

Office of Government Ethics

87 x 13 -- 10/23/87

**Memorandum issued October 23, 1987
from Donald E. Campbell, Acting Director
to Designated Agency Ethics Officials,
Inspectors General, General Counsels
and Other Interested Persons
Regarding Acceptance of Food and Refreshments
by Executive Branch Employees**

Recent news articles have suggested that this Office has issued a "new rule" on acceptance of breakfasts, lunches or dinners by executive branch employees from members of the news industry, lobbyists, lawyers and contractors. That "new" rule was simply a newly revised version of the Federal Communications Commission's (FCC's) standards of conduct which does not vary from this Office's long-standing interpretations of Executive Order 11222 and Part 735 of 5 C.F.R. While some news reports were unclear about the origin of the rule, most reports did generally state the correct interpretation of the rule prohibiting executive branch employees from accepting free food and entertainment when provided for by prohibited sources. In general, an executive branch employee's acceptance of "one-on-one" meals from someone who hosts that individual because of his or her Government position is prohibited, regardless of the cost of the meal.¹

The context in which this issue arose was this Office's response to the Federal Communications Commission's request for guidance as to the proper implementation of its rule permitting the acceptance of certain food and refreshments at group functions. Earlier this year the Commission had drafted an amendment to its version of the standard language in § 735.202(b)(2), in order to clarify what constituted an appropriate luncheon or business meeting as well as to establish a standard for employees of the agency to use in determining whether they might attend and accept the food and refreshments at a widely-attended meeting or reception hosted by an otherwise prohibited source of gifts to employees of the agency. Because the latter issue has not been addressed by most agencies' standards of conduct, their regulations lack an exception which would permit employee attendance at such functions. Consequently, we have encouraged agencies to draft an exception,

subject to our approval, to permit agency employees to attend this typical Washington event when their attendance would be beneficial to the mission of the agency. (See OGE Informal Advisory Letter 85 x 9.)

After discussing the basic restrictions and this exception with this Office, the FCC chose also to make it clear that the standard gift restriction applies to a meal offered by an individual member of the news media as well as a communications organization which is regulated by the Commission when that meal is offered simply because of the Commission employee's position. When members of the news media recognized that they too are considered "prohibited sources" for gifts to executive branch employees when seeking information from them, they had a markedly renewed interest in the restriction.

The initial reaction of many members of the news media was to complain that they were being singled out in order to prohibit their access to Government officials. This is not and has never been the purpose of the rule. Further, from their perspective, if there had always been a general restriction against executive branch officials accepting one-on-one meals from "prohibited sources," it was being widely honored in the breach. While we believe that most executive branch officials are aware of and act within their agencies' regulations on this subject, to avoid further misunderstanding about this Office's long-standing position on this issue, we are providing this memorandum as a reminder. Those who have participated in our training sessions and have read our materials over the years, should find no surprises in this memorandum. Previously written materials of this Office are referenced where appropriate. We would suggest that if after reviewing this memorandum an agency ethics official believes there may be some misunderstandings on the part of the employees of his or her agency, a reminder should be sent to them.

Basic Administrative Rule

Pursuant to section 201 of Executive Order 11222 and the implementing regulations at 5 C.F.R. § 735.202(a), without a written exception drafted by his or her agency and approved pursuant to subsection (b) discussed below, an employee of the executive branch may not accept, directly or indirectly, anything of monetary value from an organization or person who:

- (1) Has, or is seeking to obtain, contractual or other business or financial relations with his or her agency;
- (2) Conducts operations or activities that are regulated by his or her agency; or
- (3) Has interests that may be substantially affected by the performance or nonperformance of his or her official duty.

Meals and entertainment, as items of monetary value, clearly fall within these restrictions.

Further, pursuant to section 201 of Executive Order 11222 and 5 C.F.R. § 735.201a, an executive branch employee shall avoid any action, whether or not specifically prohibited by the Executive Order and Part 735 of 5 C.F.R., which might result in, or create the appearance of, using public office for private gain; giving preferential treatment to any person; making a Government decision outside official channels; or affecting adversely the confidence of the public in the integrity of the Government. These standards, too, have a clear bearing on the subject of the acceptance of gifts.

