

Memorandum dated January 19, 2007,  
from Robert I. Cusick, Director,  
to Designated Agency Ethics Officials  
Regarding Counting Days of Service  
for Special Government Employees

The Office of Government Ethics (OGE) has received several requests for guidance concerning the appropriate method of counting days of service or expected service for special Government employees (SGEs). The specific question is whether there may be certain kinds of activities that are sufficiently insubstantial or de minimis that the days on which those activities are performed need not be counted toward any relevant statutory day limits.<sup>1</sup> OGE, therefore, is issuing this Memorandum to clarify the conditions under which an agency need not count a day of service solely on the basis of certain activities by SGEs.

Day counting is relevant to several statutory and regulatory provisions affecting SGEs. First, the statutory definition of SGE, 18 U.S.C. § 202(a), requires agencies to make an advance determination of whether an employee is expected to serve no more than 130 days during the ensuing 365-day period. Thus, an individual's very status as an SGE, and consequently the ability to rely on important exceptions created by Congress and OGE for the sole benefit of SGEs,<sup>2</sup> depends on the counting of

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<sup>1</sup> OGE previously has issued other documents providing general guidance concerning various SGE day counting issues. *E.g.*, OGE Informal Advisory Memorandum 00 x 1, at 5-6 (and authorities cited there). Ethics officials are referred to those documents for more comprehensive discussion of issues pertaining to SGEs. The present Memorandum is confined to the narrower issue of when an agency must count a day of service because of the nature or extent of the activities performed on that day.

<sup>2</sup> These exceptions are described more fully in OGE 00 x 1 and include, among other things, a complete exemption from the criminal supplementation of salary statute, 18 U.S.C. § 209, and various exceptions to other criminal provisions in 18 U.S.C. §§ 203, 205, 207 and 208.

days of expected service. As OGE has described more fully elsewhere, the counting of days for the purpose of this 130-day limit is to be done prospectively by the agency, based on a good faith estimate, and the agency's determination of SGE status is conclusive for the ensuing one-year period, even if the SGE in fact exceeds 130 days of service.<sup>3</sup>

Day counting also is relevant to several specific exceptions to Federal ethics requirements. Two exceptions to the criminal laws governing representational activity, 18 U.S.C. §§ 203(c) and 205(c), relax the restrictions on SGEs who have served in an agency no more than 60 days during the preceding 365-day period. Likewise, an exception to the post-employment "cooling off" restriction, 18 U.S.C. § 207(c)(2)(B), applies to SGEs who serve fewer than 60 days during the one-year period prior to their termination as a senior employee. (Note that the exceptions in sections 203(c), 205(c) and 207(c)(2)(B) all use a standard based on actual, past days of service, as contrasted with the 130-day standard of estimated future service for determining SGE status, discussed above.) Other exceptions related to 60 days of service can be found in the public financial disclosure law and in the OGE Standards of Ethical Conduct for Employees of the Executive Branch regulations.<sup>4</sup>

Given the importance of day counting, several agency ethics officials have expressed concerns that it may not be reasonable to follow an inflexible method of counting any day on which an SGE performs any activity, regardless of the nature or extent of the activity. They consider such an approach to be impractical and, more importantly, inconsistent with the legislative goal--embodied in legislation creating the SGE category and the various conflict of interest exceptions--to remove unnecessary

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<sup>3</sup> OGE 00 x 1, at 5. Of course, at the expiration of the one-year period, the agency needs to make a new estimate for the following year, and the prior year's experience will have a bearing on whether the agency reasonably can conclude that the employee is likely to serve no more than 130 days in the next year. See OGE Informal Advisory Letter 05 x 7.

<sup>4</sup> 5 U.S.C. app. § 101(h)(public financial disclosure requirement); 5 C.F.R. § 2635.805(b)(2)(iii)(expert witness activities; 5 C.F.R. § 2635.807(a)(2)(i)(E)(4)(teaching, speaking and writing related to official duties).

barriers to the recruitment of temporary experts.<sup>5</sup> The fear is that, without some de minimis consideration, the day counting method could result in significant numbers of experts, consultants and advisory committee members losing the benefit of SGE status or the benefit of other special provisions for SGEs serving 60 or fewer days. OGE shares many of these concerns.

The executive branch has long observed certain criteria for counting days of service.<sup>6</sup> A Presidential Memorandum, issued shortly after the enactment of 18 U.S.C. § 202(a), provided, among other things: "*A part of a day should be counted as a full day for purposes of this estimate, and a Saturday, Sunday or holiday on which duty is to be performed should be counted equally with a regular work day.*"<sup>7</sup>

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<sup>5</sup> It is widely recognized that one of the "main purposes" of the landmark 1962 overhaul of Federal conflict of interest laws was "to help the Government obtain the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government." Memorandum of Robert F. Kennedy, Attorney General, 28 *Federal Register* 985 (January 28, 1963). As described by one contemporary commentator who was involved in an influential study and other legislative activities leading to the creation of the SGE category, a "glaring inadequacy" of the prior conflict of interest laws was the failure to distinguish "between the regular full-time government employee on the one hand and the intermittent government employee on the other," with the result that qualified candidates for part-time advisory committees and commissions "time and again" had to decline offers to serve. Roswell Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1123-24 (1963). See also H.R. Rep. 748, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1961); Ass'n of the Bar of the City of New York, *Conflict of Interest and Federal Service* 161-62 (1960).

<sup>6</sup> See OGE 00 x 1, at 5-6.

<sup>7</sup> Presidential Memorandum, "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 *Federal Register* 4539, 4541 (May 2, 1963)(emphasis added). OGE continues to follow the principles first articulated in the Presidential Memorandum and subsequently embodied in other documents. See OGE 00 x 1, at 6 & n. 6; 82 x 22.

