



United States
Office of Government Ethics
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Washington, DC 20005-3917

May 9, 2003

Erin McDonnell
Associate Special Counsel for
Legal Counsel and Policy
U.S. Office of Special Counsel
1730 M Street, NW., Suite 300
Washington, DC 20036-4505

Dear Ms. McDonnell:

The Office of Government Ethics (OGE) has completed its review of the U.S. Office of Special Counsel's (OSC) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the effectiveness of the ethics program, largely measured by its compliance with applicable statutes and regulations. This review was conducted in March and April 2003.

HIGHLIGHTS

Although our review found some troubling ethics program aspects, overall we consider OSC's program sound and appropriately geared to your agency's mission and employees. Most importantly, we believe that the ethics program is aimed at preventing employee ethical violations by providing useful ethics training and advisory services. In addition, we found an agency enforcement process designed to promptly and effectively remedy employee ethical breaches.

We continue to be concerned about the limited time and staff resources devoted to administering the ethics program, but consider the recent staffing changes to be a step in the right direction. Past staff resource limitations, we believe, to some extent contributed to several program deficiencies we found, including (1) failing to adhere to our regulatory guidance when you waived an employee's disqualifying financial interest; (2) continuing the practice of requiring employees to seek prior approval before engaging in outside employment without authorization of the practice by our Office; and (3) delaying your certification of public financial disclosure reports. Now that another attorney on your staff will be assisting you by devoting more of her work time to ethics program matters, including reviewing financial disclosure

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reports and providing advice, we believe past problems will be addressed and further issues will be avoided.

ADMINISTRATION OF THE PROGRAM

As the Associate Special Counsel for Legal Counsel and Policy, you have long-served as the Designated Agency Ethics Official (DAEO) for the approximately 100 OSC employees who are located at headquarters in Washington, DC and two field offices. As you explained to us, for many years you, mostly alone, have handled all ethics duties, in addition to a large and growing workload of other OSC programmatic legal matters. However, in the recent past, you have been able to shift some workload to two attorneys on your staff. You told us that you intend to further assign some of your ethics-related duties to one of the attorneys on your staff, which we believe will enhance program operations.

Some limited ethics duties are also conducted by field office staff members, who on occasion dispense advice to the few employees in their respective offices. While OSC has had a long-serving Alternate DAEO, who is the Associate Special Counsel for Investigation and Prosecution, you indicated that he devotes very limited time to ethics matters and primarily serves as a collector of financial disclosure reports in your absence

18 U.S.C. § 208(b)(1) WAIVER

On OSC's annual Agency Questionnaire for 2001, you reported the issuance of an 18 U.S.C. § 208(b)(1) waiver to an employee. However, at the start of our review, you were unable to locate this waiver. In addition, our Office had never received a copy nor had it been consulted. (5 C.F.R. § 2640.303).

After reviewing various waiver-related documents that you provided to us, in addition to our discussions, we concluded that when you first made your determination to waive the affected employee's disqualifying financial interest, you did not adhere to our regulatory guidance at 5 C.F.R. § 2640.301. This includes not fully describing the disqualifying financial interest, the particular matters to which it applies, and the employee's role in the matters. This failure placed the employee at risk of inadvertently violating 18 U.S.C. § 208. To remedy this problem, by the close of our review, you re-documented the waiver to comply with the regulatory requirements and consulted with OGE. Most importantly, now that the waiver is fully documented, we believe that the affected employee is protected.

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ENFORCEMENT

You, along with other management officials, are involved in administering OSC's system of enforcement. For the only two ethics violations from 2001 to the present, OSC suspended two employees for misusing their Government-furnished travel charge cards and subsequently failing to satisfy their just financial obligations. (5 C.F.R. § 2635.809). In both cases, approximately five months elapsed from the time of the last violation until management's Notice of Decision on the disciplinary action to be taken. We believe that you are ensuring that prompt and effective action is being considered to remedy ethics violations, in accordance with 5 C.F.R. § 2638.203(b)(9), and are also ensuring that consequences are imposed on employees who engage in unethical conduct.

