

MEMORANDUM TO

SUBJECT: REQUEST FOR ETHICS/ADMINISTRATIVE LAW OPINION CONCERNING PROPRIETY OF ACCEPTANCE OF TIPS BY APPROPRIATED AND NON-APPROPRIATED PERSONNEL ENGAGED IN THE RESTAURANT BUSINESS ON A FEDERAL INSTALLATION

1. This memorandum is in response to your inquiry concerning the propriety of the acceptance of tips by either appropriated or non-appropriated fund employees working as bartenders at a restaurant on a federal installation. You have advised me that occasionally appropriated fund employees are required to substitute for, or otherwise assist, non-appropriated fund bartender employees who may be late, sick, on leave, or during periods of time when the bar is busy.
2. 18 U.S.C § 209 prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. 18 U.S.C. 209(a) states:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.

3. 18 U.S.C. §209 therefore prohibits the receipt of any compensation for services rendered and paid for by the U.S. government. 18 U.S.C. § 209 also prohibits the giving of compensation by an individual to an officer or employee of the executive branch of the U.S. government. Therefore, the issue is whether tips are prohibited on their face under

18 U.S.C. § 209, or other federal statutes permit employees to receive tips who are engaged in occupations that “customarily and regularly” involve tips as a portion of the overall wage compensation.

4. Tips have regularly and customarily been standard practice in the restaurant industry for years. The Federal Fair Labor Standards Act sets forth specific regulations concerning the federal minimum wage as it applies to occupations where compensation in part is derived from tips. State minimum wage statutes create exceptions to calculations for determining the minimum hourly wage for restaurant workers, in conformity with regulations promulgated under the Federal Fair Labor Standards Act, 29 U.S.C. 201 et seq. Tips therefore are clearly considered a customary and ordinary manner of compensation for certain types of occupations. These minimum hourly wage exceptions ordinarily will apply to waiters/waitresses, bus boys, and bartenders in the restaurant business.

5. Tips paid to workers are considered taxable income in accordance with applicable IRS regulations, and are required to be declared on an individual’s federal and state income tax return. Therefore, the Internal Revenue Code clearly considers tips given to restaurant workers as taxable income, since it is considered wage compensation for services rendered. Whether tips are considered taxable income for the purposes of the Internal Revenue Code cannot necessarily be interpreted as a blanket interpretation that tip income constitutes a “contribution to or supplementation of salary” within the meaning of 18 U.S.C. § 209, as the federal government is also required to comply with the Federal Fair Labor Standards Act.

6. The Federal Fair Labor Standards Act has promulgated specific regulations concerning employees who are engaged in occupations that “customarily and regularly” receive tips as income. These statutes therefore must be interpreted in conjunction with each other, as regulations involving tipping of federal employees have not been promulgated under 18 U.S.C. § 209. The legal issue therefore is whether 18 U.S.C. §209 supersedes application of compliance by the federal government with the Fair Labor Standards Act, the promulgated regulations therein, and case law.

The Federal Fair Labor Standards Act requires that employees of the U.S. government be paid a compensatory hourly wage. The FFLSA and implementing regulations permit an employer to calculate tips as part of the compensation paid to employees for the purposes of complying with the federal minimum wage law. The FFLSA does not require employers to calculate tips as part of the minimum wage, as employers have the option to pay the federal minimum wage, and permit employees to retain tips. However, it is a standard practice in the restaurant industry for employers to calculate tips as part of the hourly minimum wage. The Federal government currently does not request that non-appropriated fund employees report their tips for the purposes of calculating the minimum wage credit under FFLSA.

7. For any non-appropriated fund employees who are paid on a basis where tips are calculated by the federal government as a credit toward the federal minimum wage, the employee would be permitted to retain any tips received by any customer. Receipt of tips under this factual scenario involves the employee having borne the burden of not receiving the standard minimum wage, but having their tips included as part of the minimum wage compensation for purposes of the employer's compliance with the FFLSA. Federal regulations promulgated under the FFLSA specifically addresses "tipped employees". The Department of Labor thus recognized that compensation for labor services in certain occupations customarily and regularly involved tips for the purposes of determining whether an employee was receiving a minimum wage in conformity with state and federal law.

8. The ethical issue is more complex where a non-appropriated fund employee receives the full minimum wage from the employer, but yet also receives tips to supplement that minimum wage. In such a scenario, the employer has voluntarily opted to pay the minimum wage to the employee and not calculate tips as part of the employer wage credit under the FFLSA. Apparently, the federal government has voluntarily opted under the FFLSA not to calculate tips as part of the minimum wage for non-appropriated fund employees working as waiters, bartenders and busboys. However, the voluntary decision by the U.S. government not to collect tip income information for the FFLSA wage credit cannot reasonably be interpreted to establish that non-appropriated fund employees were never expected to be offered, or to retain, tips in occupations that customarily and ordinarily involve such a form of compensation. In fact, the undersigned Ethics Counselor has never personally observed any dining club or restaurant establishment that expressly prohibited tips as a part of their daily operations.

