

Office of Government Ethics

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**Letter to a Private Attorney
dated May 18, 2000**

This is in reply to your letter of May 5, 2000. I understand that you had a prior telephone conversation with the General Counsel of my Office, during which she explained that 18 U.S.C. § 208 applies to employees of the District of Columbia. Your letter poses a broader question that goes beyond the application of section 208 and pertains to all of the conflict of interest statutes in Chapter 11, Title 18 of the United States Code. Specifically, you request an opinion explaining the legal authority of the Office of Government Ethics (OGE) to "exempt" employees of the District of Columbia from "the Federal Conflict of Interest provisions of 18 U.S. Code 201 et seq."

At the outset, we should explain that OGE is primarily charged with providing "overall direction of *executive branch* policies related to preventing conflicts of interest on the part of officers and employees of any *executive agency*." 5 U.S.C. app. § 402(a) (emphasis added). As OGE has stated in the past, "we do not provide advice to, or concerning, current or former employees of the legislative or judicial branches of the Federal Government or current or former employees of the government of the District of Columbia, absent unusual circumstances." OGE Informal Advisory Letter 97 x 9. Although we do not believe that your letter has presented such circumstances, we offer a few comments which may prove useful.

We are aware of no statutory authority for OGE categorically to exempt the District of Columbia or its employees from the Federal conflict of interest laws in Chapter 11, Title 18 of the United States Code. Moreover, as OGE and the Department of Justice (DOJ) have concluded in the past, employees of the District of Columbia remain subject to applicable provisions of the Federal conflict of interest laws, regardless of the passage of the District of Columbia Campaign Finance Reform and Conflict of

¹ Your letter requests that OGE issue a "formal" opinion. Although OGE does have the authority to issue formal advisory opinions, we have considered the criteria set forth in subpart C of 5 C.F.R. part 2638 and have determined that a formal opinion is not appropriate in this case.

Interest Act, D.C. Code § 1-1461, *et seq.*, which is cited in your letter. See OGE Informal Advisory Letter 93 x 22 (section 1-1461 did not displace 18 U.S.C. § 208 but simply added "additional layer of restrictions" upon District of Columbia employees). OGE and DOJ reached a similar conclusion with respect to the passage of the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), which you also cite. See OGE Informal Advisory Letter 86 x 18 (Home Rule Act did not affect applicability of 18 U.S.C. § 207 to District of Columbia employees); see also OGE Informal Advisory Letter 88 x 14 (proscriptions of 18 U.S.C. § 205 apply to District of Columbia employees).²

We do note that OGE has narrow powers of exemption with respect to certain financial interests held by employees covered by 18 U.S.C. § 208, including employees of the District of Columbia. See 18 U.S.C. § 208(b)(2). Under this authority, OGE may promulgate regulations, "applicable to all or a portion of all

² The case cited in your letter, *AFGE v. Barry*, 459 A.2d 1045 (1983), does not address the application of the criminal conflict of interest statutes. The case pertains only to the authority of the District of Columbia Council, under the Home Rule Act, to establish a local "'personnel'" system, in place of "' all or a part of the Federal Civil Service System.'" *Id.* at 1048 (quoting D.C. Code § 1-242(3)). The case and the underlying legislation cite several examples of personnel subjects, all of which appear to be related to personnel administration and employee benefits, rather than criminal enforcement: appointments, promotions, discipline, separations, pay, unemployment compensation, health, disability and death benefits, leave, retirement, insurance, veterans' preference, etc. *Id.*; see generally *Thomas v. Barry*, 729 F.2d 1469 (D.C. Cir. 1984) (background of administrative concerns leading to Home Rule Act personnel provisions). The case does note that the Council has passed a provision dealing with conflicts of interest, but this provision is quite general and does not indicate any criminal penalties. See D.C. Code § 1-619.2. Although the Federal conflict of interest statutes pertain to the conduct of Government personnel, those statutes define Federal crimes and specify criminal penalties, not mere incidents of the civil service system or conditions of employment. It is no accident that the conflict of interest statutes are codified in Title 18, the Federal criminal code, rather than Title 5, which generally contains the types of civil service provisions addressed in *AFGE v. Barry* and the Home Rule Act.

officers and employees covered by this section," that exempt otherwise conflicting financial interests where OGE has determined that such interests are "too remote or too inconsequential to affect the integrity of the services" of such employees. *Id.* In regulations implementing this authority, OGE specifically defined "employee," consistent with the statute, as including officers and employees of the District of Columbia. See 5 C.F.R. § 2640.102(b). Consequently, District of Columbia employees may utilize any applicable exemptions found in subpart B of 5 C.F.R. part 2640.

Of course, Congress itself has chosen to exempt District of Columbia employees from certain Federal conflict of interest restrictions. For example, District of Columbia employees are covered by 18 U.S.C. § 207(a), but not section 207(b) 207(c), 207(d), 207(e), or 207(f). See OGE 97 x 9. Congress also has adjusted certain conflict of interest restrictions so that they apply somewhat differently with respect to employees of the Federal Government and employees of the District of Columbia. *E.g.*, 18 U.S.C. § 203(a), (b); 18 U.S.C. § 205(a), (b); 18 U.S.C. § 207(a) (3).

If you have specific questions about the applicability of any particular conflict of interest statute to employees of the District of Columbia, we recommend that you contact the ethics counselor in the employing agency or the District of Columbia Board of Elections and Ethics.

Sincerely,

Stephen D. Potts
Director