Office of Government Ethics

99 X 5

**Memorandum dated April 12, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials
Regarding OGE Regulations and an
Agency's Duty to Engage
in Collective Bargaining**

More and more frequently, agencies have sought the advice of the Office of Government Ethics (OGE) where the executive branchwide ethics regulations issued by OGE in chapter XVI of title 5 of the Code of Federal Regulations are the subject of union proposals during the collective bargaining process. In addition, OGE recently has become aware of some troubling applications of its regulations in this context.[1] We are issuing this memorandum to address these concerns.

An agency's duty to bargain in good faith with its exclusive bargaining representative (union) under the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. chapter 71, does not extend to union proposals that are "inconsistent with . . . any Governmentwide rule or regulation." *See* 5 U.S.C. § 7117(a).[2] Various provisions in the executive branchwide ethics regulations issued by OGE in 5 C.F.R. chapter XVI call for the agency to make some determination, to come to some conclusion, to grant or deny approval, or otherwise to exercise judgment (all of which are referred to collectively herein as agency determinations) in

---

[1] *See*, *e.g.*, the decision by the Federal Labor Relations Authority in *Patent Office Professional Ass'n and Patent and Trademark Office*, 53 F.L.R.A. 625 (1997), finding a duty to bargain over proposals concerning agency determinations to require divestiture of prohibited financial interests under 5 C.F.R. § 2635.403.

[2] It is clear from both the legislative history of the FSLMRS and FSLMRS case law that OGE's executive branchwide ethics regulations in chapter XVI of title 5 of the Code of Federal Regulations are "Governmentwide" for purposes of the FSLMRS. *See* H.R. Conf. Rep. No. 95-1717, at 158 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2893; *U.S. Department of Health and Human Services v. Federal Labor Relations Authority*, 844 F.2d 1087 (4th Cir. 1988); *Overseas Education Association v. Federal Labor Relations Authority*, 827 F.2d 814 (D.C. Cir. 1987); *U.S. Department of Treasury, I.R.S. v. Federal Labor Relations Authority*, 996 F.2d 1246 (D.C. Cir. 1993).

implementing the regulations.[3] Those provisions are intended to confer sole and exclusive authority on the agency with regard to those agency determinations, even though some of the regulations do not use phrases such as "sole" or "exclusive" or similar language. Union proposals that seek to prescribe those agency determinations, or to provide for their review outside the agency (*e.g.*, through arbitration), are inconsistent with those regulations and therefore are not subject to the duty to bargain. Those agency determinations are final and unreviewable (except pursuant to the exercise of OGE's oversight responsibilities for the executive branch ethics program).

For example, criteria for agencies to apply in identifying which of their employees must file confidential financial disclosure reports are listed at 5 C.F.R. §§ 2634.904 and 2634.905. The regulations at 5 C.F.R. § 2634.904(a)(1) state that "the agency" is responsible for concluding who is a confidential filer based on the requirements set forth in section 2634.904. In 5 C.F.R. § 2634.905, "the agency head or designee" determines exclusions from the filing requirements. No one else may make these determinations. Any proposal to the contrary would, therefore, be nonnegotiable because the agency's authority is sole and exclusive.

Other examples concern financial interests prohibited under the authority of 5 C.F.R. § 2635.403. Under 5 C.F.R. § 2635.403(a), the issuance of a supplemental agency regulation prohibiting or restricting the acquisition or holding of a financial interest or a class of financial interests is to be based on "the agency's" determination (with OGE's concurrence) that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Likewise, agency determinations of substantial conflict under 5 C.F.R. § 2635.403(b), prohibiting or restricting an employee from acquiring or holding a financial interest or a class of financial interests, are to be made by the "agency designee." Union proposals that seek to prescribe those agency determinations or

---

[3] In conferring this sole and exclusive authority to the agency, the regulations may refer to "the agency" or may specify an individual, *e.g.*, "Secretary," "head of the agency," "agency head," "agency head's designee," "agency designee," "designee," "designated agency ethics official," "alternate designated agency ethics official," "agency ethics official," "ethics official," "designated ethics official," "deputy ethics official," "agency official," "Government official," "official specified," "reviewing official," "official to whom authority has been delegated," "delegate," "responsible official," "person responsible," "supervisor," or "officer designated."

provide for their review outside the agency are contrary to the executive branchwide regulations at 5 C.F.R. § 2635.403(a) and (b). In addition, a union proposal seeking to exceed the 90 days set by 5 C.F.R. § 2635.403(d) as a reasonable period to divest a financial interest would be nonnegotiable. It is "the agency" that has sole and exclusive authority to determine whether a longer period should be allowed "in cases of unusual hardship."

It would be inconsistent with OGE executive branchwide regulations for an agency to negotiate agency determinations that are within its sole and exclusive authority. This understanding and application of the regulations are critical because they serve the important purpose of finality and avoid protracting matters that must be resolved expeditiously and uniformly in conformance with the mandate of Executive Order 12674.

Agency ethics officials should contact OGE's Office of General Counsel as soon as possible when any provision in OGE's executive branchwide ethics regulations in 5 C.F.R. chapter XVI is the subject of a union proposal. In this way, OGE can answer any questions about the provision and thereby assist in assessing any unresolved negotiability issues. In appropriate cases, where the negotiability of a proposal concerning the regulations is before the Federal Labor Relations Authority, OGE may seek to participate as amicus curiae.