05 x 7

Letter to an Alternate Designated Agency Ethics Official dated November 1, 2005

This is in response to your request, transmitted to me by electronic mail message dated October 17, 2005, for guidance concerning the applicability of 5 C.F.R. § 2636.304 to the current Chairman of the [your agency]. Specifically, you request our view as to whether the Chairman is "precluded by 5 C.F.R. § 2636.304 from receiving any compensation for his service" on the board of a nonprofit organization created by Congress and established under the laws of the District of Columbia. In view of your expressed need to advise the Chairman "expeditiously on this matter," we will depart from our general practice of declining to provide advisory letters in response to electronic mail messages. Also in the interest of time, we will assume the facts as set out in your message and will discuss them only as necessary to explain the advice set out below.

The short answer to your question is that section 2636.304 does not necessarily preclude the acceptance of "any" compensation for his [nonprofit organization] board service, but that another provision, section 2636.306, does preclude such acceptance.

COVERED NONCAREER EMPLOYEE

Section 2636.304 is one of several provisions in part 2636 that apply only to covered noncareer employees. *See* 5 C.F.R. part 2636, subpart C. These provisions implement several separate prohibitions and administrative provisions found in Title V of the Ethics in Government Act (EIGA), as amended. *See* 5 U.S.C. app. §§ 501-505. In order to determine whether any of these prohibitions applies to the Chairman, it is necessary to determine whether he is a covered noncareer employee. OGE has defined "covered noncareer employee" in section 2636.303(a). For purposes of your inquiry, three aspects of that definition are particularly relevant: the exclusion for special Government

employees; the pay threshold; and the noncareer appointment requirement.

1. SGE Exclusion

First, the definition excludes special Government employees (SGEs), as defined in 18 U.S.C. § 202. 5 C.F.R. § 2636.303(a); *see* 5 U.S.C. app. § 505(2) (excluding SGEs from the class of covered employees). In pertinent part, SGE is defined as an officer or employee who is "retained, designated, appointed, or employed to perform, . . . for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis." 18 U.S.C. § 202(a). The determination of SGE status is to be made prospectively, based on the agency's good faith estimate of the number of days of service expected during the ensuing 365-day period. As we explained in OGE Advisory Memorandum 00 x 1: "If an agency designates an employee as an SGE, based on a good faith estimate, but the employee unexpectedly serves more than 130 days during the ensuing 365-day period, the individual still will be deemed an SGE for the remainder of that period. However, upon the commencement of the next 365-day period, the agency should reevaluate whether the employee is correctly designated as an SGE, i.e., expected to serve no more than 130 days."[1]

You have concluded that, even though the Chairman had been deemed an SGE in the past, "he can no longer be considered an SGE." This is because the agency now expects him to work in excess of 130 days during the year, in part based on the fact that the Chairman exceeded 130 days in the past two one-year periods and also on the Chairman's own statement that he expects to work more than 130 days per year in the future. Although we believe your determination is quite reasonable, it is not clear to us from your message *when* the Chairman's SGE status will terminate. As noted above, where an advance determination of SGE status is made for a given appointment, that determination

[1] The 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).

is effective for the entire 365-day period that ensues, which does not necessarily correlate with the calendar year.[2] Since we do not know when the last annual designation of SGE status was made for this individual, we do not know when the relevant 365-day period expires. It is clear, however, that whenever such period expires, he will cease to be an SGE, and, consequently, will no longer benefit from the SGE exclusion from the definition of covered noncareer employee.

2. Pay Threshold

The definition of covered noncareer employee also includes a pay criterion. For purposes of your inquiry, the relevant provision in the definition includes employees who occupy a non-General Schedule position for which the rate of basic pay is "equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule. Section 2636.303(a); *see* 5 U.S.C. app. §§ 501(a), 502(a). Pursuant to [citation deleted], the members of [your agency's] board are "entitled to receive compensation equal to the daily equivalent of the compensation prescribed for level IV of the Executive Schedule under section 5315 of Title 5." The rate of basic pay for level IV of the Executive Schedule exceeds 120 percent of the minimum rate for GS-15, and therefore the Chairman's position meets the pay threshold. *See* OGE 90 x 22 (member of board of directors of agency met pay threshold where statute prescribed compensation at rate of pay for Executive Level III).

[2] We have long advised that "an agency should make its best estimate of the number of days to be worked at the time of an individual's original appointment and at the expiration of each 365-day period thereafter." OGE Informal Advisory Letter 90 x 22. Your message makes several references to the number of days the Chairman served in previous calendar years, as well as to the number of days he is expected to serve in the current calendar year, 2005, but there is no indication of the date of the Chairman's original appointment or of any subsequent SGE designations on the anniversary of the original appointment.

