

**Ethics Through Green Eye-Shades:
Maintaining Your Agency's Fiscal Fitness**

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I. References.

- A. 31 U.S.C. § 1301; 1344; 1349.
- B. Pub. L. No. 101-94, sec. 503, Ethics Reform Act of 1989.
- C. Exec. Order No. 12674, *as amended by* Exec. Order No. 12731, Principles of Ethical Conduct for Government Officers and Employees (Oct. 17, 1990).
- D. Standards of Ethical Conduct for the Executive Branch, 5 C.F.R. Part 2635.
- E. Office of Management and Budget (OMB) Circular A-126, "Improving the Management and Use of Government Aircraft," 22 May 1992.
- F. 5 C.F.R. Part 251, Agency Relationships with Organizations Representing Federal Employees and Other Organizations (1997).
- G. 5 C.F.R. Part 3801, Supplemental Standards of Ethical Conduct for Employees of the Department of Justice (1997).
- H. 41 C.F.R. Subpart 101-6.4, Home-to-Work Transportation.
- I. 41 C.F.R. Subpart 101-20.4, Occasional Use of Public Buildings (1997).
- J. 41 C.F.R. Part 101-35, Telecommunications Management Policy (1997).

K. GAO, Principles of Federal Appropriations Law (2d ed. 1991), Volumes I-III.

II. Introduction. The purpose of this session is two-fold:

- A. Review, from a fiscal law perspective, the Office of Government Ethics (OGE) regulations pertaining to use of government resources.
- B. Propose methodologies for assessing the legal sufficiency of agency regulations that define the "authorized purposes" for which government resources may be used.
 - (1) Under what circumstances may federal agencies permit their employees to use government resources for personal purposes?
 - (2) Under what circumstances may federal agencies use official resources in support of non-federal entities?

III. The Roles of OGE and Individual Agencies in Regulating the Use of Government Property.

- A. OGE's Regulation. Federal employees must protect and conserve Government property and refrain from using or allowing its use for purposes other than those for which it is made available to the public *or those authorized in accordance with law or regulation.* 5 C.F.R. 2635.704.
 - (1) The Standards of Ethical Conduct acknowledge that "there may be circumstances when an employee may properly use Government property or official time for activities other than the performance of the official duties of the employee's position." Office of Government Ethics (OGE) Letter to General Counsel, Office of

Personnel Management, dated March 21, 1997.

- (2) Thus, by definition, employees who use government property in accordance with applicable laws and regulations do not violate the Standards. OGE Informal Advisory Letter 95 X 13, 1995 WL 855438 (Dec. 1, 1995).

B. Individual Agencies' Role in Regulating the Use of Property.

- (1) The General Services Administration (GSA) and the Office of Personnel Management (OPM) are authorized to promulgate executive branch-wide regulations governing the use of government resources.
- (2) Except as limited by statute or regulation, federal agencies possess the discretion to promulgate departmental regulations governing the use of government resources. OGE Informal Advisory Letter 93 X 6, 1993 WL 721226, Mar. 10, 1993.
- (3) The Office of Government Ethics (OGE) does not have the authority to promulgate any expansion or limitation of other agencies' regulations governing the use of government property. OGE Informal Advisory Letter 95 X 13, 1995 WL 855438, Dec. 1, 1995.

- a. OGE's authority is limited to implementing the principle of conduct stated in the Executive Order 12674 that "Employees shall protect and conserve Federal property and shall not use it for other than authorized purposes."
- b. Thus, OGE's regulations only purport to define what is meant by "authorized

purposes" (i.e., purposes for which government property is made available to members of the public or *those purposes authorized by law or regulation*).

IV. General Restriction. Employees must protect and conserve Government property and use it (or allow its use) only for authorized purposes. 5 C.F.R. § 2635.704(a).

- A. This restriction is based on the general principle set forth at 5 C.F.R. § 2635.101(9) and Exec. Order No. 12674, April 12, 1989, as amended by Exec. Order No. 12731, October 19, 1990, Part I(i) ("Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.")
- B. "Government property" includes real or personal property in which the government has any property interest, and any right or other intangible interest (including contractor services) purchased with government funds. 5 C.F.R. § 2635.704(b)(1). Also, any benefit to which the government is entitled, resulting from expenditure of appropriated funds, belongs to the government, and may not be accepted for personal use. 5 C.F.R. § 2635.204(c)(3).
- C. "Authorized purposes" are purposes for which government property is made available to the public, or purposes authorized under law or regulation. 5 C.F.R. § 2635.704(b)(2).
- D. Duty to protect and conserve government property and to use it only for authorized purposes is attended by an obligation to disclose waste, fraud, abuse, and corruption to appropriate authorities. See 5 C.F.R. § 2635.101(11).