We were unable to assess OSC's compliance with 5 C.F.R. § 2638.603, wherein OGE is to be notified by agencies concerning referrals to the Department of Justice of alleged criminal conflict of interest violations and of related matters, as there have been no referrals. Nevertheless, OSC appears to have a system in place for notifying OGE should a referral be made.

COUNSELING AND ADVICE

Your ethics counseling and advice services meet the requirements of 5 C.F.R. § 2638.203(b)(7) and (8). While you often provide general ethics advice orally, as necessary you also dispense it in written form, usually by e-mail. We examined approximately 15 written determinations that you provided to employees from 2001 to the present and found that they were accurate, consistent with applicable laws and regulations, and appeared to meet employees' needs. The advice covered outside activities, gift acceptance, fund raising activities, and potential conflicting interests.

On occasion, you provide general ethics-related information to employees through memorandums or e-mail, which we advocate as a good method to heighten their awareness of the rules and regulations. We encourage that you continue to distribute information on topical ethics matters, which you told us you intend to do. You also told us that, as necessary, when employees leave the agency for the private sector, you give them relevant post-employment information. In addition, you stated that since you attend agency senior staff meetings, as appropriate, you keep managers informed of newsworthy ethics matters.

OUTSIDE ACTIVITY AND EMPLOYMENT

During the course of our review, we were able to clear up a misunderstanding concerning OSC's long-standing requirement that employees obtain prior approval before pursuing outside activities and employment related to their work duties. This practice had continued subsequent to the issuance of our Standards of Conduct in 1992. But, as we explained in several DAEOgrams to agencies, continuing a practice such as this was not permitted, except for a limited time under "grandfather" provisions.

We discussed with you that the authority to require prior approval of outside activity and employment must reside in an agency supplemental regulation agreed to by and jointly issued with OGE pursuant to 5 C.F.R. § 2635.105. In addition, we informed you that your OGE Desk Officer is available to assist should you choose to issue a supplemental regulation. Until the issuance of such a regulation, OSC needs to suspend the prior approval practice, which you agreed to do. In the interim, you may encourage employees to seek advice when they plan to undertake certain types of outside activities and employment.

EDUCATION AND TRAINING

We found that OGE's ethics education and training requirements are being met at OSC, including annually documenting the ethics training plan.¹ We believe that your ethics Intranet site is one useful tool for ensuring that employees have easy access to educational materials.

Initial Ethics Orientation

The initial ethics orientation requirement is routinely satisfied for all new employees, including a new Special Counsel.² You told us that in addition to providing the Special Counsel required written materials, your practice is to provide a one-on-one ethics briefing, which is a practice we encourage you to continue. Another practice of yours that we support is the holding

¹Though the ethics training plan was not documented at the start of our review in March, you did document your training approach shortly after we reminded you of this annual requirement.

²The Special Counsel is the only Presidentially-appointed Senate-confirmed (PAS) position at OSC.

of periodic in-person briefings when there is a large enough group of new employees to train.

In addition to in-person ethics orientation briefings, initial ethics orientation is immediately satisfied for new employees when they in-process and are given written ethics materials. These include an OSC Directive on initial ethics orientation, a memorandum signed by the Special Counsel, and an acknowledgment form. Employees are required to sign this form which certifies that they, among other things, are required to comply with the Standards of Conduct. This is another practice that we believe helps to ensure employees' understanding of the rules. According to the Director of Human Resources, inspection of new employees' official personnel files found that eight of the nine employees who entered on duty in approximately the past year had completed and returned the acknowledgment form. She intended to collect the form from the remaining employee.