Nevertheless, there has always been some recognition of the need for a *de minimis* principle, so that the day counting method does not unreasonably interfere with the Congressional purpose of facilitating the recruitment of temporary experts and advisors who would not be willing or able to serve without the benefit of SGE status. Bayless Manning, who participated substantially in the efforts leading to the enactment of section 202(a), wrote:

It seems clear that under Section 202 the employee's working time is not to be computed on a minute-by-minute or hour-by-hour basis. In principle, the employee will be considered to have worked a day for the Government if he has worked part of the day. At the same time there is doubtless a *de minimis* limitation on this method of computing; a one-minute telephone call in which the consultant agrees to show up on the following Thursday is hardly enough in itself to count as a 'day' of his one hundred thirty allotted days.<sup>8</sup>

In recent years, the proliferation of information technology and telecommunications devices has reinforced the need for a "rule of reason" in this area. The occasional telephone calls described by Manning are now the PDA messages and other electronic communications that vie for the attention of busy professionals in the information age. The flow of work is not confined to the traditional "workplace," and the reality of "multi-tasking" makes it likely that various communications and other activities related to Federal service will be interspersed with activities related to an SGE's regular private employment.

This is true particularly where the SGE serves part-time on a board or advisory committee and spends relatively few days at the Federal work site. In such cases, it is virtually unavoidable that certain details, such as filling out administrative paperwork or doing certain preparatory reading, will be worked out essentially on the SGE's own time, at his or her own regular place of business or home. OGE is aware that

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<sup>8</sup> Bayless Manning, *Federal Conflict of Interest Law* 28 (1964); see also 68 *Federal Register* 7844, 7858 (February 18, 2003)(preamble to proposed rule interpreting provision in 18 U.S.C. § 207(c) pertaining to SGEs).

some agencies have advised SGEs to confine all their Government-related activities to certain designated days, so that, for example, they make all their agency communications on one day, rather than scattering the same communications among several days. However, OGE does not believe that such advice adequately reflects the reality of how work is actually performed today.

Therefore, in order to help ethics officials and SGEs deal with some of the day counting issues that arise in these and similar circumstances, OGE is issuing the following general guidelines:

(1) Any day on which an SGE performs any work for which he or she is compensated by the Government should be counted as a day, regardless of the amount of time worked that day or the nature of the services. For example, if an SGE submits a time sheet or voucher for pay for any increment of time on a given day, the entire day should be counted, even if the services involved only administrative matters rather than the substantive merits of any matter for which the SGE's expert services were retained. Where the Government actually pays an SGE for services, regardless of their nature or duration, OGE does not believe that such services can be discounted as inconsequential for purposes of day counting under the conflict of interest laws.<sup>9</sup>

(2) Uncompensated activities limited to strictly administrative matters, such as filling out personnel paperwork or scheduling meetings, need not be counted. For example, if an SGE spends an hour one day at her law office filling out an application for a security clearance to receive certain Government information, this day need not be counted toward the statutory limits.

(3) Uncompensated brief communications, even if they touch on substantive matters, are not sufficient to require that the entire day be counted toward the statutory limits. For example, if an advisory committee member spends five minutes composing and sending an e-mail message to the Chair of the committee, and the message is simply one or two sentences indicating the

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<sup>9</sup> This does not mean, however, that uncompensated services cannot be counted; indeed, the statutory definition of SGE expressly recognizes that an SGE may serve "without compensation" at all. 18 U.S.C. § 202(a).

member's view that a certain issue needs to be taken up by the committee, this level of activity is not sufficient to require counting a day of service. OGE does not question the importance of such activities,<sup>10</sup> but merely wants to emphasize that such small increments of time should not be the sole basis for counting a day of work toward the statutory limits.

(4) Uncompensated brief periods of reading or other preparation performed at the SGE's home, regular place of business, or other setting away from a Government workplace, need not be counted. OGE is aware that many SGEs, especially advisory committee members, do occasional reading at home or at their private offices, in preparation for official meetings. Previously, OGE has determined that private preparations of this sort, under some circumstances, are not even "regarded as 'substantial' participation in a particular matter within the meaning of section 208" of title 18.<sup>11</sup> Similarly, OGE believes it is reasonable not to count, for purposes of the statutory day limits, days on which the only activity is a brief period of private preparation. Thus, for example, an advisory committee member who finds 15 minutes, amidst the press of other business, to read an article distributed by the Chair of the committee need not count a day of service.<sup>12</sup> (Again, however, if the agency chooses to compensate the SGE for such preparatory time, any day on which such compensated activities are performed must be counted as a full day for purposes of the statutory limits.)

It is important to remember that the above guidelines are intended to operate as a rule of reason, to be used judiciously, in light of the facts of the situation. Where, for example, it is apparent that an SGE is engaging in numerous communications on a given day, the day should not be discounted simply on the ground that each communication, considered alone, is relatively insignificant. In general, although this approach affords what

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<sup>10</sup> See OGE Informal Advisory Letter 92 x 25.

<sup>11</sup> *Id.*

<sup>12</sup> SGEs sometimes ask whether to count general "background" reading in which they engage at their own initiative, rather than pursuant to an assignment from the agency. OGE typically advises that such general, self-directed reading is more akin to professional development than to official work and need not be counted, unless, of course, the SGE seeks or is granted compensation from the agency for the time devoted.

OGE believes is a necessary degree of flexibility in the administration of the ethics program for SGEs, much depends on the good faith of agency officials in estimating the number of days of expected service and of SGEs themselves in recognizing the number of days of actual service, for purposes of the various limits.