Individuals or organizations who fall within those groups outlined by 5 C.F.R. § 735.202(a) or individuals or organizations who offer anything of monetary value to executive branch employees simply because of their official positions are considered "prohibited sources" for purposes of this memorandum. And, the acceptance of the "one-on-one" meal from a "prohibited source," absent the application of one very narrow exception regarding relatives and close personal friends, is prohibited. The acceptance of food and refreshments at a larger group gathering hosted by a "prohibited source" is also prohibited, unless the agency has an approved exception for such acceptance.

Examples of prohibited sources include, but are not limited to:

- A company which has or is seeking a Government contract from an agency is a prohibited source of gifts for employees of that agency.²
- A business regulated or inspected by an agency is a prohibited source of gifts for employees of that agency.

- A public interest group which is neither regulated by nor does business with an agency but which seeks regulatory action by the agency is a prohibited source for employees of that agency involved in the regulatory process because they can affect the group's interests through their official duties.
- A company involved in litigation with an agency is a prohibited source for employees of that agency and for the employees of the Department of Justice if the Department is handling the litigation.
- A reporter seeking information from, or an interview or ongoing working relationship with, a Government employee because of the employee's official position is a prohibited source for that official.
- A professional, trade, or business association, a substantial majority of whose members are regulated by or do or seek to do business with an agency is itself a prohibited source for employees of that agency. (See 84 x 5, page 3, example 1.)
- A foreign business who seeks a benefit or an action such as a loan, a contract, a permit or a license from an agency is a prohibited source for gifts to employees of the agency regardless of where, geographically, the gifts are given.

Exceptions to the Administrative Restrictions

Executive Order 11222 at subsection 201(b) recognizes that individual agencies may need to provide for certain exceptions to this broad restriction. These exceptions are to be tailored to situations where acceptance of gifts from otherwise prohibited sources might be appropriate in view of the agency's work and duties. The Order provides general examples of the kinds of exceptions anticipated. The regulatory provision for agency--specific exceptions is found in 5 C.F.R. § 735.202(b) and, like the Executive Order, it sets forth examples of the kinds of exceptions agencies could consider for inclusion in their regulations.

The exception which directly addresses the acceptance of food and entertainment from otherwise prohibited sources is found at

5 C.F.R. § 735.202(b)(2). It states that an agency may develop an exception through regulation approved by the then Civil Service Commission, now this Office, which would --

[p]ermit acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance.

This exception, which most agencies adopted verbatim, is the one which has apparently been relied upon in justifying the offer and acceptance of the "one-on-one" meal. It has been and is the position of this Office that a meal at a restaurant or private club during which some business may be discussed is not a meeting of the kind contemplated by this exception. Consequently, in that context the questions of what is nominal and what is infrequent under that exception do not have to be addressed. What is contemplated by this exception is the kind of luncheon or dinner attended by a large group at which the employee is the guest speaker (often referred to as the "rubber chicken" exception), or the real working meeting at which food is brought in to facilitate the continuance of the work and is not itself the focus of the meeting. We have attempted in our agency training sessions,³ in the pamphlet "How to Keep Out of Trouble,"⁴ and whenever the issue has been discussed in our informal advisory letters,⁵ to make the restriction and the limited extent of the exception clear. Any agency which has adopted language similar to that of section 735.202(b)(2), should have been, and must in the future, follow this interpretation when counseling its employees. Further, for any agency that has an exception which does not use substantially the language of section 735.202(b)(2), and the ethics official's interpretation of his or her agency's regulation differs significantly from that presented here, the ethics official should review the approval documents received for the agency's exception and should discuss the exception with this Office.

The second exception which has been used occasionally to justify the acceptance of the "one-on-one" meal from an otherwise prohibited source is one based upon that suggested in § 735.202(b)(1) for gifts given for --

obvious family or personal relationships . . .
when the circumstances make it clear that it is

those relationships rather than the business of the persons concerned which are the motivating factors.