V. Relationship Between Fiscal Law and Ethics

Regulations.

A. The Nature of Fiscal Law.

- (1) Fundamental Axiom: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317, 321 (1976).
- (2) Congressional "Power of the Purse". Congress is constitutionally vested with the power to appropriate funds and to prescribe the conditions governing their use. Article I, section 9, clause 7.
- (3) A "central theme underlying much of federal fiscal law and policy" is the "*natural antithesis of executive flexibility and congressional control.*" I GAO, Principles of Federal Appropriations Law (2d ed. 1991) 1-8.

B. The Fundamental Fiscal Law Principle:

Appropriated funds are available only for the objects for which the appropriations were made.
31 U.S.C. § 1301(a) (the "Purpose Statute").

- (1) Congress cannot specify every item of expenditure in agency appropriation acts. Thus, under the "necessary expense rule," appropriations made for particular objects, by implication, confer authority to incur expenses that are reasonably necessary or incident to the proper execution of those objects. See 71 Comp. Gen. 527 (1992).
- (2) Application of the "necessary expense rule" is a matter of agency discretion.

(3) In reviewing the propriety of an expenditure, the Comptroller General considers whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. See Ms. Comp. Gen. B-257488 (Nov. 6, 1995).

C. The Comptroller General of the United States retains authority under 31 U.S.C. 3529 to issue decisions to disbursing or certifying officers and heads of agencies on matters involving the use of appropriated funds that do not specifically involve settling a claim or other functions transferred to the Director of the Office of Management and Budget by section 211 of the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, 109 Stat. 514, 535 (1995). Ms. Comp. Gen. B-275605 (Mar. 17, 1997).

D. Violations of the Purpose Statute may result in violations of the Antideficiency Act, 31 U.S.C. 1341, a criminal statute.

VI. Restrictions on Use of Particular Types of Government Resources.

A. *Official Time.* Employees must use official time in an honest effort to perform official duties, unless authorized under law or regulation to use official time for other purpose. 5 C.F.R. § 2635.705(a). Employees who are not under a leave system, including Presidential appointees, must expend an honest effort and a reasonable proportion of their time in the performance of official duties. OGE Informal Advisory Letter 95 x 9, WL 855435 (1995).

B. *Official Authority.* **"An employee shall not use his public office for his own private gain, for**

the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations." 5 C.F.R. § 2635.702. "Official authority" (i.e., position, title or any authority associated with public office) may not be used to:

- (1) Coerce or induce any person to provide any benefit to the employee or any person with whom the employee is affiliated in nongovernmental capacity. 5 C.F.R. § 2635.702(a).
- (2) Imply official endorsement of personal activities. 5 C.F.R. § 2635.702(b).
- (3) Endorse any product, service or enterprise except as statutorily authorized, or pursuant to agency programs that recognize accomplishments or compliance with agency standards.

C. *Nonpublic Information.* Information gained through federal employment that the employee knows or should know has not been made publicly available may not be used in financial transactions, or to further private interests. 5 C.F.R. § 2635.703.

D. *Subordinates.* **"An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation."** 5 C.F.R. 2635.705(b).

E. *Communication Systems.*

- (1) Telephone calls placed over Government-provided and commercial long distance systems that will be paid for or reimbursed by the Government, shall be used to conduct official business only. 41 C.F.R. 101-35.201(c)(1).
- (2) "Official business" calls may include emergency calls and other calls the agency determines are necessary in the interest of the Government.
- (3) Agencies may properly authorize telephone calls that:
 - (a) Do not adversely affect performance of official duties;
 - (b) Are of reasonable duration and frequency; and
 - (c) Could not reasonably have been made at another time; or
 - (d) Are provided for in a collective bargaining agreement.
- (4) Personal long distance calls may be made over the commercial long distance network if they meet the above criteria and are not charged to the Government.
- (5) Agencies must issue directives on using telephone services (including contractor-operated facilities). The directives may further define calls that are "necessary in the interest of the Government" and must include procedures for collecting reimbursement for unauthorized calls. 41 C.F.R. 181-35.281(d)(3). (Agencies must collect for unauthorized calls, if it is cost-effective to do so, and collections shall include the administrative costs of processing the collection, as well as the

value of the call. Reimbursing the Government for unauthorized calls does not exempt an employee from appropriate administrative, civil, or criminal action. 41 C.F.R. 181-35.282.

