

Office of Government Ethics

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Letter to a Private Attorney dated March 10, 1982

We are responding to your request for an advisory opinion concerning the denial of the application of your client to perform outside employment. Under the provisions of 5 C.F.R. § 738.305(a)(2), we have elected to handle our answer informally, rather than under the more detailed procedures of the formal advisory opinion service.

Your letter of February 8, 1982, and the attachments to it set forth the following:

Your client, [a present Government employee], is a machinist employed by [an agency] at its machine shop building in [a certain Government facility]. He is not in a managerial position nor does he hold any executive position. [Your client] submitted a written request to the [facility] for approval for outside employment to perform machining operations for [a private company] on a part-time basis. He represented that the work would be performed outside of his usual duty hours with [his agency] and that it would not be on any contracts that [the private company] might have with [the agency].

[Officials at the facility] denied his application and it is from this denial that you have taken an appeal, in effect, to this Office. It is clear from the letter of [the] Chief Counsel of [the facility], dated October 28, 1981, that the denial was predicated upon section 303 of the Standards of Conduct governing [the agency] employees. The applicable provisions of section 303 are:

Outside employment or other outside activity is incompatible with the full and proper discharge of an employee's duties and responsibilities, and hence is prohibited, if:

- (b) It would give rise to a real or apparent conflict of interests situation even though no violation of a specific statutory provision was involved.

(d) It might bring discredit upon, or reasonably cause unfavorable criticism of, the Government or [the agency] or lead to relationships which might impair public confidence in the integrity of the Government or [the agency].

There is no doubt of the validity of [the agency's] regulation. It was issued under the authority of Executive Order 11222 and the regulations implementing that Order published by the former Civil Service Commission (now the Office of Personnel Management) in part 735 of Title 5 of the Code of Federal Regulations. [The agency's] regulations were duly approved by the Civil Service Commission pursuant to 5 C.F.R. § 735.104.

You do question the applicability of [the agency's] regulation to [your client]. You argue cogently that [he] is not an employee in procurement, in management or in any discretionary position with [the agency] and that under these circumstances he would not be in any real or apparent conflict with [the agency's] functions in taking on outside employment with [the private company].

Appearance of conflict cannot be measured in precise terms. It involves a question of judgment which, unless exercised in an arbitrary or capricious manner, will not be overturned by this Office. In point of fact, however, there is a substantial rational basis for the denial, as shown in [the chief counsel of the facility's] letter to you. [The chief counsel] states that it has been a matter of long-standing policy not to permit machinist employees to engage in outside employment in any machine shop which has or is attempting to obtain work with any [agency facility] and that in the past there have been complaints when [agency] machinists at [the subject facility] were employed at some of these shops on a part-time basis. These complaints demonstrated, according to him, "that the part-time employment of our machinists by local machine shops which perform [agency] work creates the appearance of a conflict of interest under our Standards of Conduct regulations § 303(b) and they also caused unfavorable criticism and impaired the public confidence in the integrity of our procurement process under § 303(d). Under these circumstances, outside employment is prohibited and we accordingly established our policy noted above. Since that policy was established, we have not been subject to this type of criticism."

In sum, we concur with [the agency's] denial of [your

client's] application to perform outside work at [the private company]. For your information, we conferred with the ethics authorities at [agency's] national headquarters and they agreed with the decision of [the officials at the facility].

Sincerely,

J. Jackson Walter
Director