

Office of Government Ethics

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Letter to the Head of an Agency dated January 13, 1994

This is in response to your memorandum dated December 20, 1993, by which you forwarded for our review and comment proposed procedures for handling complaints that administrative law judges at [an agency within a] Department have engaged in certain types of misconduct during the hearings and appeals process. We offer the following comments and suggestions about two items in the proposed procedures which are of particular interest to the Office of Government Ethics (OGE).

First, among the complaints that are listed on page 3 as being subject to the procedures is that an administrative law judge has engaged in conduct:

[v]iolating applicable standards of conduct, including those standards adopted by the Office of Government Ethics (OGE), [the Department, the agency within the Department, or the division within the agency] that pertain to areas affecting the hearing and deciding of claims but not including purely ministerial or private activities unrelated to the hearings process.

With regard to this type of complaint, it is explained later on page 3 that "[a]lleged misconduct in areas not affecting the hearing and deciding of claims for benefits, such as ministerial matters, private investment activities, publication and teaching, and personal ethics would not be within the purview of the proposed review process."

It appears from this that the executive branchwide Standards of Ethical Conduct regulation that OGE has issued in 5 C.F.R. part 2635, together with other "standards of conduct" issued by various components of [the Department], will be applied as a judicial "Code of Conduct" at [the agency within the Department]. OGE does not have any objection to this per se. All [Department] employees, including [agency] administrative law judges, must comply with the OGE Standards of Ethical Conduct when acting in either their official or personal capacities; while the OGE Standards of Ethical Conduct do not specifically address conduct during

administrative hearings and appeals, employees involved in that process would be bound by the Standards with respect to that involvement. A violation of the Standards may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures.

You should be aware, however, that any agency regulation which supplements the provisions of the Standards of Ethical Conduct in 5 C.F.R. part 2635, and which is not based on authority independent from that part, can only be issued by an agency jointly with OGE after OGE's concurrence.¹ Indeed, OGE has been working with the Designated Agency Ethics Official (DAEO) at [the Department] to develop agency regulations that will supplement the Standards of Ethical Conduct. The reference in the proposed procedure to standards of conduct "adopted by . . . [the agency] or [the division within the agency]" suggests that there will be conduct rules for [agency] administrative law judges that are separate from the supplemental regulation. Those separate rules should be coordinated with the [Department] DAEO in order to ensure that they should not be issued as part of the supplemental regulation.

The second item in the proposed procedures which is of particular interest to OGE are the statements on page 8 that those members of [a] Board (which will review and evaluate complaints against administrative law judges) who come from "outside" the Government may be employed "as special Government employees for purposes of the Board" and "would then be subject to the same . . . conflict of interest . . . requirements as 'regular' Federal employees." The description of Board members' responsibilities does indicate that those members who are not already Government employees could be appointed or employed as "special Government employees," as that term is defined at 18 U.S.C. § 202(a), so long as the requisite advance determinations are made that they will not serve for more than 130 days during any period of 365 consecutive days. However, it is incorrect to say that a special Government employee is subject to the "same" conflict of interest requirements as other employees. In fact, the prohibitions applicable to special Government employees are less stringent than those which affect regular employees. Accordingly, it would be better if the statement in this regard were rephrased to say only that if Board members are appointed or employed as special Government employees, they would then be subject to the conflict of interest requirements that apply to such employees.

Thank you for seeking our views on this important matter. Please let me know if we may be of any additional assistance.

Sincerely,

Stephen D. Potts
Director

1Agency issuances regarding procedures, such as those you forwarded for our review, are outside the scope of the Standards and will not be considered supplemental agency regulations which require OGE concurrence and joint issuance.