F. *Vehicles.*

(1) General Limitation. Appropriated funds may be expended for maintenance, operation, or repair of passenger carriers only if the carrier is used to provide transportation for official purposes. 31 U.S.C. § 1344(a)(1). Thus, government vehicles may only be used for official purposes. See Ms. Comp. Gen. B-275365 (Dec. 17, 1996).

(a) Employees who willfully use or authorize the use of a government vehicle or aircraft for other than official purposes violate 31 U.S.C. § 1344, and shall be suspended without pay for at least one month or, when circumstances warrant, for a longer period of summarily removed from office.

(b) This penalty is mandatory, and there is no authority to impose a lesser sanction. See *Fields v. Veterans Administration*, 21 M.S.P.R. 176, 177 (Merit Systems Protection Board 1984).

(c) Whether misuse of a government vehicle is "willful" is a question of fact to be determined by the employee's agency. The standard requires actual knowledge that the use would be characterized as "nonofficial" or reckless disregard as to whether the use was for nonofficial

purposes.

(2) Specific Rules on Use of Vehicles.

(a) Government vehicles may not be used to transport personnel over all or any part of the route between their domiciles and places of employment ("home to work"). Exceptions (for "field work," "clear and present danger," "emergency" and "compelling operational considerations") require Service Secretary approval.

(b) Rental car agreements are contracts between agency employees and car rental agencies. Thus, a rental car may be used like a personally owned vehicle, even if the government reimburses the employee for the costs attributable to official use.

VII. Personal Use of Government Resources. Agencies may authorize limited **personal** use of government resources (other than vehicles) by their employees. See, e.g., 28 C.F.R. 45.4 (authorizing personal use of government property by Department of Justice employees). Agencies should authorize personal use of government property by their employees only if such use:

- A. Does not interfere with official duty performance;
- B. Is of reasonable duration and frequency;
- C. Is in the agency's interest; and
- D. Creates no significant additional cost to the government.

VIII. Enforcement.

- A. The Merit Systems Protection Board regards misuse of government resources as a serious charge. The Board has upheld suspensions of 38 days or more for sustained charges of misuse of government resources. *Barcia v. Department of the Army*, 47 M.S.P.R. 423 (1991) (38-day suspension was reasonable for appellant's use of government computer to maintain private business records and contact computer firms by modem).
- B. The agency is not required to prove intent to sustain a charge of misuse of government property. *Sternberg v. Department of Defense, Dependents Schools*, 52 M.S.P.R. 547 (1992)
- C. Charge of misusing government property can be sustained regardless of whether the employee paid for such usage. *Wenzel v. Department of the Interior*, 33 M.S.P.R. 344 (1987).

IX. Support of Non-Federal Entities.

- A. General limitation. Federal agencies cannot use appropriated funds to supply services or manufacture products or materials for private parties in the absence of specific authority. 62 Comp. Gen. 323 (1983).
 - (1) The performance of services by government personnel for private entities constitutes an improper use of appropriated funds, even if the government is compensated therefor or reimbursed in kind. See 34 Comp. Gen. 599 (1955).
 - (2) The government is solely responsible for supervising and controlling the official performance of its officers and employees, and federal agencies may not delegate this responsibility to a private entity. 31 Comp. Gen. 624 (1952).

B. Authorized Categories of Support.

(1) 42 U.S.C. 1856a (mutual aid fire protection agreements).

(2) Charitable, Community Support and Public Affairs Activities.

(a) "While federal funds, facilities and employees' time are available only for purposes authorized by law, we believe it is not necessary that each and every authorized government employee activity, or for that matter, agency activity be specifically designated by statute." 71 Comp. Gen. 469 (1992).

(b) Agency heads may authorize limited use of appropriated resources in furtherance of recognized and publicly accepted charitable or community support activities. 71 Comp. Gen. 469 (1992).

C. Limitations on Support of Non-Federal Entities.

(1) *Impartiality.*

(a) DoD employees are generally prohibited from engaging in any official activities in which a non-Federal entity is a party or has a financial interest if the DoD employee is an active participant in the non-Federal entity or has been an officer in the non-Federal entity within the last year. 5 C.F.R. § 2635.402 and .502; 18 U.S.C. § 208.

(b) Agency Designees or travel approving authorities who are active participants in non-Federal entities

cannot act on requests to travel to or participate in activities of those entities. See 5 C.F.R. § 2635.402 and .502; 18 U.S.C. § 208.

