Rather, we must consider whether an intent to compensate Federal employees can be inferred from the totality of the circumstances. We believe that it can.

Critical to our decision is the fact that the beneficiaries of the proposed trust include only past, present, and future employees of the [office]. Eligibility for benefits under the trust arrangement is thus defined by reference to Federal employment. This Office and the Office of Legal Counsel were faced with a somewhat similar proposal after the attempted assassination of President Reagan in 1981. Motivated by the extreme suffering and exemplary behavior of one of the victims of that attempt, some generous individuals sought to establish a charitable trust for the benefit of those injured in connection with assassination attempts. The trust as originally conceived was to provide benefits only to Federal employees. It was after the trust was amended to provide benefits to all innocent bystanders injured in assassination attempts, whether or not Federal employees, that this Office and the Office of Legal Counsel were able to conclude that payments to Federal employees from the trust would not necessarily violate section 209. However, we still declined to give advance blanket approval to the proposed arrangement, because we felt it necessary to determine on a case-by-case basis whether payments to a particular individual under particular circumstances would

constitute an impermissible supplementation of salary.

In the case of the proposed employees' trust, we understand that to define those eligible for benefits without reference to their Federal employment would not be possible, in view of your objectives in establishing the trust. We also understand that case-by-case examinations for section 209 purposes of each grant and loan from the trust would not be feasible under the circumstances, nor would such a review be likely to yield a favorable result in most cases.

For the foregoing reasons, we must decline your request for our approval of the proposed employees' trust. We commend your generosity and are sorry our conclusions could not have been more favorable. We hope you will feel free to contact this Office should you require our assistance on this or any other matter in the future.

Sincerely,

David H. Martin
Director

1 Indeed, the predecessor of section 209, passed originally in 1917 was aimed at what were seen as undesirable practices of the Rockefeller and Carnegie Foundations. See B. Manning, Federal Conflict of Interest Law 148-49 (1964); 54 Cong. Rec. 2039-45 (1917).

2 The creation of a new and separate trust, as you have proposed, to make the individual loans and grants would not, in our view, avoid the problem. A payment that would be impermissible under the statute may not be accomplished indirectly. In any event, the proposed employees' trust would also be a source "other than the United States."

We are leaving aside, for present purposes, any consideration of problems that might arise under section 209 in connection with future sources of funding for the employees' trust, which we understand may include, in addition to you and your family trust, individuals and profit making organizations in the private sector and other charitable entities with which you may come into contact through your philanthropic activities.