In the Matter of an Interest Arbitration between the DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF THE SECRETARY WASHINGTON, D.C. and NATIONAL TREASURY EMPLOYEES UNION	Case Nos. 91 FSIP 134 and 91 FSIP 144

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (Union) in Case No. 91 FSIP 134 and the Department of Health and Human Services, Office of the Secretary, Washington, D.C. (Employer) in Case No. 91 FSIP 144 filed requests with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119(b)(1) of the Federal Service Labor-Management Relations Statute (Statute). Pursuant to section 2471.11(a) of its regulations, the Panel determined to consolidate the cases and direct the parties to submit their dispute, which arose during negotiations over a successor agreement, to the undersigned for mediation-arbitration. I was vested with authority to mediate with respect to all outstanding issues, and render a decision should any remain unresolved.

On September 5 and 6, 1991, representatives of the parties convened before me at the Panel's offices in Washington, D.C. During mediation, the parties were able to resolve issues concerning alternative work schedules, awards, and notice to the Union of disciplinary actions and actions based on unacceptable performance. With respect to the issue of outside employment, they reached only a partial agreement;[1/] the

1/ On September 5, 1991, the parties agreed that requests for approval of outside employment would be answered by the Employer as quickly as possible, normally within 2 weeks of submission.

remaining provisions were submitted to arbitration. A hearing was held during which the parties were afforded the opportunity to present in full their respective positions, offer testimony, cross-examine witnesses, and submit documentary evidence for the record. Post-hearing briefs were filed, and I now have considered the entire record.

ISSUES

The parties disagree over whether attorneys employed by the Cffice of the General Counsel (OGC) should be permitted to engage in the outside practice of law for compensation.

1. The Employer's Position

The Employer proposes that the approximately 200 bargaining-unit attorneys employed by the OGC be prohibited from engaging in the practice of law outside of their employment with the Department of Health and Human Services. It maintains that this has been the policy since March 10, 1987, when the General Counsel issued a memorandum to the OGC staff advising that henceforth no attorney could engage in the private practice of law for compensation, with certain limited exceptions (Emp. Exh. 1).2/ In essence, the Employer argues that allowing its attorneys to engage in the outside practice of law for compensation presents a potential for creating an actual conflict of interest or an appearance of impropriety with the fiduciary duties which they owe their "client," the Secretary of the Department of Health and Human Services (Department). In support of its position, the Employer argues that although the OGC provides advice to the heads of several programs, it is not accountable to them, but rather to the Secretary himself. The headquarters divisions of the OGC, which include Social Security; Health Care Financing; Public Health; Food and Drug; Inspector General; Legislation; Children, Families, and Aging; Civil Rights; Business and Administrative Law; and Ethics, provide "legal services to the numerous programs and activities of the Department touching

2/ This policy was not the subject of negotiations with the Union.

virtually every aspect of society" (Emp. Br. 4.)[3/] Thus, because of the broad range of advice which OGC attorneys may be called upon to provide to their Employer, "there [are] no particular areas of outside law practice in which there would not be an actual conflict of interest or appearance of impropriety" (Emp. Br. 6.) Furthermore, "although an OGC attorney may be assigned to a particular OGC office or division at a given time, the attorney has fiduciary responsibilities to the Secretary as a client that transcend the limits of the areas in his or her specialty" (Emp. Br. 9.) Moreover, the agency's Standards of Conduct provide, in 45 C.F.R. 73.735-101, that the business of the Department must be conducted "without improper influence or the appearance of improper influence"; and employees "must avoid conflicts of private interests with public duties and responsibilities". (Emp. Br. 8). Furthermore, the Code of Professional Responsibility, applicable to all attorneys, requires in EC 5-1 that "(t)he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties" (Emp. Br. 8.)

