



United States
Office of Government Ethics
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September 6, 2005

Richard Porras
Designated Agency Ethics Official
International Boundary and Water
Commission, United States Section
4171 North Mesa Street
Suite C-100
El Paso, TX 79902-1441

Dear Mr. Porras:

The Office of Government Ethics (OGE) has completed a review of the ethics program at the United States Section of the International Boundary and Water Commission (USIBWC). This 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 ethics program's compliance with applicable statutes and regulations. We also evaluated USIBWC's systems and procedures for ensuring that ethics violations do not occur. We note that the Department of State's (State) Office of Inspector General (OIG) issued an inspection report on USIBWC prior to our review. While we found their report highly useful to our own review, our jurisdiction precluded us from addressing most of the issues they raised. However, we did examine the former Commissioner's salary raise, which was an issue brought up in the inspection report.¹

Our review was conducted intermittently from April through July 2005. The following is a summary of our findings, conclusions, and recommendations.

HIGHLIGHTS

Aspects of USIBWC's ethics program require improvement to comply with applicable statutes and regulations. USIBWC continues to publish its residual standards of conduct at 22 C.F.R. part 1100, even though they were superseded when OGE published its Standards of Ethical Conduct for Employees of the Executive Branch (Standards). The completion, filing, and review of financial disclosure reports must be improved. Nevertheless, we were impressed that USIBWC exceeds the minimum regulatory requirements by providing verbal annual ethics training to confidential financial disclosure report filers more frequently than once every three years and that some non-filers complete annual training, as well.

¹ The former Commissioner left USIBWC in August 2005.

PROGRAM STRUCTURE

The number of personnel assigned to administer the ethics program appears adequate. The ethics staff includes you, as the Designated Agency Ethics Official (DAEO), and the Alternate DAEO (ADAEO). In addition to being the DAEO, you serve as the Deputy Commissioner, State Affairs Officer, and an Attorney Advisor. The ADAEO serves as the Internal Auditor, Internal Controls Administrator, Privacy Act Officer, Freedom of Information Act Officer, and Tort Claims Administrator. The ADAEO performs the day-to-day duties of the ethics program, but will consult with you when necessary.

AGENCY-SPECIFIC ETHICS RULES

This element of USIBWC's ethics program will be brought into compliance upon revocation of USIBWC's residual standards of conduct.

Residual Standards of Conduct

Part 1100 of 22 C.F.R. contains USIBWC's residual standards of conduct which were superseded by OGE's Standards. Included in part 1100 are sections on outside employment restrictions, gifts, conflicting financial interests, misuse of Government information and property, and filing statements of financial interests. USIBWC's failure to revoke these outdated standards threatens to point employees to incorrect and incomplete ethics rules. Therefore, we recommend that you revoke USIBWC's residual standards of conduct.

In June 2005, we received a letter from the ADAEO which requested assistance with revoking the residual standards. We provided a sample rulemaking document to him and offered to review USIBWC's draft once it is ready. The ADAEO stated that he will have OGE review the draft.

Outside Employment and Activities

Prior to our review, USIBWC had given its employees the impression that they were required to receive prior approval before engaging in outside employment and activities. However, USIBWC does not have a supplemental agency regulation issued pursuant to 5 C.F.R. § 2635.105. Additionally, you stated that USIBWC does not have any organic authority to require employees to seek prior approval. Instead, a table of recommended penalties located in a directive issued by the human resources office contained language indicating that employees may be punished for failing to seek prior approval before engaging in outside employment and activities. Although you stated that the prior approval requirement had not been enforced, you followed our suggestion of removing the unauthorized requirement from the directive.

You stated that USIBWC does not wish to issue a supplemental agency regulation requiring employees to seek prior approval. However, you may want to inform employees that

ethics officials are available for consultation to those who opt to seek guidance before engaging in outside employment and activities.

FINANCIAL DISCLOSURE SYSTEMS

Certain deficiencies in the financial disclosure systems must be corrected for the systems to generally comply with the provisions of 5 C.F.R. part 2634.