We have heard in many of our training sessions that individuals claim to have worked together so long that they have become personal friends and that the meals offered by the nongovernment individual to the Government employee are based upon that relationship. If that is clearly the case, then the exception would apply. What we frequently find, however, is that the meals are still used as a business deduction by the nongovernment individual. In that case, these are not gifts of personal friendship, they are business expenses. Further, even though the personal relationship may exist, certain Government employees are in such conflict-sensitive positions that the perception of an proper gift will still be present. In those cases, we would hope that the Government employee and the prohibited source/"friend" would recognize this and both strive to avoid creating any appearance of impropriety on the part of the Government employee by simply enjoying each other's company without involving gifts.

We have been encouraging agencies to review their regulatory exceptions in order to provide guidance to their employees on the issue of attending certain widely-attended receptions held by what might otherwise be prohibited sources. We believe that there are certain instances where an agency may have a legitimate interest in permitting attendance at certain group events where food is served so that employees may be able to meet on a less formal basis and have an interchange of ideas with a variety of individuals, including members of nongovernment groups, legislators and other Government agency personnel, who are interested in but may have divergent positions on the same issues. The food and refreshments involved should, of course, not be excessive. The general standards we expressed to the FCC and others in the past who have wished to implement such a regulation is that any exception to the basic restriction should include the following concepts:

- (1) it is in the agency's interest that the employee attend the event where food and refreshments are being served;
- (2) the sponsor of the event should not be one individual or entity that is regulated by the agency, or one individual

or entity that has some other business connection with an agency or is directly involved in a matter pending before the agency so that the timing or the reason for the event would create an appearance of impropriety;

(3) the exception should be applied only to widely-attended gatherings of mutual interest to the Government and industry such as receptions, seminars, conferences and training sessions;⁶

(4) the food and refreshments offered in conjunction with these events is not excessive; and

(5) some mechanism for providing an approval process that does not rely solely on the individual invitee's own judgment of what is in the agency's best interest.

Again, it is important to stress two points. First, if an agency does not have such an exception, attendance at such an event by one or more of the agency's employees where the host is a prohibited source will fall within the restriction. Second, if an agency does have such an exception, it will still not permit the acceptance of the one-on-one meal.

Gifts from Foreign Governments

If the offeror of a gift to an executive branch employee is a foreign government, then the provisions of the Foreign Gifts Act, 5 U.S.C. 7342, and the employee's agency's implementing regulations should be applied before determining whether the gift, including a meal, may be accepted. If an agency has not promulgated the implementing regulations referred to in the statute, ethics officials may wish to review those of the State Department at 22 C.F.R. Part 3 for some guidance. Remember, this statute applies only to gifts from foreign governments and not to gifts from private foreign organizations or businesses.

Criminal Restrictions

There are three criminal conflict of interest statutes in ch. 11 of Title 18, United States Code, which may apply to the offer by nonfederal sources and acceptance by executive branch employees of gratuities, which includes meals and entertainment.⁷ Their application, of course, turns on the particular facts of the situation. The first statute is 18 U.S.C. 201, particularly

at subsection (c)(1) (formerly subsections (f) and (g)).⁸
We mention this for reference only. This Office's Memorandum of Understanding with the Department of Justice concerning our issuing advisory opinions on the criminal conflict of interest statutes does not extend to section 201. We suggest, however, that ethics officials review the following 3rd and 5th Circuit opinions which interpret this statute's restrictions.

United States v. Evans, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978).

United States v. Niederberger, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978).

United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979), aff'g, 452 F.Supp. 1178 (W.D. Pa. 1978).

The following opinions may also be of interest:

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974).

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

United States v. Alessio, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976).

The second and third ch. 11 criminal conflict of interest statutes we believe could, given the right facts, apply to the offer and acceptance of gratuities, including meals and entertainment, are 18 U.S.C. §§ 203 and 209. Although our Memorandum of Understanding with the Department of Justice on advisory opinions does extend to these sections, because of the more general nature of this memorandum, we feel that a simple reminder of their potential application is sufficient. A review of the materials provided by this Office in the past which discuss sections 203 and 209 and a review of the Office's four previous memoranda concerning conflict of interest prosecutions by U.S. Attorneys' offices nationwide should be helpful. (Note, for example, Case #4 in our September 4, 1984 prosecutions memorandum, Case #17 of the July 15, 1985 prosecutions memorandum, and Case #8 of our January 23, 1987 prosecutions memorandum.)