Allowing OGC attorneys to engage in the outside practice of law for compensation creates a potential for interference with official Government duties. The Employer maintains that

> (b)y its very nature, law practice involves uncertainties in scheduling, unexpected emergencies, and personal problems of clients. Thus, Government attorneys with outside legal work could be subject to phone calls and visits at their office, as well as pressure to change their schedule in the office to accommodate private clients. Whether this would happen regularly is not the issue. An attorney taking on fiduciary duties to private clients could never ensure that it would not happen. (Emp. Br. 8-9).

Even where no actual conflict of interest may exist it is equally important to avoid the appearance of impropriety which a private legal practice may create. In this regard,

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3/ Programs in which OGC attorneys may provide advice include: Social Security disability and retirement; Medicare; Medicaid; Aid to Families with Dependent Children; the regulatory programs of the Food and Drug Administration; the biomedical and public health research programs of the National Institutes of Health and Centers for Disease Control; and programs providing health care in the Public Health Service, including one of its components, the Indian Health Service. (Emp. Br. 4-5.)

> (m)any private clients' problems would require research into issues touching on HHS programs in order to be handled properly. There will always be a problem of appearance of impropriety where such research is required, since the circumstances reasonably leave a question as to whether the attorney may be using information made available to him or her in the context of official duties for purposes of aiding a private client. See 45 C.F.R. 73.735-307(a)(4) (Standard of Conduct prohibition against using official information not available to the general public for private gain). (Emp. Br. 10).

In the Employer's view, "(m)erely leaving it up to the individual supervisor to consider outside activity requests on a case-by-case basis does not address the overall problem of potential conflicts and appearance of impropriety" (Emp. Br. 12.)

There are, however, several exceptions which the Employer is willing to make. First, "occasional legal work for family members" would be permitted because

> there is not the same level of risk of impropriety that would be presented by allowance of outside legal work for private clients. This limited form of legal work does not carry with it the same likelihood of interruption of official duties that work for an open-ended range of clients could present. Occasionally being asked to provide legal assistance to family members is also natural and appropriate in the context of sharing experiences and confidences with family, and giving advice and counsel in such ad hoc situations is less likely to develop into broad-based attorney-client relationships with increasing potential for conflicts and appearance of impropriety. (Emp. Br. 13).

A second exception would be pro bono work, "in recognition of the traditional role attorneys have played in providing public service to society -- which is akin to the role OGC attorneys play by the very nature of their Government jobs -- and in recognition of the duties of public service often codified in bar rules" (citations omitted) (Emp. Br. 16.)

Another exception would be to permit OGC attorneys "to carry out all appropriate functions as a Union official"

(Emp. Br. 16.) Thus, they would be able to "represent any Department employee -- not just OGC employees -- in a grievance" as well as any matter concerning the exercise of employee rights under section 7102 of the Statute. However, employee representation would not extend to administrative "proceedings outside of the Statute, such as Merit Systems Protection Board (MSPB) cases or cases before the Equal Employment Opportunity Commission (EEOC) ... " because with those matters "there is more of a likelihood that attorneys could inadvertently represent interests contrary to the interests of their client, the Secretary, because of the more public and adversarial nature of these proceedings." (Emp. Br. 16). Grievances, on the other hand, typically involve internal matters "which more often than not are resolved before a management official at one of the grievance steps ... " (Emp. Br. 16.) A final exception to the Employer's proposed policy would be to permit OGC attorneys to engage in teaching and writing, but only when "consistent with the requirements of the Department's Standards of Conduct." (Emp. Proposal p. 100).

In further support of its position, the Employer cites similar prohibitions against compensated outside legal employment concerning attorneys employed by the Department of Justice; Office of the Solicitor, Department of the Interior; Office of the General Counsel, Department of Housing and Urban Development; and the Legal Division, Department of the Treasury. (Emp. Exhs. 2, 3, 4, 5). Finally, the Employer notes that there are other career opportunities available for attorneys within the OGC who are interested in career enhancement which may provide a substitute for compensated outside legal employment. In this regard, details to other divisions and agencies are available so attorneys may "broaden their legal experience in other substantive practice areas" (Emp. Br. 19.) Also, promotion opportunities for OGC attorneys are increasing to the nonsupervisory Grade 15 level.

