

Office of Government Ethics

94 x 8 -- 02/23/94

Letter to a Designated Agency Ethics Official dated February 23, 1994

This is in reply to your letter dated November 16, 1993, in which you request our opinion concerning the application of 18 U.S.C. § 205 to employees of your agency who provide representational services to complainants in Equal Employment Opportunity (EEO) proceedings and to persons who furnish information to [an Office in your agency] regarding alleged or suspected [particular] misconduct. You have asked for confirmation of informal advice on this topic supposedly provided by the Office of Government Ethics (OGE) to a member of your staff.

When your office first inquired about this matter, it was in the context of two employees who, without any official permission and during work hours, leave their work stations to accompany other employees to [the Office]. According to what OGE was told at the time of the initial inquiry, the two employees do not have any first hand knowledge of the alleged [particular] misconduct; they provide representational services to the other employees on the basis of their personal experiences with disclosing alleged wrongdoing at your agency and their self-taught knowledge of [the Office's] procedures. As an aside during the initial inquiry, it was mentioned that the two employees also represented complainants in EEO proceedings at your agency.

18 U.S.C. § 205

Section 205(a)(2) of title 18, United States Code, makes it a felony for any Federal employee, "other than in the proper discharge of his official duties," to act as agent or attorney, with or without compensation, for anyone else before an agency in connection with any covered matter¹ in which the United States is a party or has a direct and substantial interest. An exception to this prohibition permits an employee, "if not inconsistent with the faithful performance of his duties," to act without compensation as agent or attorney for, or otherwise represent, "any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings." 18 U.S.C. § 205(d).

There is a clear distinction in the statute between an activity performed by an employee while discharging his official duties and an activity that is not inconsistent with the employee's performance of his

official duties. The inclusion of the term "other than in the proper discharge of his official duties" in 18 U.S.C. § 205(a)(2) suggests that Congress did not intend to limit the ability of Federal agencies to assign employees to tasks that would involve their representing other parties. 4B Op. O.L.C. 498, 504 (1980). On the other hand, the exception for an employee's representational activities relating to personnel administration proceedings, "if not inconsistent with the faithful performance of his duties," would apply only with respect to activities that are not among the employee's official duties.

Being allowed to engage in an activity on "official time" would not bring the activity within the scope of an employee's official duties. As is the case with excused absence (also called "administrative leave"), when an employee is granted "official time" for an activity, the employee is excused from performing his official duties during work hours without charge to leave or loss of pay. For example, under the Federal Service Labor-Management Relations Statute (FSLMRS), an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be authorized official time for such purposes, "during the time that the employee otherwise would be in a duty status." 5 U.S.C. § 7131.2

It is not up to the employee to decide whether a given representational activity is permitted by 18 U.S.C. § 205. Deciding whether a representational activity is "in the proper discharge" of an employee's official duties requires the employee's official superiors to make a factual determination of whether a proposed representational activity falls within the scope of the employee's official duties, i.e., whether the activity is part of the employee's job. OGE Informal Advisory Letter 88 x 14.

Similarly, under the "personnel administration proceeding" exception at 18 U.S.C. § 205(d), the facts, parties, or particular issues of the proceeding must be evaluated by the employee's superiors so that they can determine on a case-by-case basis whether the employee's representation in the proceeding is "not inconsistent with the faithful performance" of the employee's duties. OGE Informal Advisory Letters 82 x 19 and 88 x 3. A representational activity would be inconsistent with the "faithful performance" of an employee's duties if it conflicted with the employee's official duties or if it otherwise interfered with the employee's ability to carry out his official duties.

EEO Proceedings

An EEO complaint is a personnel administration proceeding. The complainant in an EEO proceeding would be a person who is the subject of the proceeding. Accordingly, under 18 U.S.C. § 205(d) an employee would

be permitted to act without compensation as agent or attorney for, or otherwise represent, the complainant in an EEO proceeding "if not inconsistent with the faithful performance of his duties."

Your letter states that your office was advised by OGE that the exception in 18 U.S.C. § 205(d) does not apply to representation of a complainant in an EEO proceeding. That is not what your office was advised, and that is not OGE's opinion on this subject. Your office suggested after the initial inquiry that [the Office] proceedings might be analogous to EEO proceedings, and asked whether an employee therefore could represent another employee in an [Office] proceeding just as an employee could represent another employee who is the complainant in an EEO

proceeding. In response, your office was advised that EEO proceedings and [Office] proceedings did not seem to be analogous, and it was suggested that your office look at the regulations of the Equal Employment Opportunity Commission (EEOC).