Annual Ethics Training

You told us that you routinely provide in-person annual ethics training to covered employees every year and confirmed that all received it in 2002. Last year's training consisted of attendees viewing a videotape of the Department of the Interior's 2002 satellite ethics training, receiving a draft copy of OSC's newly updated Directive chapter entitled "Ethics Responsibilities and Program Procedures," and participating in a question and answer segment. You stated that the Special Counsel has attended one of the annual training sessions each year of her five-year tenure. We remind you, however, that OGE encourages giving all PAS employees one-on-one annual ethics training in order to personalize it for their specific needs.

PUBLIC AND CONFIDENTIAL SYSTEMS

We found that OSC's public and confidential financial disclosure systems are in general compliance with the laws and regulations. Notwithstanding the fact that financial conflicts are highly remote for most OSC employees, we encourage adherence to the procedural and reporting requirements of 5 C.F.R part 2634.

Eleven public and two confidential reports were required to be filed in 2002. Our examination of all reports, excluding the public reports filed by you and the Special Counsel, found that all were filed and initially reviewed timely. However, concerning the thoroughness of the review, at the time of our examination, you had

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not yet certified two of the public reports filed by one employee, pending the receipt of additional information.

The reports filed by the Special Counsel and you, which are required to be transmitted to OGE pursuant to 5 C.F.R § 2634.602, were only examined for timeliness of filing, review, and transmittal to OGE. We found that one was forwarded timely and the other was delayed. We reminded you of the requirement to transmit reports to our Office as soon as they are certified.

Though your initial review of public financial disclosure reports was timely, certification of almost all was protracted (at least six months after your initial review). Delays were generally not due to needing additional information from filers; rather, certification was held up due to the demands of your other work.

For the two reports not yet certified, you told us that you had initially reviewed this one filer's annual and termination reports shortly after they were submitted in July and August 2002, respectively. But, mostly due to the demands of your other work, you had not followed-up with the filer to obtain additional information. In the course of our review, when we questioned the reports' status, you contacted the filer and told us that you expect to obtain the required brokerage information soon.

We believe that such long delays will be eliminated by having another reviewing official on your staff. In addition, she will help to ensure that the administrative and substantive aspects of the financial disclosure process are accomplished each filing season.

ACCEPTANCE OF TRAVEL PAYMENTS

OSC accepted nine payments from non-Federal sources for travel, subsistence, and related expenses incurred by agency employees on official travel from October 1, 2001 to September 30, 2002. The semiannual reports were forwarded to OGE timely. Based upon the information contained in these reports and an examination of other related OSC documents, we found these payments were accepted in accordance with the General Services Administration's Interim Rule 4 at 41 C.F.R. part 304-1, implementing 31 U.S.C. § 1353.

CONCLUSIONS AND RECOMMENDATIONS

It is clear that you have placed priority on keeping OSC employees aware of the requirements for ethical conduct and that

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the agency takes prompt and effective action when employees violate ethics rules. These are essential elements for a well-run ethics program.

We expect that you will consider the various program suggestions we made during discussions with you, in addition to taking action on the matters addressed in this report. You agreed to suspend OSC's practice of requiring employees to obtain approval before undertaking certain outside activities and employment and told us that you will be considering issuing an agency supplement to the Standards of Conduct. Recognizing that other improvements are underway, we are only recommending that you:

1. Ensure that sufficient resources are continually dedicated to the ethics program
2. Complete your review of and certify the two remaining uncertified public reports from 2002.
3. Ensure that financial disclosure reports are reviewed and certified timely.

In closing, we wish to thank you for your efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions planned or taken concerning the recommendations in our report. A follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of the Office of Government Ethics under subsection 402(b)(9) of the Ethics Act, as implemented in subpart D of 5 C.F.R. part 2638, it is important that ethics officials take actions to correct these deficiencies in a timely manner. Please contact Ilene Cranisky at 202-208-8000, extension 1218, if we may be of further assistance.

Sincerely,



Jack Covaleski
Deputy Director
Office of Agency Programs