

06 x 4

Letter to an Acting Inspector General
dated March 30, 2006

I appreciate receiving a copy of your office's February 10, 2006, report to the Acting Chairman of [an agency], concerning the handling of an ethics matter pertaining to [a] former [agency] Board Member. Based on the facts and legal authorities set out in the report, we agree with your conclusion that [the former Board member] is not entitled to reimbursement of legal expenses he incurred in contesting the determination of the [agency] Designated Agency Ethics Official that he violated the gift restrictions in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). It may interest you that the Office of Government Ethics (OGE) in the past has expressed concern about efforts of high level officials to seek reimbursement of legal fees, particularly where the request suggests that ethics officials bear some responsibility for the ethics violation or the resulting legal expenses. See Letter of Stephen D. Potts, Director, OGE, to The Honorable Sam Winters, Chairman, Board of Governors, U.S. Postal Service, January 15, 1998 (copy enclosed); Bill McAllister, "Ethics Chief Disputed Fees Claim 6 Days Before Runyon Resigned," *The Washington Post*, February 2, 1998, at A17 (copy enclosed).

I am concerned, however, that certain statements in the report might be read as being inconsistent with OGE's views on the role of ethics officials and the operation of agency ethics programs.

First, the report (pp. 9-13) suggests that [agency] ethics officials may have been at fault for initiating contacts with OGE and the White House concerning a possible ethics violation by a Board Member without giving the Member notice of such "external contacts." OGE is concerned that such criticism could chill ethics officials in the conscientious performance of their duties. This includes the duty to maintain "close liaison with the Office of Government Ethics," 5 C.F.R. § 2638.203(b)(1), and the duty to ensure that "prompt and effective action" is undertaken to remedy actual or apparent ethics violations, 5 C.F.R. § 2638.203(b)(9). Agency ethics officials have a responsibility to report ethics violations to the appropriate

authorities and do not owe any personal duty to protect agency employees from inquiries by OGE or any other duly authorized executive agencies or offices. See OGE Informal Advisory Letter 00 x 2.

In the case of Presidential appointees, such as the former Member, it is the President who ultimately has authority to exercise discipline with respect to violations of the Standards of Conduct. Therefore, it was perfectly appropriate for [agency] officials to consult the White House Counsel's office without providing the Member with prior notice of such contact. OGE believes it could impede efforts to take prompt action if ethics officials thought they were invariably under an obligation to give notice to Presidential appointees prior to any contacts with the White House or OGE concerning possible violations.

Second, the report (p. 10) suggests that the ethics official may have erred or overreacted by issuing a written opinion concluding that the gift prohibition had been violated, without first giving the Member an opportunity to resolve the matter by reimbursing the market value of the prohibited gift. We want to point out, however, that employees are not always entitled to such an opportunity to "resolve" the matter of a possible violation simply by paying market value after accepting a prohibited gift. Rather, the OGE rules allow employees to avoid a violation by reimbursement only under carefully limited conditions, which are intended to prevent complacency or even gamesmanship on the part of employees.

The subject of repayment is addressed in the gift rules at 5 C.F.R. § 2635.205. Under section 2635.205(a)(3), an employee who has received a gift that cannot be accepted may "reimburse the donor its market value." Section 2635.205(c) provides that an employee "who, on his own initiative, promptly complies with the requirements of this section [including reimbursement], will not be deemed to have accepted an unsolicited gift" (emphasis added). The same provision also states that an employee will be deemed to have complied with these requirements "on his own initiative" if he "promptly consults his agency ethics official to determine whether acceptance of an unsolicited gift is proper" and then disposes of the gift upon the advice of the ethics official. As we have explained, "to avoid violating the gift rule, an employee is required to make a prompt payment of the cost of the gift, under his or her own initiative," OGE Informal Advisory Letter 98 x 16, and an employee cannot simply wait until contacted (if ever) by an ethics official to initiate repayment. If an employee does not promptly, at his

own initiative, make reimbursement or at least seek advice from an ethics official--but rather does nothing about the matter until an ethics official receives independent information and directs remedial action--it is not fair to say that there was no violation in the first place.

Third, we are concerned that the report could be read as suggesting that a Senate-confirmed Presidential appointee could be excused from personally knowing and following the ethics rules. The report refers to the violation as "unintentional" (pp. 3, 9) and "not a deliberate attempt to breach or otherwise evade ethics standards" (p. 3). The report also notes (pp. 2-3) that the [agency] Investigator-in-Charge did not share her own misgivings with the former Member about potential ethics concerns with acceptance of the gift.

In this context, it is important to remember that the gift prohibitions do not depend on specific intent, such as willfulness or "a deliberate attempt to breach or otherwise evade ethics standards." Plainly, it is no defense that the former Member may have been unaware that he was violating the gift prohibition, that a lower level employee may not have shared her ethical concerns with him, or that the Member may have lacked knowledge of the ethics rules. Such excuses would not be accepted in the case of ordinary civil servants subject to the ethics rules. See *Faitel v. Veterans Administration*, 26 M.S.P.R. 465, 468-69 (1985)(lack of notice of standards of conduct regulation is "not a defense to the charge"); *Coons v. Department of Navy*, 15 M.S.P.R. 1, 4 (1983)("standards of conduct are largely a matter of common sense and cover an area for which employees must be presumed to know the law"). OGE believes it would harm the credibility of the executive branch ethics program to suggest that a Senate-confirmed Presidential appointee may be subject to a lower standard. As we pointed out in the enclosed 1998 letter, it is the personal responsibility of even high level officials to remember their ethical obligations or at least seek ethics advice, and OGE is particularly sensitive to any effort that may be perceived as shifting this personal responsibility from the individual concerned to the agency's ethics officials.

Again, we thank you for sharing a copy of the report with us. Please feel free to contact me, if you have any questions about this matter.

Sincerely,

Marilyn L. Glynn
Acting Director