

Office of Government Ethics
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Letter to a Department Official dated September 28, 1994

This responds to your request for our views on the extent to which 18 U.S.C. § 205 constrains meetings between representatives of an employee organization and officials of the employing Department or agency. For purposes of this response, we assume that examples of such organizations would include credit unions, child care centers, health and fitness organizations, and recreation associations, as well as other organizations such as the Senior Executive Association, that have been formed to address the needs of particular groups of employees. None of the organizations would be labor organizations as described in 5 U.S.C. §§ 7101-7103.

Section 205 of title 18 prohibits a Government employee, except in performance of official duties,¹ from acting as agent or attorney² for anyone before any agency or court of the United States in connection with a covered matter³ in which the United States is a party or has a direct and substantial interest. The statute contains certain exceptions, not relevant here, for representing other persons such as an employee's parents, spouse, or child. Section 205(d) also permits an employee to represent an individual who is subject to a disciplinary, loyalty, or other personnel administration proceeding, provided that the representation is not inconsistent with the employee's faithful performance of his duties. The statute does not bar self-representation.

As a general proposition, it seems clear that section 205 would bar an employee from representing an employee organization before the Government unless the representation was part of the employee's official duties, or otherwise met one of the exceptions in the statute, or was undertaken in accordance with a statute that explicitly exempted the activity from the proscription of section 205.⁴ There is no indication that Congress intended to generally exempt employees from the prohibition of section 205 when representing employee interest groups. See, e.g., 5 Op. O.L.C. 194, 196 (1981).

Because section 205 does not prohibit self-representation, an employee may represent his own views before the Government in connection with a particular matter even if those views are the same as those held by an organization in which the employee happens to be a member. However, the employee could not communicate those views to the Government as the

organization's representative without running afoul of the prohibition in section 205. Thus, while it is conceivable that a member of an employee organization might communicate his personal views to the Government in connection with a particular matter in which the organization has an interest, an examination of all of the circumstances surrounding the communication might indicate that the employee was in fact representing the organization to the Government on the matter. For example, if the employee's views were submitted in writing on the organization's stationery, or if the employee identified himself as an officer or member of the organization in stating his views, the Government might properly conclude that the employee was really acting as the organization's representative.

There may be some question whether employees have the right to communicate with the Government concerning the terms and conditions of employment through an employee organization selected to represent the employees. Indeed, because section 205 was intended to bar representations to the Government on behalf of someone else, it might be argued that a representation made by an employee organization concerning the terms and conditions of employment of its members is tantamount to a self-representation by the employee members. We are not aware of any authoritative determination to this effect, however, and note that [the] Office [of Legal Counsel] appears to have taken a contrary position in a case where an employee sought to represent a group of employees (which did not have the status of a "labor organization" under 5 U.S.C. § 7103) on matters concerning employment. See *id.* at 196.⁵

Of course, for the prohibition of section 205 to apply, representations made by members of employee organizations to the Government must be in connection with some matter in which there is some controversy or at least a potential for divergent views. Communications of a purely ministerial nature made on behalf of an employee organization are not barred by section 205. For example, simply requesting factual information or responding to requests from the Government for factual information are not the types of representational communications which would violate section 205. Additionally, it could be said that making a completely routine request that has no element of controversy, such as asking to use a meeting room, would fall outside the proscription of section 205. However, even a request of this type might involve some potential for conflict if there is a shortage of space available and the employee organization is competing with other groups for use of the space. Thus, it is difficult to conclude with certainty that a particular type of request will never have a potential for divergent viewpoints and will always lack the requisite conflict to fall within the statute.

Finally, there may be situations where a member of an employee organization wishes to represent the organization to the Government on a matter which is not a "particular matter" within the meaning of section 205. In such a case, the representation would be made in connection with a broad policy matter that is directed to the interests of a large and diverse group of persons rather than one that is focused on the interests of a discrete and identifiable class. Although in this case the representation may not be in connection with a "particular matter" as contemplated by section 205, certain other aspects of the communication to the Government that are incident to the representation may themselves be "particular matters." For example, if a member of an employee organization wanted to communicate the views of the organization to the Government on proposed changes in Social Security benefits, the employee's efforts to schedule a meeting with the Social Security Administration might violate section 205. The decision to meet with representatives of the employee organization might itself be considered a "particular matter." On the other hand, sending a letter to the Social Security Administration that simply states the organization's views without asking for a specific Government response would not violate section 205 where the communication was not made in connection with a "particular matter."

While we recognize that section 205 appears to impose an unreasonable burden on the ability of employee organizations to communicate with the Government, we are not aware of any authoritative interpretations of the statute that would allow broad exemptions from the statute's prohibition for representations made on the organizations' behalf. Moreover, we are reluctant to endorse the theory that representations made on behalf of these organizations are the same as self-representations made by the organizations' individual members because it appears that the same theory would necessarily apply in cases where an employee represents the interest of any organization of which he is a member.

We regret that we are unable to suggest any alternative interpretations of section 205 that would provide agencies more flexibility in dealing with employee organizations. However, it may be that the problems agencies are encountering in this area can be resolved only through an amendment to section 205 that would create exceptions for specific types of representations on behalf of employee organizations.

Sincerely,

Stephen D. Potts
Director

1An employee may represent another to the Government in the course of performing his official duties. In a 1980 opinion, your office found that official duties involve tasks "that are integral to a substantive federal program." See, e.g., 4 Op. O.L.C. 498, 503 (1980). The opinion stated that an employee of the Environmental Protection Agency (EPA) who was detailed to work for a state government under the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376, could represent the state back before the EPA as part of his official duties because the environmental laws administered by the EPA expressly or implicitly authorized detail assignments involving representational activities.

2Although the term "acts as agent or attorney" is not defined in the statute, it generally has been regarded as encompassing representational activities on behalf of another. The term was also used in a prior version of 18 U.S.C. § 207, and in that context was generally construed as applying in cases where the Government and the person being represented would have differing, or potentially differing, views. See, e.g., OGE Informal Advisory Letter 80 x 4.

3A "covered matter" is described at 18 U.S.C. § 205(h) as including "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."

4For example, 5 U.S.C. § 7102 permits a member of an employee labor organization to represent the views of the organization to agencies and officials of the executive branch, Congress or other appropriate authorities. The right to engage in representational activities is limited in part by 5 U.S.C. § 7120(e) which bars activities that "would result in a conflict or an apparent conflict of interest or would otherwise be incompatible with law or the official duties of the employee." This Office has offered somewhat differing views on whether section 7102 constitutes an exception to the prohibition on representation contained in 18 U.S.C. § 205. See, e.g. OGE Informal Advisory Letters 81 x 12 and 82 x 19. In any case, the activities of employees who represent the interests of employee labor organizations are, for the most part, undertaken in connection with personnel administration proceedings and are excepted explicitly from the requirements of section 205(a) pursuant to section 205(d).

5In that case, the employee argued that section 205 was not intended to prohibit the types of representational activities in which he wanted to engage, which were broadly defined as efforts to organize and bargain with the employees' employer. [The Office of Legal Counsel] found that even though the legislative history of section 205 did not specifically mention

union organizing or representational activities, it would be inappropriate to assume that Congress, by its silence, intended to enact an exception to the "clear terms of the statutory prohibition."