

Office of Government Ethics

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Letter to an Agency Head dated February 7, 1992

Your letter of January 16, 1992, offered comments concerning the gift issue which we discussed in our letter to [an employee of your agency] of October 29, 1991, and you requested our further opinion on the same matter.

As indicated in our letter to [the employee], we would not consider the payment for utility services by an occupant of her husband's residential property to constitute a gift, under the circumstances described. While an employee is generally prohibited by the standards of ethical conduct from accepting anything of monetary value from an agency contractor, no gift is made where the source receives something of equivalent or greater value in exchange. In this instance, we understood that the contractor who occupied this residential property received the use and benefit of utilities, for which he paid actual cost directly to the commercial providers. Although that had the incidental effect of saving [the employee's] husband the expense of paying for basic utilities on what had otherwise been vacant housing, we do not view this apparently unintended consequence as a prohibited gift under the standards of conduct.

We leave to the [agency's] judgment whether this arrangement may, nonetheless, create an appearance (for a reasonable person with knowledge of the relevant facts) that [the employee] would have lost independence or impartiality if she were to perform services as general counsel and member of the [agency's] contracting committee with respect to this contractor's renewal bid. Any such appearance could be eliminated by having her recuse herself from official participation in the matter, as you have proposed.

We can also appreciate the concern that an employee should seek approval prior to engaging in a financial relationship which might create an appearance of conflict such that recusal would be required. However, that principle can only apply where the employee has control over the financial relationship. We understood from [the employee] that the residential property was owned by her husband and that she had very little control over its use, though apparently her husband's ownership was not clearly

evident from one of her earlier financial disclosure statements. If in fact she did not have ownership and control of the property, then the standards of conduct would not normally require her to seek advance approval for its use; the appropriate resolution would be her recusal from official matters where an appearance of losing impartiality might result.

If the facts are as discussed above, consideration should be given to reassessing the letter of admonishment concerning this matter, unless [the employee] failed to recuse herself from participation in official actions affecting the individual who occupied this residential property and paid for utilities.

Sincerely,

Stephen D. Potts
Director