9. 29 C.F.R. §531.50(a) provides the general rule for employers who choose to calculate tips for the purpose of minimum wage compliance:

With respect to tipped employees, section 3(m) provides: In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (whether himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount such employee by his employer shall be deemed to have been increased by such lesser amount.

10. A "tipped employee" is defined in section 3(t) of the FFLSA as "any employee engaged in an occupation in which he customarily and regularly receives more than \$20 a

month in tips.” However, 29 U.S.C. § 203(t) was modified in 1977 to define a “tipped employee” as one who customarily and regularly receives more than \$30.00 a month in tips. 29 C.F.R. §531.52 defines “tip” as:

“...a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of any agreement to the contract between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a “tipped employee” within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips. (Emphasis added).

11. 29 U.S.C. § 203(e)(2)(A) defines “employee” as:

“any individual employed by the Government of the United States – (i) as a civilian in the military departments..... and (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,....”

Therefore, both appropriated fund and non-appropriated fund employees are considered as employees under the Fair Labor Standards Act. Thus, the FFLSA by federal statute and regulations promulgated thereunder included federal employees as possibly being in a type of occupation that “customarily and regularly” receives tips in excess of \$30.00 per month. 29 U.S.C. 203(t); 29 C.F.R. § 531.57.

12. Case law interpreting the Fair Labor Standards Act, 29 U.S.C. 201 et seq., concerning tips paid to workers generally accepts the principle that in the absence of an express agreement between the employer and the employee, tips belong to the employee to whom they were left, and the employer was required to pay his tipped employees at least one-half of applicable minimum wage in addition to tips left them by customers. Richard v. Marriott Corp., 549 F. 2d 303, cert. denied, 433 U.S. 915 (4th Cir. 1977); Barcelona v. Tiffany English Pub, Inc., 597 F.2d 464 (5th Cir. 1979). An agreement under which employees had to turn in all monies collected as tips and be reimbursed just up to the amount that would equal minimum wage was held to violate the Fair Labor Standards Act, which limits amount by which employer can reduce its minimum wage obligation by treating employees tips as wages. Wright v. U-Let-Us Skycap Services, Inc., 648 F. Supp. 1216 (1986).

In Dole v. Continental Cuisine, Inc., 751 F. Supp. 799 (E.D. Ark. 1990), the court held that participation by a restaurant maitre d' in a restaurant tip pool did not deprive the restaurant of its entitlement to the minimum wage tip credit under the Fair Labor Standards Act; the maitre d' was not an employer and was the type of employee who would customarily receive tips. The court in Elkins v. Showcase, Inc., 704 P.2d 977 (Kan. 1985), held that bartenders whose functions were performed away from customers were "non-service" bartenders who did not "customarily and regularly" receive tips with the meaning of the Fair Labor Standards Act. Thus, payment of 40 percent of tip pool to "non-service" bartenders was held to violate the Act.

Thus, the Federal Fair Labor Standards Act, the regulations promulgated therein, and case law, establish that in absence of an agreement between the employer and the employee to the contrary, tips given by customers to an employee are the property of the employee. You have indicated to me that currently there is no agreement between the federal government and its non-appropriated fund employees that all tips belong to the federal government. In the absence of such an agreement, it appears that the government's responsibility to comply with the FFLSA requires that any tip provided to an employee whose occupation would "customarily and regularly" involve the receipt of tips is entitled to retain that compensation. 29 C.F.R. §531.57. Non-appropriated fund employees who customarily and regularly receive tips within the definition of 29 C.F.R. §531.27 would include waiters/waitresses, bartenders, and busboys who regularly and customarily deal with the general public as their primary employment duties. Such tips are taxable income, and the Ethics Guidelines require all federal employees to comply with proper filing of federal and state income tax returns.

14. Restaurant Managers. The primary duties and obligations of appropriated fund employees such as managers and assistant managers would not fall within the definition of an occupation that "customarily and regularly" receives tips. Customers do not "customarily and regularly" tip the club manager. While it is certainly foreseeable that managers/assistant managers in an emergency or unanticipated labor shortage may be required to "fill in" on behalf of a bartender or waiter, it cannot be said that such duties are customary and regular. Furthermore, the duties and obligations of club managers/assistant managers include management, supervisory, and operational control over club operations including relationships with government contractors, suppliers, and assessing performance of subordinate employees and non-appropriated fund employees. Therefore, as the ordinary, customary and regular duties of an office manager or assistant manager of a restaurant would not involve or contemplate the receipt of tips, such a payment would fall outside the definition of 29 C.F.R. §531.27.