2. The Union's Position

The Union proposes to continue the wording in the parties' current collective-bargaining agreement concerning outside employment and activities, with one modification previously agreed to by the parties during mediation.[4/] Essentially, it proposes that bargaining-unit attorneys be permitted to engage

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4/ See note 1.

in the outside practice of law for compensation so long as such practice is consistent with Governmentwide regulations, the Department of Health and Human Services' regulations, including the Standards of Conduct, and the Employer finds that none of the following conditions exists:

1. The activity is prohibited by higher law or regulation;

2. The activity would place the employee in a conflict of interest between his or her official duties and the outside employment;

3. The activity would afford the employee an opportunity to make improper use of information obtained through the employee's official duties;

4. The activity or the hours devoted to it might reasonably be expected to impair the employee's availability, capacity, or efficiency for the performance of official duties;

5. The activity is such that it would reflect upon the integrity of the Employer, or cause a loss of public confidence in the Employer;

6. The activity is otherwise demonstrably prejudiced against the Employer; and

7. Acceptance of a fee, compensation, gift, payment of expenses, or any other thing of monetary value in any circumstance in which acceptance may result in, or create the appearance of, conflicts of interest. (Un. Proposal; 1985 General Agreement, Article 39, 1B).

Essentially, the Union opposes the blanket prohibition against compensated outside legal employment as proposed by the Employer. In this regard, it contends that the Employer has failed to demonstrate a need to change the practice which has been in effect since 1985. Rather, applicable regulations as well as the exceptions to the approval of the outside practice of law which the Union proposes to continue "provide sufficient protection of the Employer's interests while protecting employees' rights to engage in outside activities that do not interfere with the Employer's proper interests" (Un. Br. 2.) The Department's Standards of Conduct concerning Outside Activities, 45 C.F.R. section 73.735-704, address the

conditions under which employees may provide professional services. "The primary criterion is that the outside work not create a real or apparent conflict of interest" (Un. Br. 2.) Other provisions prohibit the use of Government property except for officially approved activities, 45 C.F.R. 73.735-304. In addition to these regulations, others exist which are applicable to bargaining-unit attorneys and provide the Employer with additional safeguards. In this regard, the proposed Standards of Ethical Conduct regulations issued by the Office of Government Ethics concerning outside employment, misuse of position, and impartiality in performing official duties, 56 F.R. 3378 (July 23, 1991), prohibits "'the use of non-public information for private gain (Sec. 2635.703); the use of official time for other than official purposes (Sec. 2635.705); and the use of Government property for other than authorized activities (Sec. 2635.101(a)(9))'" (Un. Br. 6.) Moreover, the wording in Article 39, section 1B of the parties' current agreement

> expressly supplements real or apparent conflict of interest criteria with other conditions. Specifically, the outside work may not 'afford the employee any opportunity to make improper use of information obtained through the employee's official duties' (Section 1B3). 'The activity or hours devoted [must not] reasonably be expected to impair the employee's availability, capacity, or efficiency for the performance of official duties' (Section 1B4). 'The activity [must not be] such that it would reflect upon the integrity of the Employer, or cause a loss of public confidence in the Employer' (Section 1B5). 'The activity [must not] otherwise [be] demonstrably prejudiced against the Employer' (Section 1B6). (Un. Br. 2).

Furthermore, the proposal gives the Employer the right to deny a request for outside practice "if there is a real or apparent conflict of interest" (Un. Br. 4.)

The Employer's willingness to permit pro bono work by attorneys and to allow them to handle legal problems of family members, so long as the practice is in accordance with regulations and the negotiated agreement, demonstrates certain logical inconsistencies in the Employer's position. The Union contends that since the Employer's interests are

> identical in cases involving pro bono/service for family members as they are in cases where the employee engages in the outside practice of law for compensation, there is no justification to treat the circumstances disparately. This arbitrary differential treatment is not justified by any compelling Government interest nor, for that matter, does it bear even a rational relationship to any purported Government interest. (Un. Br. 4-5).