Because an EEO complaint is a personnel administration proceeding, the EEOC's regulations regarding representation during the processing of an EEO complaint are consistent with 18 U.S.C. § 205(d) in providing that "[a]t any stage in the processing of a complaint . . . the complainant shall have the right to be accompanied, represented, and advised by a representative of [the] complainant's choice," 29 C.F.R. § 1614.605(a), and in providing that "[i]n cases where the representation of a complainant . . . would conflict with the official or collateral duties of the representative, the Commission or the agency may . . . disqualify the representative." 29 C.F.R. § 1614.605(c). Like the above-cited FSLMRS provision which authorizes "official time" for representational activities "during the time that the employee otherwise would be in a duty status," the EEOC's regulations provide that the complainant's representative shall have official time to carry out the representational activity, "if otherwise on duty." 29 C.F.R. § 1614.605(b).

[Office] Proceedings

Unlike an EEO complaint, an [Office] [particular] misconduct proceeding is not a disciplinary, loyalty, or other personnel administration proceeding. Our review of the statute that established [the Office] -- [citation deleted] -- indicates that [Office] proceedings are broadly

concerned with the integrity of [a particular activity] supported by [the agency], and generally are not "personnel" related. In some [Office] cases, the party accused of [particular] misconduct may be an agency employee rather than an [agency] grantee or an applicant for [agency] funding. That fact, however, and the fact that in some cases the agency may ultimately decide to discipline an employee in a separate proceeding, would not make the [Office] process itself a "disciplinary, loyalty, or other personnel administration proceeding." OGE Informal Advisory Letter 85 x 1.

Even if the [Office] process could be characterized as a "personnel administration proceeding," the exception at 18 U.S.C. § 205(d) would not apply to representation of a person who provides information to [the Office] regarding alleged or suspected [particular] misconduct. That exception permits the representation of a person who is "the subject" of a personnel administration proceeding in connection with that proceeding. Thus, the exception is intended to permit representation of Federal employees only in matters directly connected to their treatment as employees by their Federal employers. OGE Informal Advisory Letter 85 x 1. In contrast to the complainant in an EEO proceeding, a Federal employee who provides information to [the Office] would not be the subject of that proceeding because his treatment as a Federal employee would not be directly connected to the proceeding.

All of this is not to say that 18 U.S.C. § 205 bars a person who provides information to [the Office] regarding alleged [particular] misconduct from being represented or assisted in that regard. For example, section 205 would not apply to non-Federal employees' representational activities. Moreover, an agency employee such as an ombudsman or a member of the [Office] staff could provide such representation or assistance as part of his official duties.

Furthermore, a Federal employee can, while acting on behalf of another party, have purely ministerial contact with a Federal agency without violating 18 U.S.C. § 205. Some of the contacts undertaken by an employee on behalf of another employee at [the Office] may be ministerial. However, it would not be a ministerial contact if, for example, an employee were to try to convince [the Office] to open a case of [particular] misconduct, based on information provided by another employee. Section 205 is a general intent statute that prohibits absolutely certain forms of conduct which have been determined to be harmful per se; it does not require proof of consciousness of wrongdoing or bad purpose to disobey or disregard the law. Thus, notwithstanding any perception that an employee's representation of another employee would help the [Office] process, that representation would be barred by 18

U.S.C. § 205.

We trust that we have clarified for you the application of 18 U.S.C. § 205 to employees of your agency who provide representational services to complainants in EEO proceedings and to persons who provide information to your agency's [Office] regarding alleged [particular] misconduct.

Sincerely,

Stephen D. Potts
Director

1Both an EEO proceeding and a [particular] misconduct proceeding would be a "covered matter" as that term is defined in the statute, at 18 U.S.C. § 205(h).

2The phrase "official time" in 5 U.S.C. § 7131 does not have the same meaning as "official capacity." Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 105 (1983). Representational activities under the FSLMRS are permitted by 18 U.S.C. § 205 because they deal with matters regarding agency personnel administration. OGE Informal Advisory Letter 81 x 12. The FSLMRS by itself, however, does not authorize an employee to act as a representative of a labor organization if that activity "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee." 5 U.S.C. § 7120(e). See also OGE Informal Advisory Letters 82 x 19 and 92 x 6.