15. It is clear that Congressional intent under 18 U.S.C. § 209(a) would prohibit federal employees from receiving additional compensation where their duties would not "ordinarily or customarily" involve the receipt of tips as compensation. Therefore, appropriated fund employees whose duties and obligations within the restaurant trade do

not “customarily and regularly” involve the receipt of tips would be prohibited from soliciting or receiving any tip as additional compensation under 18 U.S.C. § 209.

16. Consequently, restaurant managers or assistant managers who are offered a tip during the occasional and infrequent times they operate as a bartender, waiter, or similar type of duties would be required to either refuse the tip, or accept the tip on behalf of the employees who customarily and regularly receive tips within the meaning of 29 C.F.R. § 531.57 under a tip-pooling agreement between those employees. The Ethics Guidelines require that federal employees avoid even the appearance of impropriety. 5 C.F.R. § 2635.502. Restaurant managers and assistant managers exercise management control over issues involving government contracting, employee supervision, and business operations. Restaurant managers also act as custodians of public money within the purview of the Miscellaneous Receipts Act, 31 U.S.C. § 3302. These integral and primary duties and responsibilities obviously place restaurant managers in an occupational position that does not “customarily and regularly” involve tips as compensation.

17. Volunteers who are tipped. Individuals who volunteer to work for tips are not federal employees within the meaning of the Fair Labor Standards Act or the Dual Compensation Act. Therefore, the Joint Ethics Regulations would not apply to these employees. Whether a federal instrumentality should develop and encourage volunteers to perform labor services as a pattern or practice is an issue outside the scope of this Ethics Opinion.

18. Policy of Charging Tips for Large Parties. Some private restaurants as an industry practice charge an established percentage of the bill for large parties over a specified number of people. Currently, the percentage ordinarily charged varies between fifteen and twenty percent. Many restaurants initiated this practice to ensure that the waiters and waitresses would receive a guaranteed tip for serving a large number of customers. Once again, the pertinent regulation under the Fair Labor Standards Act defines “tip” as:

“...a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of any agreement to the contract between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a “tipped employee” within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips. (Emphasis added). 29 C.F.R. § 531.52.

While such a practice does not currently exist here, implementing a policy to impose tips on large groups would not be permitted under the Ethics Guidelines. Such a policy would impose a contractual condition prior to any customer receiving service. Therefore, the unilateral imposition of a contractual condition that the restaurant operation imposes upon the customer to pay a tip would not conform to the legal definition of a “tip” within the meaning of the Fair Labor Standards Act. Tips are voluntary, and initiating such a practice would clearly eliminate the voluntary character of any tip given by a customer. Furthermore, as such a policy would impose a charge on any customer, any “tip” charged to the customer could not possibly be considered a gift under the Ethics Rules. Additionally, the practice of recommending that a tip be given, or recommending a certain percentage of the bill be provided as a tip would constitute solicitation of a gift of money, and thus would be also prohibited under the Ethics Guidelines.

19. Federal Fair Labor Standards Act v. Dual Compensation Act. The Federal Fair Labor Standards Act and the Federal Dual Compensation Act must be construed, if possible, as consistent with each other. The Federal Fair Labor Standards Act clearly was intended to address in part occupations involving tips, and includes both appropriated and non-appropriated fund employees within its application. Settled rules of statutory construction require that when faced with potentially conflicting statutes, the proper course is to interpret them harmoniously to eliminate any conflict. Rodgers v. United States, 185 U.S. 83, 87-89 (1902); United States v. Borden Co., 308 U.S. 188, 198 (1939); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155, 48 L.Ed. 2d 540, 96 S. Ct. 1989 (1976). Therefore, reasonable statutory construction would dictate that the Federal Fair Labor Standards Act, the “tip” regulations promulgated therein and relevant court decisions specifically requires that tips are the property of the employee, in the absence of an agreement between the employee and a third party, where the employee’s occupation is one which “customarily and regularly” involves tips as a portion of the wage compensation. The Dual Compensation Act would prohibit the receipt of tips by any federal employee whose occupational duties would not “customarily and regularly” involve tips as a portion of the employee’s wage compensation.

20. Summary. Employees whose occupational duties are of the type that would “customarily and regularly” receive tips are entitled to retain that income under the Fair Labor Standards Act, in the absence of an agreement between the government and employee that all tips are to be reported for purposes of calculating the employer minimum wage credit under the FLSA. Both appropriated fund and non-appropriated fund employees whose primary occupational duties do not customarily and regularly involve tips, or involve government contracting, restaurant management, supervision of employees or other fiduciary duties are prohibited under 18 U.S.C. § 209 from soliciting or accepting tips as a “contribution to or supplementation of salary”. Such occupational

duties would not “customarily and regularly” involve the receipt of tips within the regulatory requirements of 29 C.F.R. § 531.57 promulgated pursuant to the Fair Labor Standards Act.

21. I appreciate your request for an Ethics Opinion concerning this matter. Should you have any further questions, please do not hesitate to contact me at your earliest convenience at _____.

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Ethics Counselor