As to the Employer's comparability data which purports to show similar restrictions by other Government agencies on outside compensated legal practice, only the attorneys in the Department of the Treasury, Office of the Chief Counsel are represented by a labor organization; however, the Employer has overlooked the fact that within certain constraints they are permitted to engage in the outside practice of law for compensation. The Union maintains that "it is hard to imagine any agency having a greater propensity for conflicts of interest than the Department of the Treasury. After all, almost everything is affected by the tax code in one way or another." (Un. Br. 7). The restrictions on outside employment affecting attorneys in the Departments of Housing and Urban Development, Interior, and Justice which the Employer cites were set unilaterally by those agencies; therefore, in the absence of a bargaining relationship between those attorneys and their agencies, the Employer's claim that they are similarly situated to OGC employees is unfounded.

Finally, the Union maintains that the Employer's proposal is contrary to applicable law and Governmentwide regulation. While the Employer is permitted to supplement the standards of conduct proposed by the Office of Government Ethics in 5 C.F.R. section 2635.802 with more restrictive measures, "such addendum must be preceded by approval and concurrence by [that office] as well as publication in the Federal Register (See, Sec. 2635.105, 56 F.R. 33793-4)" (emphasis and footnote omitted) (Un. Br. 7-8.) The Employer has done neither. Furthermore, the Employer's proposed restriction against allowing bargaining-unit attorneys to represent employees in statutory appeals involving the Department with respect to personnel matters also violates applicable law and regulation. In this regard, the regulations of the Equal Employment Opportunity Commission, Merit Systems Protection Board, and the Office of Workers Compensation Programs typically limit the basis for disqualification of a chosen representative to cases where the representative would have a conflict of interest, conflict of position, or the representative is prohibited from acting as a representative "'pursuant to any provision of law'" (citations

omitted) (Un. Br. 8.) The Employer's restrictions would go well beyond those limitations by precluding such representation even in the absense of a showing of a conflict of interest.

CONCLUSIONS

Having considered the evidence and arguments presented by the parties, I conclude that the parties should resolve their dispute by adopting a modified version of the Union's proposal. The record reveals that the Union's proposal essentially is the same terminology which has been in the parties' negotiated agreement since 1985. While it provides the Employer with several safeguards to ensure that an OGC attorney's request to engage in the outside practice of law for compensation would not present either an actual conflict of interest with the attorney's official duties or the appearance of impropriety concerning those duties, it does not go far enough, in my view. In this regard, the proposal fails to require the submission of certain information which would appear to be necessary for the Employer to make a reasoned decision with respect to requests for outside legal employment. For example, the requestor should provide specific information concerning whether the case would involve subject matters with which the OGC attorney may have developed familiarity by virtue of his or her employment with the Department, whether the potential clients have claims pending against the Department, the number of hours the attorney estimates would be needed to attend to the case, whether court or administrative appearances may be required, and the estimated amount of leave that may be needed to handle case-related matters during duty hours. As worded, however, the Union's proposal appears to require the Employer, absent a finding of a conflict with law, regulation, or the provisions of the proposal itself, to authorize a general approval for compensated legal work without the submission of certain information on each case which otherwise would appear necessary for the Employer to make a judgment on the matter.

Under the circumstances of this case, while I find blanket authorizations for the outside practice of law to be inappropriate for these employees, given their fiduciary responsibilities as attorneys for the Government, I find the Employer's proposal for a blanket prohibition of such activities to be equally unsupported. One of the essential criteria for altering an established practice or a longstanding provision in a negotiated agreement is a demonstration on the part of the party proposing the change that there is a need to do so. I find that the Employer has not established that a need exists for a total ban against all compensated outside legal employment for OGC attorneys. Rather, the record reveals

that there have been few requests for approval to engage in the outside practice of law as well as few grievances filed concerning disapprovals by the Employer to engage in such activities.[5/] Moreover, there is no indication that any approved outside legal employment by bargaining-unit attorneys subsequently has resulted in conflicts of interest or the misuse of Government property or time.

