

Office of Government Ethics

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Letter to a Private Attorney dated January 19, 1996

This is in response to your letter of December 7, 1995, in which you request an informal advisory letter regarding the scope of the authority of an agency under 5 C.F.R. § 2635.106(b) to initiate corrective action in individual cases.

Corrective action, as defined at 5 C.F.R. § 2635.102(e), includes any action necessary to remedy a past violation or prevent a continuing violation of part 2635 of title 5 of the Code of Federal Regulations. It includes, but is not limited to, restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling. Such action would usually be taken in order to remove a disqualifying conflict and thereby enable an employee to fully perform his or her duties. 1

In accordance with the decentralized administration of the ethics program in the executive branch, it is the employing agency that has the primary responsibility to initiate appropriate corrective action in individual cases. The Director of the Office of Government Ethics (OGE) may order corrective action under the procedures at 5 C.F.R. part 2638. However, action by OGE would ordinarily be taken only when the agency has taken or recommended inappropriate corrective action.

Your first two questions are whether section 2635.106(b) authorizes the agency itself to investigate potential ethics violations and take corrective action or whether it merely authorizes the agency to refer potential violations to OGE. Section 2635.106(b) states that "it is the responsibility of the employing agency to initiate appropriate ... corrective action in individual cases." Thus, the agency has the responsibility to undertake a particular corrective action rather than to refer a potential ethics violation to OGE.

The actual legal authority for an agency to undertake an investigation, however, is not conferred by section 2635.106(b). Section 2635.106 does not provide an independent legal basis for an agency to investigate a potential ethics violation. Rather, it is a statement of the primary responsibility of an agency to take corrective action where it is appropriate. Such agency action would be based on legal authority other

than part 2635 or part 2638. Investigative authority might be found, for example, in an executive branch wide statute such as the Inspector General Act or in a specific agency authority. Thus, it would be necessary to look to a particular agency in order to determine what was the specific legal authority to conduct an investigation. Agencies have the responsibility to investigate such matters and to make appropriate findings and recommendations. An agency may wish to consult with OGE with respect to legal questions involving interpretation of ethics laws or regulations. However, OGE does not review or intervene in ongoing agency proceedings. 2

Your third question is whether, in the event that an agency has not adopted procedures for conducting agency investigations, an individual would have the same rights as are provided under 5 C.F.R. §§ 2638.504 and 2638.505. These sections set forth procedures (including notice, comment and hearing requirements) to be followed by OGE whenever it undertakes corrective action in individual cases. These sections do not make these procedures applicable to agencies whenever they undertake corrective action. This includes an agency that does not have any procedures in place. In such a case it would be necessary to obtain advice from the particular agency as to what notice, comment and hearing requirements it will follow in taking corrective action. An agency that had not adopted procedures could, of course, decide to be guided by the procedures for taking corrective action set forth in sections 2838.504 and 2638.505.

Your fourth question is whether an employee has a right of review or appeal of agency corrective action, and if so, under what regulations. There is nothing in the regulations issued by this Office that provides for such a right of review or appeal. Given the number of personnel systems in the executive branch and the range of remedies (including grievance procedures) available to employees under those systems, we are unable to provide an opinion as to whether such review or appeal would be generally available.

Sincerely,

Stephen D. Potts
Director

1 Section 2635.106 applies to both disciplinary and corrective action. Disciplinary action, as defined at 5 C.F.R. § 2635.102(g), includes those actions referred to in the Office of Personnel Management regulations and

instructions implementing provisions of title 5 of the United States Code. It includes but is not limited to reprimand, suspension, demotion, and removal. As noted in section 2635.106(b), the initiation of appropriate disciplinary action is the responsibility of the employing agency.

2 Part 2638 contemplates that agencies generally shall undertake investigations of violations of ethics provisions. Section 2638.503(a), for example, provides that the Director of OGE may recommend that an agency conduct an investigation where the Director has reason to believe that an employee is violating or has violated any ethics provision.