Conclusion

We frequently hear Government employees claiming that they cannot be bought with a lunch and that to prohibit them from accepting an occasional meal from a person doing business with them impugns their integrity. We also are told that the private sector conducts business at such occasions and that Government employees must participate in the same kinds of activities in order to get the Government's position disseminated and understood. We sincerely hope and expect that Government employees cannot be bought for a lunch; we do not agree that for the Government to have such a restriction impugns the integrity of its employees nor that the entertainment standard for businesses dealing with one another is the standard that should be adopted by a Government. The standards involved in public service are based on different considerations and include a concept of avoiding situations where an employee's integrity can be made an issue.

This concept is also reflected in the criminal conflict of interest code. For instance, 18 U.S.C. § 208 prohibits an executive branch employee from taking an action in a matter in which he or she has a financial interest.⁹ There is no concept of a de minimis interest in this restriction. It simply prohibits all such acts and, therefore, does not involve any judgment of the integrity of the employee in taking them. There are some waiver provisions, but they too turn not on the integrity of the employee but on the extent of the financial interests and the integrity of the services the employee would provide. The administrative gift restriction follows the same pattern. When certain relationships exist between an agency and a nongovernment person or entity, an employee of that agency may not accept anything of monetary value from that individual or entity. Again, this restriction is not a judgment of the integrity of the employee. It simply creates a bar to a situation where an employee's integrity could be questioned, without denying the employee anything to which he or she is entitled. Similar to the waiver provisions of section 208, however, there can be limited exceptions, and in those, too, it is not the integrity of the individual which is the determining criteria for the exception, but whether an important governmental interest will be served or the relationship between the Government employee and the donor is predominately personal.

1 The term "one-on-one" meals should not be read so literally as to cover only those situations where there is one host one guest. It should be read to include any situation where one or more prohibited sources host one or a very small number of employees with or without their spouses at a restaurant or private club where the meal is purportedly the reason for the individuals to meet at that time. This is distinguished from the larger group gathering where the invites and/or the hosts are more diverse. While acceptance of the meal during an occasion fitting the latter description may still be improper, there is some possibility it can be covered by an exception discussed herein.

2 In this example and in some of those which follow, an entity is used rather than an individual. When that is the case, the example must be read to include the entity's officers, employees and agents as prohibited sources.

3 See Question 4 of the Problems for Ethics Counselors in the OGE 1984 training materials, Questions 3 and 9 of the Case Studies in the OGE 1985 training materials, Questions 1, 7, 12, and 14 of the Case Studies in the OGE 1986 training materials. These materials were used in our regional training sessions and the training sessions we have typically held in February and March of each year in Washington and were a part of the packet given to each participant.

4 "How to Keep Out of Trouble", Office of Government Ethics, January, 1986, at pp. 2-3.

5 See Informal Advisory Letters 84 x 10 and 85 x 9.

6 This concept is not to be confused with the situation where an agency has paid for an employee's admission to a conference or seminar. In those instances, an employee may participate in all events hosted by the conference organizers as a part of the paid admission. Receptions and dinners hosted by someone other than the conference sponsor but held at the same time in order to invite all or a portion of the conference participants must be analyzed separately because they are not a part of the paid conference admission.

7 There are other statutes which deal with the offer and acceptance of gratuities when the employees involved are carrying out functions under specific statutes. For example, see 7 U.S.C. § 87(a) (grain inspection), 21 U.S.C. § 622 (meat inspection), and 18 U.S.C. §§ 212 and 213 (bank examination). These types of statutes are not addressed in this memorandum but should be considered when counseling affected employees.

8 It is impossible to note the Executive Order 11222 is recognized as related and is reprinted in its entirety immediately following section 201 of Title 18, United States Code.

9 For purposes of this memorandum, a matter in which an employee has a financial interest is a matter in which he or she, his or her spouse, minor child, partner organization in which he or she serves as and officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.