Given that the area of outside employment is highly regulated, there are ample parameters for the Employer to follow to assess the propriety of a request. Furthermore, in my view, the Employer has failed to articulate an adequate rationale for that portion of its proposal which would allow attorneys to handle legal matters for family members and pro bono cases. It would appear that with respect to those matters as well, the Employer has the same interest of ensuring that real or apparent conflicts of interest do not exist before approval is authorized.

As to that aspect of the Employer's proposal which would prohibit attorneys from representing other employees of the Department in personnel administrative proceedings including adverse actions, disciplinary matters, employment discrimination, or certain unfair labor practice cases, the Federal Labor Relations Authority has held that it is an unfair labor practice for an agency to prohibit by regulation an attorney/employee's representational activities in an equal employment opportunity case. The Authority determined that absent a determination of a conflict or apparent conflict of interest or a showing why an attorney/employee's involvement in such a case was incompatible with his official duties, the agency was precluded from prohibiting the employee activity as it was protected by section 7102 of the Statute.[6/] Although

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5/ Currently pending is a single grievance referred to by the parties as the Romano grievance which concerns the Employer's refusal to authorize a request to engage in "(l)egal work, pro bono and for fee, primarily probate and title work, ..." (Emp. Exh. 7). Apparently, the parties have agreed that its resolution will be based on the outcome of the interest arbitration herein.

6/ Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office and National Treasury Employees Union, 41 FLRA 401 (June 27, 1991), Report No. 706, appealed sub nom. U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office v. Federal Labor Relations Authority, No. 91-1406 (D.C. Cir. filed August 23, 1990).

the Authority's decision is now the subject of judicial review and it subsequently may be denied enforcement, I am constrained to follow Authority precedent on this matter until altered by the Authority or the U.S. Supreme Court.7/

In order to rectify the above-described deficiencies with the Union's proposal, it should be modified to require attorneys to seek approval, on a case-by-case basis, to engage in the outside practice of law (1) for compensation, (2) pro bono, or (3) as it concerns family members. In all three categories of cases the Employer has the same interest in ensuring that the outside practice of law by bargaining-unit attorneys does not present a conflict with the attorney's position as an employee of the Department, create the appearance of such conflict, or otherwise violate applicable law or regulation. Given the potential burgeoning nature of an outside legal practice, the Employer can better assess the propriety of the cases handled by its attorneys by evaluating each case. The burden of this process would be shared equally by both the employee and the Employer. In this regard, the employee would have the responsibility of supplying enough information on each case to provide the Employer with a basis upon which to make an informed decision on the request; conversely, the Employer would have to evaluate the information in order to provide a reasoned response. With respect to the nature of the information on each case which should accompany an approval request, it should include, but is not limited to, such matters as are listed below.

DECISION

The parties shall adopt the Union's proposal, as modified to require the following:

> Requests to engage in the outside practice of law whether for compensation, pro bono, or on behalf of a family member shall be submitted to the Employer on a case-by-case basis. The requestor shall submit information to the Employer on each case which includes, but is not limited to the following: (1)

7/ Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and AFGE, Council 220, 41 FLRA 1052, 1054 (July 31, 1991), Report No. 713; and American Federation of Government Employees, AFL-CIO, Local 1361 and Department of the Air Force and Air Force Plant Representative's Office (DET 27), General Dynamics, Fort Worth, Texas, 11 FLRA 357, 373-74 (February 18, 1983).

the employee's relationship with the potential client, (2) the general nature of the case and the area of law it involves, (3) whether the case would involve subject matters with which the Office of the General Counsel attorney may have developed familiarity by virtue of his or her employment with the Department, (4) whether the potential clients have claims pending against the Department, (5) the number of hours the attorney estimates would be needed to attend to the case, (6) whether court or administrative appearances may be required, and (7) the estimated amount of leave that may be needed to handle case-related matters during duty hours.

Donna M. Di Tullio

Donna M. Di Tullio
Arbitrator

November 21, 1991
Washington, D.C.