3. Noncareer Appointment

The statutory restrictions apply only to "noncareer" employees and officers. 5 U.S.C. app. 501(a), 502(a). The definition of covered noncareer employee, in OGE's implementing regulations, specifies the types of appointments that are covered as noncareer. 5 C.F.R. § 2636.303(a)(1)-(4); *see* OGE Informal Advisory Letter 04 x 10 ("For purposes of type of appointment, the regulations at sections 2636.303(a)(1)-2636.303(a)(4) specify under which appointment authorities employees will be considered covered noncareer employees"). For purposes of your inquiry, the definition includes employees "[a]ppointed by the President to a position . . . that, by statute or as a matter of practice is filled by Presidential appointment," with two exceptions not relevant here. Section 2636.303(a)(1). The Chairman of the [agency] is required by statute to be appointed by the President, with the advice and consent of the Senate. [Citation deleted.] Consequently, the Chairman's position meets the noncareer appointment requirement. *See* OGE 90 x 22 ("As a Presidentially-appointed member of the Board of Directors of the [agency], the Director is a noncareer officer or employee of the Government.").

Therefore, the Chairman would appear to meet the criteria to be considered a covered noncareer employee, as of the date when he is no longer covered by the last one-year SGE designation. *See* OGE 90 x 22 (Presidentially appointed member of board of directors of agency, employed at rate of basic pay for EL III, would be covered noncareer employee, unless agency determined he was expected to work for 130 days or less during the ensuing 365-day period and thus excluded as SGE).

RELEVANT RESTRICTIONS

1. Limitation on Outside Earned Income

Covered noncareer employees are subject to a limitation on the amount of outside earned income they may receive attributable to a given calendar year. This statutory requirement, found at 5 U.S.C. app. § 501(a), is the restriction that is implemented by 5 C.F.R. § 2636.304, the rule to which

you refer in your message. However, you should be aware that neither the statute nor the implementing rule imposes an absolute ban on any outside earned income; rather, the requirement is simply a limitation on the amount that can be received in a calendar year. Specifically, a covered noncareer employee may not receive outside earned income in excess of 15% of the rate of basic pay for Executive Level II, as in effect on January 1 of the given year. In 2005, for example, covered noncareer employees may not receive in excess of $24,315, which is 15% of the rate of basic pay for EL II this year. For individuals who become covered noncareer employees for only a part of the calendar year, the law requires that the amount of permissible outside earned income be pro rated according to a formula set out in the statute and the implementing regulations. 5 U.S.C. app. § 501(a)(2); 5 C.F.R. § 2636.304(b). If it turns out, for example, that the Chairman is properly considered an SGE for some part of 2005, pursuant to a prior one-year SGE designation, then the amount of permissible outside earned income for the remainder of the year when he is no longer an SGE must be prorated accordingly.

In any event, we cannot say that section 2636.304 prohibits "any" compensation from the [nonprofit organization], as you inquired, since the rule and the statute permit outside earned income up to the applicable 15% ceiling. A determination would have to be made concerning the amount of outside earned income the Chairman is permitted for the year, and that limit would have to be applied to the amount of income earned during the relevant year, not only from the [nonprofit organization] but from any other outside source.

There may be some question concerning whether the compensation from the [nonprofit organization] should even be counted toward the earned income limit. The Office of Government Ethics has defined "outside earned income and compensation," for purposes of all the restrictions applicable to covered noncareer employees in subpart C, to exclude "salary, benefits and allowances paid by the United States Government." 5 C.F.R. § 2636.303(b). The [nonprofit organization] is a nonprofit corporation that was created by Congress and receives most of its funding from Federal appropriations. [Citation

deleted.] However, Congress' purpose was to create "a private corporation," [citation deleted], subject to District of Columbia nonprofit corporation law, [citation deleted], and Congress specified that the [nonprofit organization] "will not be an agency or establishment of the United States Government," [citation deleted.][3] Furthermore, although board members [of the nonprofit organization] are appointed by the President (with the advice and consent of the Senate), the "Members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States." [Citation deleted.] Under these circumstances, we are not inclined to view any compensation the Chairman may receive for serving on the board [of the nonprofit organization] as "salary, benefits and allowances paid by the United States Government" that can be excluded from the definition of outside earned income and compensation.

Finally, we want to emphasize that the 15% limitation on outside earned income, under 5 U.S.C. app. § 501(a) and 5 C.F.R. § 2636.304, is not to be confused with the absolute ban on outside earned income, under section 102 of Executive Order 12674, as amended by Executive Order 12731. The Executive order prohibition is applicable only to Presidential appointees to a "full-time" noncareer position. This total ban in the Executive Order is applicable to a subset of noncareer employees covered by the statutory 15% limitation, but not all employees covered by the 15% limitation are subject to the Executive order provision. *See* 5 C.F.R. § 2636.302 (explaining the relationship between the two requirements). It does not appear that the Executive order ban applies to the Chairman: your message indicates that he is a "part time or intermittent" employee,