Public Financial Disclosure

We examined all nine public financial disclosure reports filed in 2004 and 2005;² two new entrant, four incumbent, and three termination reports were filed.³ Our review of the reports was hampered by the lack of sufficient information disclosed by public filers. In particular, the underlying assets of IRAs, 401(k)s, annuities, etc. were not disclosed. Therefore, we recommend that you ensure public filers fully disclose all required information on their financial disclosure reports. The provision of required information will greatly aid the ethics staff's efforts in determining whether actual or potential conflicts exist between employees' public responsibilities and private interests and activities (and will allow for the effective use of the USIBWC contractor list in reviewing reports). Additionally, disclosure of the required information will allow the ethics staff to assist filers in taking appropriate remedial action against conflicts when they first arise (see 5 C.F.R. § 2634.605(b)(5) for a list of remedial actions). If filers do not provide the required information, then the ethics staff must follow-up with filers to obtain the required information before certifying the reports. This is especially important because the signature of the reviewing official, in this case the ADAEO, certifies that a report is complete and that the filer is in compliance with applicable laws and regulations.⁴

² Two of the termination filers, who left in 2004, did not submit incumbent reports in 2004. Apparently, there was confusion about their employment status. We were advised that both of the would-be filers may not have been working in their positions immediately prior to the termination dates on their reports.

³ One new entrant report was mismarked as an incumbent report; this report is included in the new entrant report count. Filers should accurately mark their reporting status because this determines the report schedules to be completed and the reporting periods to be covered.

⁴ During our review, both you and the ADAEO received training from your OGE Desk Officer on how to complete and review public reports. We understand that, prior to this training, neither of you were trained in how to complete and review financial disclosure reports.

With the exception of one new entrant report, the public reports were reviewed in a timely manner.⁵ We were disappointed to find an absence of follow-up documentation in the files and annotations on the reports. We received verbal confirmation from the ADAEO that the reports had been reviewed; the ADAEO held discussions with the filers and their supervisors to learn about the duties of and projects assigned to the filers. We recommend you ensure that public reports are reviewed in accordance with 5 C.F.R. § 2634.605, especially paragraph (b)(3), which requires that additional information requested by the reviewing official be made a part of the report. This would include documenting the ADAEO's follow-up discussions with filers and their supervisors.

We found that one incumbent report filed in 2004 was submitted approximately two months late. We did not find any indication of a filing extension being requested or granted. In the absence of a filing extension, the \$200 late filing fee should have been imposed on the filer. We did not find any indication of a waiver of the late filing fee. The late filing fee should be imposed on public filers in accordance with 5 C.F.R. § 2634.704. You agreed to levy the late filing fee unless information received from the filer warrants a waiver.

We note that your 2004 and 2005 public reports were forwarded to OGE in a timely manner for final review and certification. However, USIBWC was slow in forwarding to OGE the 2004 termination public report filed by the former DAEO.⁶ The termination report was received by OGE in January 2005, approximately 10 months after agency certification.⁷ Forwarding DAEO reports right after certification will enable OGE's review and any follow-up on questions to be accomplished in a timely manner.

⁵ All public reports lacked a date of agency receipt. In accordance with 5 C.F.R. § 2634.605(a), the date of receipt must be noted on the reports. Therefore, we based the timeliness of filing and review on the dates of the filers' and ADAEO's signatures. There was a seven month difference between the dates of the signatures on one 2004 new entrant report. While review must occur within 60 days, certification can take place at a later date under the terms of paragraph (a).

⁶ Although the President appoints the Commissioner, USIBWC does not employ Presidential appointees confirmed by the Senate; therefore, your DAEO report is the only public report required to be forwarded to OGE every year.

⁷ The transmittal letter accompanying the former DAEO's termination report stated that the report was not forwarded in a timely manner because USIBWC was "without a DAEO for a short period of time and [USIBWC] must have overlooked sending it to [OGE]." (Approximately five months elapsed from the time the former DAEO left and the former Commissioner appointed you as DAEO.)

Confidential Financial Disclosure

We examined all 54 confidential reports required to be filed in 2004; 19 new entrant and 35 annual reports were examined.⁸ We noticed that 26 annual filers incorrectly used the OGE Optional Form 450-A (Form 450-A). In accordance with 5 C.F.R. § 2634.905(d)(4) and (5), eligible annual confidential filers may use the Form 450-A for a maximum of three consecutive years before they are required to complete a new OGE Form 450 every fourth year, beginning in 2000. While agencies may further restrict the maximum number of consecutive years in which the Form 450-A can be used, we were informed that USIBWC limits its use to a maximum of three consecutive years. Therefore, no confidential filers were eligible to use the Form 450-A in 2004. To put these confidential filers back on track, we recommend you ensure that the 26 annual confidential filers who submitted the Form 450-A in 2004 submit the OGE Form 450 in the 2005 annual filing cycle.⁹ The 26 filers may submit the Form 450-A in 2006 and 2007, provided they meet the eligibility requirements, but must file an OGE Form 450 in 2008 and in every fourth year thereafter, along with the rest of USIBWC's annual confidential filers.

