Office of Government Ethics
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Letter to a DAEO dated June 18, 1979

This responds to [your office's] inquiry of April 24, 1979 -- which has been the subject of several telephone conversations with my staff -- wherein questions were posed concerning the applicability of the Ethics in Government Act of 1978 (Pub. L. No. 95-521) ("the Act") to personnel serving on detail, under the Intergovernmental Personnel Act ("IPA") (5 U.S.C. §§ 3371-3376), from a state or local government or institution of higher education.

The following questions were posed concerning Title II of the Act:

1. Is a person serving on detail to a Federal agency under an IPA assignment an "officer or employee" under section 201(f)(3)?

2. Does the source of funds for paying such persons play any role in determining whether they are officers or employees? If it does, what proportion of a person's salary must be reimbursed by the agency to the state or local government to make that person an employee?

3. Our reading of section 201(f)(3) is that the classification of the position in which the person is serving is controlling rather than the amount of pay received. For example, we have a person serving in a GS-14 position but being paid at a rate equivalent to a GS-16 ($44,964). We have not required this person to file a financial report under the Act. Is this interpretation correct?

The following questions were posed concerning Title V of the Act:

1. Is a person serving on detail to a Federal agency under an IPA assignment "a person employed" for purposes of this subsection?

2. Does the source of funds for paying such persons play any role in determining whether they are covered by this

subsection?

3. Are those serving on detail to a Federal agency under IPA assignments who are paid $47,500 or more automatically covered by the post-employment restriction on senior level employees since they are employed at a rate of pay comparable with executive level positions? Does this automatic coverage apply even though the position occupied is not an executive level position and is not considered to exercise significant supervisory or decision-making responsibility?

4. Does supplemental pay or per diem received by persons on detail under IPA count as pay in determining which persons are employed at a rate of pay comparable to the executive level?

The applicability of certain regulations and statutes to personnel assigned to Federal agencies under the IPA depends upon the manner in which such personnel are assigned; that is, whether by "appointment" or by "detail." A state or local government employee who is "appointed" to an executive agency is considered an employee of that agency for all purposes, except certain provisions of Title 5 U.S.C. pertaining to retirement, life and health insurance (5 U.S.C. § 3374(b)). However, when an individual is "detailed" to an executive agency, his status is different, as indicated by section 3374(c) of Title 5 U.S.C.

> (c) During the period of assignment, a State or local government employee on detail to a Federal agency--
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> . . . .
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> (2) is deemed an employee of the agency for the purpose of Chapter 73 of this title, sections 203, 205, 207, 208, 209, 602, 603, 606, 607, 643, 754, or 1905, and 1913 of Title 18, section 635(a) of Title 31, and the Federal Tort Claims Act and any other Federal Tort liability statute; . . . (emphasis added).

The legislative commentary accompanying the aforementioned statute states, in part, that "(a)n employee who is detailed to the Federal government would remain a state government employee for most purposes . . . . Such personnel would not be entitled

to Federal pay, but would be considered Federal employees for the purpose of certain Federal employee laws including those relating to conflict of interest . . . . In addition, they would be subject to such regulations as the President may prescribe." (See 1970 U.S. CODE CONG. & AD. NEWS 4897-5898.) The language of section 3374(c) of Title 5 U.S.C. is, however, very specific concerning which conflict-of-interest statutes, including 18 U.S.C. § 207, are applicable to personnel who are "detailed. "This contrasts with the inclusive language concerning tort liability.

Accordingly, those personnel who are appointed under the IPA are considered officers or employees for all purposes of the Act, while those who are detailed are considered officers or employees only for the purpose specified by statutes, including Title V of the Act. We believe that, as a matter of statutory language, it is relatively clear that an amendment would be required to cause detailees to be subject to the new requirements of Title II, and that it is for Congress to determine whether those in the IPA program serving on detail should participate in public disclosure. Those who are "detailed" should be required to file confidential disclosure reports and it is likely that we will propose new confidential reporting requirements for such individuals who are not covered by Title II.

The foregoing discussion answers the questions concerning Title II and the first question regarding Title V of the Act.

As to question 2 concerning Title V of the Act, the source of funds for paying such persons is not a relevant consideration in determining the application of the Title V provisions.

In regard to questions 3 and 4, those serving on detail to a Federal agency under an IPA assignment who are paid $47,500 or more, or receive supplements, are not automatically covered by the post-employment restrictions on Senior Employees. Section 207(d)(1) of title 18 U.S.C. is understood to include only executive level positions or equivalent positions in other pay systems. They would, however, be automatically covered if detailed to an executive level position. If they are not so detailed, then such personnel would by covered only if designated by the Director, Office of Government Ethics, under the other provisions of 18 U.S.C. § 207(d).

Sincerely yours,

Bernhardt K. Wruble
Director