[3] As one court has put it: "Congress knows how to create entities and confer upon them non-governmental status when it is Congress' intention to do so. In establishing Amtrak and the Corporation for Public Broadcasting, for example, Congress explicitly provided that they were not agencies or establishments of the United States Government." *Baker v. Runyon*, 114 F.3d 668, 671 (7th Cir. 1997), *cert. denied*, 525 U.S. 929 (1998). *See also* 21 Op. O.L.C. 96 n.6 (1997) . . . .

rather than a full-time employee.[4] Your conclusion that the Chairman may not be deemed an SGE for the next relevant 365-day period does not preclude you from determining that he is not a full-time employee. Whether or not an employee is full-time does not necessarily correspond to whether or not an employee is an SGE, as is plainly indicated by the statutory definition of SGE, which refers to "temporary duties *either* on a full-time or intermittent basis." 18 U.S.C. § 202(a). As a general matter, it is not surprising to find employees working less than a full-time schedule who do not qualify as SGEs. *See, e.g.*, 5 C.F.R. part 340 (OPM rules governing part-time, seasonal and intermittent employment, including provisions on part-time employment for up to 32 hours per week of an equal or varied number of hours per day).

2. Prohibition on Compensation for Board Service

In addition to any other limits on outside earned income, there is flat prohibition on receipt of compensation for service as an officer or member of the board of any association, corporation, or other entity. 5 U.S.C. app. § 502(a)(4); 5 C.F.R. § 2636.306. The OGE implementing regulation states that "association, corporation or other entity" is "not limited to for-profit entities, but includes nonprofit entities." § 2636.306(b); *see* 56 *Federal Register* 1721, 1722 (January 17, 1991)("The interim rule at § 2636.306 makes it clear that the former prohibition applies to compensated service with nonprofit as well as for-profit entities"). Since the [nonprofit organization] is clearly a nonprofit corporation, subject to District of Columbia nonprofit corporation law, the Chairman would be prohibited from receiving any compensation for service

[4] In addition to the information provided on this subject in your message, we note also that OGE's recent review of the ethics program at [your agency] reflects your agency's conclusion that members of the board work "an hour here and an hour there." Letter of Jack Covaleski, Deputy Director, Office of Agency Programs, OGE, to DAEO, at 3, 2005. *See generally* OPM, *Guide to Processing Personnel Actions*, ch. 35, at 35-6, December 26, 2004 ("Intermittent service or intermittent employment—service when employee works on less than a full-time basis with no prescheduled tour of duty").

on the board [of the nonprofit organization], as of the date when he can no longer be deemed an SGE.[5]

It is important to remember that, unlike the 15% limitation discussed above, the law provides for no permissible amount of compensation for board service. However, as the implementing regulation emphasizes, "[n]othing in this section prohibits uncompensated service with any entity." § 2636.306(a). Therefore, this restriction does not prohibit the [agency] Chairman from serving on the board [of the nonprofit organization], but only from receiving compensation for doing so (provided, again, that he no longer qualifies as an SGE).

3. Other Restrictions

In addition to the restrictions discussed above, the Chairman should be advised that covered noncareer employees are subject to a number of other special restrictions. Although these restrictions may not be immediately relevant to your specific inquiry, it is important that any covered noncareer employee be aware of all applicable ethical requirements.

Subpart C of part 2636 explains in detail the other restrictions and requirements applicable to covered noncareer employees under Title V of the EIGA. These include several restrictions relating to professions involving a fiduciary relationship, section 2636.305, and a requirement for advance authorization to engage in teaching for compensation, section 2636.307. *See* 5 U.S.C. app. § 502. Apart from part 2636 and Title V of EIGA, covered noncareer employees are subject to broader restrictions than other federal employees on receipt of compensation for teaching, speaking and writing related to official duties. *See* 5 C.F.R. § 2635.807(a)(2)(i)(E)(3), (iii)(D).

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[5] Note that the same definition of outside earned income and compensation discussed above, 5 C.F.R. § 2636.303(b), applies to this prohibition as well. It follows from our earlier discussion, therefore, that compensation for service on the board [of the nonprofit organization] is not excluded from the compensation prohibition as salary "paid by the United States Government."

Finally, the Chairman should be advised that the absence of an SGE designation will subject him to a number of other requirements that are generally more strict than those applicable to SGEs. This subject is discussed comprehensively in OGE 00 x 1, cited above, and we would refer you to that document for guidance. It is worth noting here, however, that a number of these restrictions are found in criminal statutes. *E.g.*, 18 U.S.C. § 209(c) (prohibition on outside supplementation of Federal salary not applicable to SGEs). Some of these heightened restrictions may have an impact on the Chairman's outside activities, including activities on behalf of the [nonprofit organization]. *E.g.*, 18 U.S.C. § 205(c)(prohibition on representing another before agency or court in particular matters in which United States is party or has direct and substantial interest, limited with respect to SGEs).

We hope this information is helpful to you.

Sincerely,

Marilyn L. Glynn
General Counsel