Our review of the confidential reports was hampered by the lack of sufficient information disclosed by confidential filers. In particular, the underlying assets of IRAs, 401(k)s, deferred compensation plans, etc. were not disclosed. Therefore, we recommend that you ensure confidential filers fully disclose all required information on their financial disclosure reports.

With the possible exception of one new entrant report, the confidential reports were reviewed in a timely manner.¹⁰ We were disappointed to find an absence of follow-up documentation in the files and annotations on the confidential reports. Therefore, we recommend you ensure that confidential reports are reviewed in accordance with 5 C.F.R. § 2634.605, especially paragraph (b)(3), which requires that additional information requested by the reviewing official be made a part of the report.

⁸ Three new entrant reports were mismarked as annual reports and one new entrant did not indicate his reporting status; these reports are included in the new entrant report count.

⁹ The other nine annual confidential filers, who submitted the OGE Form 450 in 2004, may use the Form 450-A in the 2005 annual filing cycle, provided they meet the eligibility requirements.

¹⁰ One annual and two new entrant reports lacked the dates of agency receipt. Therefore, we had to base the timeliness of filing and review on the date of the filers' and ADAEO's signatures. The timeliness of review could not be determined for one of the new entrant reports because it lacked the signatures and dates from the filer and ADAEO.

We found that two new entrant reports were submitted approximately 1.5 months late.¹¹ We were concerned that the ethics staff was not immediately aware of when new employees entered on duty and when employees were promoted to covered positions. At the time of our onsite fieldwork, no procedure was in place to ensure that the ethics staff received this information to assist them in the identification of financial disclosure report filers. Since then, a Memorandum of Agreement (MOA) was signed by you and the Acting Director of the human resources office in June 2005. We understand that the efficacy of the MOA has already been tested due to there being several new employees hired. The ethics staff was notified of the new hires via e-mail from the human resources office. Although the new employees are not subject to financial disclosure requirements, we are satisfied that the cooperation demonstrated thus far will assist in the filing of a new entrant report within 30 days of an employee's assumption of a position or duties requiring the filing of a financial disclosure report. The timely filing of new entrant reports will assist the ethics staff's identification of any potential or actual conflicts of interest in a timely manner.

ETHICS AGREEMENTS

No employees entered into written ethics agreements; no remedial action, such as recusal, resignation, or procurement of a waiver issued under 18 U.S.C. § 208, was taken by any public or confidential filers. Therefore, we did not assess this area of your program for compliance.

SPECIAL GOVERNMENT EMPLOYEES

At the time of our review, USIBWC did not employ special Government employees (SGE). However, we were informed that consultants are hired as either independent contractors or temporary employees. When we inquired as to whether SGE status had been considered for three employees who had been appointed as temporary consultants, we were told that the ethics officials were not aware of these consultants and their status as temporary employees when they entered on duty. Therefore, a determination as to SGE status was not made.

An SGE, as defined in 18 U.S.C. § 202(a), is "an officer or employee...who is retained, designated, appointed, or employed" by the Government to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not more than 130 days during any period of 365 consecutive days. SGEs are subject to less restrictive conflict of interest

¹¹ We could not determine the timeliness of filing for six new entrant reports because the filers did not list their appointment dates and one of the filers did not date his report. Additionally, five employees who were promoted to covered positions listed their original appointment date, rather than the date on which they became subject to filing a new entrant confidential report (i.e., the date of promotion). We remind you that new entrant filers must provide their date of appointment, if new to USIBWC, or date of promotion to a covered position. This will enable the reviewing official to determine whether the report was filed within 30 days of an employee's assumption of a position or duties requiring the filing of a confidential report.

requirements than regular employees, but are subject to more restrictive requirements than non-employees, such as independent contractors, who are not covered by the conflict of interest statutes.¹²

The determination of SGE status must be made at the time the individual is appointed or retained. Employees should be designated as SGEs only where the agency makes an advance estimate of the number of days the employee is expected to serve during the ensuing 365-day period. This is done so that employees will know what rules will apply to them. The Department of Justice's (DOJ) Office of Legal Counsel has stated that, "as a general matter, employees are presumed to be regular Government employees unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less" (7 Op. O.L.C. 123, 126 (1983)).¹³ The MOA should assist the ethics staff in determining whether temporary consultants should be designated as SGEs when they are appointed or retained.

