



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

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DO-98-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Regulatory Amendment to Clarify Finality of Position Designations for Confidential Financial Disclosure

Pursuant to 5 C.F.R. §§ 2634.904 and 2634.905, each executive branch department and agency designates which of its positions will require employees to file confidential financial disclosure reports (primarily OGE Form 450), applying criteria stated in the regulation. Employee complaints about such designations are reviewed under the procedures at 5 C.F.R. § 2634.906, whereby the decision of the agency head or his designee is final.

When the Office of Government Ethics (OGE) issued this regulation in 1992, we considered the finality language to be clear and unambiguous. It has become apparent, however, that some may be interpreting that finality as limited to the agency's internal decisional mechanism for review, leaving open the possibility of negotiated grievance and arbitration procedures, or other remedies within or outside the agency. See, for example, the Federal Labor Relations Authority's decision in *American Federation of Government Employees, Local 3258 (Union) and U.S. Department of Housing and Urban Development, Boston, Massachusetts (Agency)*, 0-AR-2734 (FLRA, Feb. 19, 1998).

In order to clarify the original intent of the regulation, OGE has, therefore, issued a minor clarifying regulatory amendment. See 63 Fed. Reg. 15273-15274 (March 31, 1998). Effective immediately, it states more emphatically that the agency head's (or his designee's) decision upon review of complaints regarding the designation of employee positions for filing confidential financial disclosure reports is final and conclusive for all purposes, notwithstanding any other provision of law or regulation.

This amendment reemphasizes, by expressly stating, that this procedure is the sole and exclusive means of seeking such review, and that the final decision by the agency head or designee is intended to preclude administrative or negotiated grievances, arbitration procedures, and any other review or appeal, either within or outside the agency.

The purpose of finality, without additional appeals or complaints, is to avoid protracted review of filer designations, which could seriously undermine the effectiveness and orderly administration of the executive branch confidential financial disclosure system. While an agency's decision to require confidential reports by employees in designated positions affects the privacy of employees, there are sufficient safeguards built into the system to adequately minimize privacy intrusions, such that the need for nonpublic financial disclosure clearly outweighs privacy concerns. Therefore, prompt and final decisions about who must file these reports are necessary and appropriate.

The bases for the executive branch confidential financial disclosure system and the safeguards that have been built in are described at 5 C.F.R. § 2634.901. Specifically, the confidential disclosure system serves the necessary purposes of assisting in the prevention of employee conflicts of interest and maintaining ethical integrity in agency programmatic functions. These reports are strictly confidential, not available to the public under the Freedom of Information Act (5 U.S.C. § 552, exemptions (b)(3), (b)(4) and (b)(6)) or otherwise, and protected under the Privacy Act (5 U.S.C. § 552a), section 107(a) of the Ethics in Government Act (5 U.S.C. appendix, § 107(a)), and section 201(d) of Executive Order 12674. Additionally, only certain types of positions may be designated, applying the criteria provided in the regulation, and employees may seek review by the agency head (or designee) of an agency decision to designate their positions for filing, in accordance with the procedure prescribed in § 2634.906.

Given the importance of the confidential reporting system and these built-in protections for employees, OGE had determined when the regulation was issued in 1992 that it was necessary and appropriate to reach finality promptly when handling confidential filer designation complaints. That was and continues to be the basis for the statement in the regulatory text at 5 C.F.R. § 2634.906 that the decision of the agency head or his designee is final. The clarifying regulatory amendment of March 31 will serve to dispel any lingering doubt as to the meaning of that finality.