(2) *Endorsement.*

(a) This restriction stems from general principle that employees must act impartially, and may not give preferential treatment to any private organization or individual. 5 C.F.R. § 2635.101(b)(8).

(b) When acting in a personal capacity, agency employees may not use their official titles, positions or organization names, except as authorized under 5 C.F.R. § 2635.807(b) (allowing limited use of official title or position in connection with off duty teaching, speaking or writing).

(3) *Competition with Private Sector.* The general policy of the federal government is not to compete with available commercial sources in performing commercial activities. See OMB Cir. No. A-76.

D. Forms of Support.

(1) *Distributing Information.* Agencies may permit the use of official information channels to disseminate information pertaining to professional development events; scientific, technical or professional events relevant to the agency's programs or policies; or employee morale and welfare.

(2) *Attendance.*

(a) In official capacity.

(i) Employees may not officially attend events in order to acquire or maintain professional credentials that are minimum requirements of the employee's position. 5 U.S.C. § 5946.

(ii) Events are not "official" if: invitation is extended on a social basis; the event is purely political; the event is one to which people are invited because of such things as their ethnic background, home state, religious or educational background, and not to carry out a function of their agency; the event is a private or non-profit fundraiser. OGE Informal Advisory Letter 85 x 9, WL 57326 (1985).

(b) Excused Absence. Agencies may authorize excused absence for employees who are willing to pay their own expenses to attend a meeting of a professional association or other organization from which an agency could derive some benefits. 5 C.F.R. 251.282(a)(3).

(3) *Participation in Conferences.*

(a) Federal employees may participate as uncompensated speakers, instructors or panelists at a luncheon or symposium when authorized to do so as part of their official duties (even though a registration fee is charged). OGE Informal Advisory Letter 98 x 1, WL 485679 (1998).

- (b) Standard: Employee's participation is in agency's interest and the event is an appropriate forum for the exchange of information relevant to agency programs, operations and responsibilities. (All relevant factors must be considered in determining whether forum is "appropriate", including whether registration fees charged government attendees are in line with the actual costs of the program to the sponsor.)
- (c) Agencies may permit employees to use agency equipment or administrative support services for preparing papers to be presented at conferences or symposia or published in journals. 5 C.F.R. 251.282(a)(1).

(4) *Membership.*

- (a) Appropriated funds may not be used to purchase a federal employee's membership fees or dues in any association or society. 5 U.S.C. 5946. An agency may use appropriated funds to purchase a membership in its own name, provided that such a membership will contribute substantially to the fulfillment of its mission. See, e.g., Ms. Comp. Gen. B-221569 (Jun. 2, 1986).
- (b) Federal employees may serve as liaisons to non-federal entities, and officially represent their agencies in meetings, provided they do not participate in managing or controlling the entity.
- (c) In accordance with agency regulations, federal employees may join organizations in their personal capacity. Note that there membership may create potential conflict of

interest issues under 18 U.S.C. 283, 285 and 288; and 5 C.F.R. 2635.582.

(5) *Management.*

(a) Department of Justice has concluded that 18 U.S.C. § 208 prohibits management of non-Federal entities by federal employees, unless expressly authorized by federal statute, or non-Federal entity repudiates fiduciary duties owed to it under applicable state law.

(b) Preferred means of conducting official business with non-Federal entities is through liaison. Service as liaison avoids conflict of interest and fiscal issues and minimizes DoD employee's potential personal liability.

(6) *Logistical Support.*

(a) Occasional Use of Public Buildings Administered by General Services Administration (GSA).

(i) Any person or organization desiring to use a public area must apply for a permit with the GSA Buildings Manager. 41 C.F.R. Subpart 181-28.4.

(ii) Applications for permits will be disapproved if the proposed use is a commercial activity; interferes with access to the public area; disrupts official business; interferes with approved uses of the property; damages any property; is intended

to influence or impede a judicial proceeding; is obscene; or entails political solicitations in violation of 18 U.S.C. 687.

(b) Provision of agency facilities and equipment (and related personnel services). Agencies may provide limited logistical support, in the form of facilities, equipment, and agency employees necessary for proper use of the equipment), if:

(i) The support does not unduly interfere with the performance of official duties;

(ii) The support furthers the agency's interests;

(iii) The event is an appropriate forum for agency support;

(iv) The agency is willing and able to provide the same support to comparable events sponsored by similar non-Federal entities; and

(v) The support is not prohibited by other statute or regulation.

X. Conclusion. "The protection of the public fisc is a matter that is of interest to every citizen . . ."
Brock v. Pierce County, 476 U.S. 253, 262 (1986).