EDUCATION AND TRAINING

The education and training program is generally compliant with the provisions of 5 C.F.R. part 2638. Moreover, certain aspects of USIBWC's education and training program exceed the regulatory requirements.

Initial Ethics Orientation Program

The initial ethics orientation (IEO) program generally complies with the provisions of 5 C.F.R. § 2638.703. The ethics office provides a packet of materials to the human resources office to disseminate to all new employees. IEO materials consist of contact information for the ethics staff, the 14 Principles of Ethical Conduct, and OGE's "A Brief Wrap on Ethics" pamphlet, which summarizes the Standards. During our review, you amended the cover letter to the IEO packet to incorporate the requirement that employees be allowed at least one hour of official duty time to review the IEO materials. Additionally, the ADAEO will begin tracking receipt of IEO by having new employees sign a certification notice. We applaud USIBWC for implementing this best practice into its IEO program.

¹² The conflict of interest statutes (i.e., 18 U.S.C. §§ 203, 205, 207, 208, and 209) contain special provisions for the treatment of SGEs or simply do not apply. There are exceptions for the treatment of SGEs under the ethics regulations at 5 C.F.R. part 2635, as well. Additionally, although an SGE usually files either a public or confidential financial disclosure report, depending on whether he or she meets the applicable criteria, an agency may exclude an SGE from the OGE Form 450 reporting requirement under the provisions of 5 C.F.R. § 2634.905(a), (b), or (c).

¹³ For more information on SGEs, see the attachment to DAEOgram DO-00-003, dated February 15, 2000.

We were informed that the former Commissioner's IEO in 2004 consisted of the same packet of materials that regular new employees receive. We encourage you to provide future Commissioners with an in-person, one-on-one IEO tailored to the nature of this high-profile position.

Annual Ethics Training Program

The annual ethics training (AET) program generally complies with the provisions of 5 C.F.R. §§ 2638.704 and 2638.705.

In 2004, covered employees completed their AET via OGE's computer-based training modules. An employee who is based at State completed her training by attending a briefing provided by State's ethics officials. Completion of AET was tracked by the ADAEO who received the certificates of completion.

Based on our examination of the certificates, it appeared that the former Commissioner did not complete his 2004 AET; we could not locate a certificate of completion for him in the files. The ADAEO confirmed that no certificate was on file and you stated that you were not aware of any AET the former Commissioner completed in 2004. It is extremely important that the person occupying the highest echelon at USIBWC complete AET. The former Commissioner risked running afoul of ethics regulations. Additionally, as the leader of USIBWC, the Commissioner occupies a position from which he can encourage and support ethical behavior by USIBWC employees. A leader's adherence to ethical requirements, including completing ethics training, can set the tone for fostering and maintaining an ethical work environment.

For 2005 AET, regular covered employees have been receiving an in-person briefing. We applaud the ethics staff for exceeding the minimum regulatory requirement by providing verbal AET to confidential financial disclosure report filers more frequently than once every three years. An ethics quiz is administered at the briefing. The quiz topics include gifts, misuse of position, and fundraising. The ADAEO discusses the relevant ethics regulations and explains the rationale behind the correct answers to the quiz. Completion of AET is tracked by the ADAEO who has attendees sign-in to certify their attendance at the training session. Although most employees completed their training in April 2005, some field employees still need to be trained before the end of December 2005. We understand that 33 non-covered employees completed the training. We applaud the ethics staff for exceeding the regulatory requirement.

We were informed that the former Commissioner would have watched OGE's "You've Got It!" video and taken the ethics quiz to complete his 2005 AET. The ADAEO would have been present to discuss the relevant ethics regulations and provide explanations for the quiz answers. We encourage you to provide future Commissioners with an in-person, one-on-one ethics briefing to satisfy AET in subsequent years, especially one that is tailored to this high-profile position.

