



United States
Office of Government Ethics
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DO-00-015

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Van Ee v. Environmental Protection Agency

On February 8, 2000, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Van Ee v. Environmental Protection Agency* (No. 99-5147). The decision construes 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The Court concluded that section 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

The Court's decision is available on the Court of Appeals Web site at www.cadc.uscourts.gov. The employee had argued that the statutory bar of section 205(a)(2) applies only in the context of formal, adversarial proceedings and only in connection with formal, legal "agent or attorney" relationships. He also claimed that, if section 205(a)(2) did apply to his activities, then the prohibition would be unconstitutional under the First Amendment. The District Court rejected both his arguments, 55 F.Supp.2d 1 (D.D.C. 1999), and the employee appealed. Because the Court of Appeals determined that the statute does not apply to the employee's proposed communications, albeit for reasons other than those advanced by the employee, the Court was able to avoid, and consequently did not address, the First Amendment issue.

In view of the very narrow grounds on which further review by the Court of Appeals or the Supreme Court may be sought, the Government has decided not to seek further review.

Accordingly, the case will now be remanded to the District Court for entry of a declaratory judgment in the employee's favor, in accordance with the ruling by the Court of Appeals.

If you are asked to advise on the application of section 205(a)(2) to facts similar to those in the van Ee case, please consider the Court of Appeals decision and feel free to consult with OGE.