ENFORCEMENT

There appears to be a cooperative working relationship between USIBWC and State's OIG. According to ethics and OIG officials, there appeared to be no violations of the Standards and no apparent criminal conflict of interest violations were referred to DOJ from January 2004 through March 2005. In the event of a referral to DOJ, OIG would assist USIBWC in complying with 5 C.F.R. § 2638.603 by notifying OGE of the referrals and their dispositions.

In March 2005, OIG released its report concerning USIBWC. Among other things, the report states that the former Commissioner's "...self-selected salary grade..." was at Executive Level II (up from Executive Level III). The report also states that the former Commissioner felt he could "...set salaries[,] including his own...." Our understanding is that USIBWC officials believe the Commissioner has the authority to set salaries via a treaty. However, our examination of the various treaties and conventions pertaining to USIBWC could not confirm this. A reference to setting salaries is featured in Article II of the Convention of March 1, 1889. The framers stated that "[e]ach Government shall fix the salaries and emoluments of the members of its Commission." We are not in a position to determine who in the Government is responsible for setting salaries at USIBWC.

During our exit conference, you stated that USIBWC also relies on guidance issued by the Office of Personnel Management (OPM). You provided us with a retyped copy of a letter, dated February 2, 1950, issued by the Civil Service Commission (now OPM). The letter states that the Commissioner has the authority "to fix and adjust from time to time the salaries of all officers and employees of [USIBWC]." However, 18 U.S.C. § 208 prohibits employees from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests. This statute would seem to be implicated by an employee making an official decision to increase his own salary. We are not in a position to determine whether the Convention and OPM guidance allow the Commissioner to raise his own salary without violating 18 U.S.C. § 208. Therefore, we have suggested to OIG that they examine the issue of the former Commissioner's salary raise to determine whether a violation of 18 U.S.C. § 208 occurred.

ADVICE AND COUNSELING

Ethics advice and counseling services generally comply with 5 C.F.R. § 2638.203(b)(7) and (8).

We examined nine documents which consisted of ethics opinions and guidance rendered by the ADAEO from December 2003 to March 2005. The topics included post-employment, outside activities, and gifts. Overall, we believe most of the advice rendered was adequate. However, some of the guidance could have been more decisive so that no misinterpretation could occur. In the future, the ADAEO may wish to be more precise in his rendering of advice.

There are plans to make post-employment counseling a regular part of the "clearing" process that departing employees will go through when leaving USIBWC. Prior to our review, the ADAEO provided post-employment counseling upon request. He is preparing a packet of post-employment materials which will be given to departing employees; they will sign a certification notice to acknowledge that they have received and read the materials. We applaud the planned institution of this best practice.

TRAVEL PAYMENTS FROM NON-FEDERAL SOURCES

USIBWC did not accept payments for travel-related expenses from non-Federal sources under 31 U.S.C. § 1353 from April 1, 2004 through March 31, 2005. We received the negative semiannual reports covering this period.

RECOMMENDATIONS

We recommend that you implement the following recommendations:

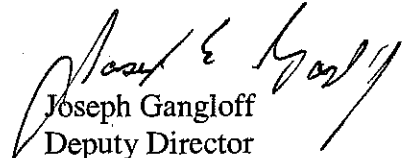
1. Revoke USIBWC's residual standards of conduct regulation at 22 C.F.R. part 1100.
2. Ensure that public and confidential financial disclosure report filers fully disclose all required information on their financial disclosure reports, including, but not limited to, underlying assets of IRAs, 401(k)s, annuities, deferred compensation plans, etc.
3. Ensure that the review of public and confidential financial disclosure reports is accomplished in accordance with 5 C.F.R. § 2634.605, especially paragraph (b)(3), which requires that additional information requested by the reviewing official be made a part of the report.
4. Ensure that the 26 annual confidential filers who incorrectly submitted the OGE Optional Form 450-A in 2004 submit the OGE Form 450 in the 2005 annual filing cycle.

In closing, I wish to thank the USIBWC officials who were involved in this review for their cooperation 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 approximately six months from the date of this report. In view of the corrective action authority vested with the Director of OGE 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 you take actions to correct these deficiencies in a timely manner. A copy of this report is being forwarded

Mr. Richard Porras
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to the Acting Commissioner and State's OIG via transmittal letters. Please contact Traci M. Quan at 202-482-9271, if we may be of further assistance.

Sincerely,



Joseph Gangloff
Deputy Director
Office of Agency Programs

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