

Rules and Regulations

Federal Register

Vol. 62, No. 29

Wednesday, February 12, 1997

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

NATIONAL LABOR RELATIONS BOARD

5 CFR Chapter LXI

29 CFR Part 100

RIN 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the National Labor Relations Board

AGENCY: National Labor Relations Board (NLRB).

ACTION: Interim rule with request for comments.

SUMMARY: The National Labor Relations Board, with the concurrence of the Office of Government Ethics (OGE), is issuing an interim regulation for employees of the NLRB that supplements the executive branch-wide Standards of Ethical Conduct (Standards) issued by OGE. The supplemental regulation requires NLRB employees to obtain approval before engaging in outside employment, and requires employees to provide written notification of disqualification. The NLRB is also repealing provisions in its old standards of conduct regulations that required prior approval to engage in outside employment and prohibited the private practice of law, both of which have been superseded by the Standards.

DATES: This interim rule is effective on February 12, 1997. Comments must be received on or before April 14, 1997.

ADDRESSES: Send comments to: Gloria Joseph, Director of Administration (Designated Agency Ethics Official), National Labor Relations Board, Suite 7100, 1099 14th Street, NW., Washington, DC 20570-0001.

FOR FURTHER INFORMATION CONTACT: Gloria Joseph, Director of Administration (Designated Agency Ethics Official); or Kym Heinzmann, Program Analyst, both at the National

Labor Relations Board, Suite 7100, 1099 14th Street, NW., Washington, DC 20570-0001; telephone 202-273-3890.

SUPPLEMENTARY INFORMATION:

I. Background

On August 7, 1992, the Office of Government Ethics published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards). See 57 FR 35006-35067, as corrected at 57 FR 48557, 57 FR 52583, and 60 FR 51667, and amended at 61 FR 42965-42970 (as corrected at 61 FR 48733) and 61 FR 50689-50691, with additional grace period extensions at 59 FR 4779-4780, 60 FR 6390-6391, 60 FR 66857-66858, and 61 FR 40950-40952. The Standards as codified at 5 CFR part 2635 and effective February 3, 1993, established uniform standards of ethical conduct that apply to all executive branch personnel.

On July 21, 1994, the NLRB issued a final rule which removed all of the provisions of its Administrative Regulations at 29 CFR part 100 that had been superseded by 5 CFR part 2635 or by OGE's executive branch financial disclosure regulations at 5 CFR part 2634. See 59 FR 37157-37159, as corrected at 60 FR 22269-22270. Along with portions not related to 5 CFR parts 2634 and 2635, the NLRB preserved those provisions of its Administrative Regulations prohibiting the private practice of law and requiring prior approval to engage in outside employment which were temporarily preserved, respectively, by the notes following 5 CFR 2635.403(a) and 2635.803 (as extended by 59 FR 4779-4780, and subsequently by 60 FR 6390-6391, 60 FR 66857-66858, and 61 FR 40950-40952).

With the concurrence of OGE, 5 CFR 2635.105 authorizes executive branch agencies to publish agency-specific supplemental regulations necessary to implement their ethics programs. The NLRB, with OGE's concurrence, has determined that the following interim supplemental regulations, to be codified in part 7101 of new chapter LXI of 5 CFR, are necessary to the successful implementation of NLRB's ethics program. By this rulemaking, the NLRB is also repealing the provisions of subpart A of its Administrative Regulations at 29 CFR part 100 that required prior approval to engage in outside employment and prohibited the

private practice of law, the grace period extensions for which have expired.

II. Analysis of the Interim Regulations

Section 7101.101 General

Section 7101.101(a) of 5 CFR explains that the supplemental regulations apply to employees of the National Labor Relations Board, including Board members, and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635. This paragraph further explains that Board Members and other employees are subject, in addition, to the executive branch financial disclosure regulations contained in 5 CFR part 2634.

The head of each executive branch agency is required by 5 CFR 2638.202(b) to appoint a designated agency ethics official (DAEO) and an alternate DAEO to carry out the duties specified in 5 CFR 2638.203. Section 7101.101(b) explains that the Director of Administration is the NLRB's DAEO and the Deputy Director of Administration is the alternate DAEO. Section 7101.101(c) explains that, except as provided in § 7101.102 regarding prior approval of outside employment, the DAEO is the NLRB's agency designee for purposes of making determinations, granting approvals, and taking other actions required of agency designees under 5 CFR part 2635 and the supplemental regulations.

Section 7101.102 Prior Approval for Outside Employment

The Standards, at 5 CFR 2635.803, specifically recognize that individual agencies may find it necessary or desirable to supplement the executive branch-wide regulations with a requirement for their employees to obtain approval before engaging in outside employment or activities. Under 29 CFR 100.102, now repealed, the NLRB required its employees to obtain approval prior to engaging in any type of outside employment, including certain occasional and private legal activities that were permitted under an exception to that regulation's prohibition against the outside practice of law. This approval requirement helped to ensure that potential ethical problems were resolved before employees undertook outside employment that could involve a

violation of applicable statutes or standards of conduct.

In accordance with 5 CFR 2635.803, the NLRB has determined that it is desirable for the purpose of administering its ethics program to require employees to obtain approval before engaging in outside employment, including the practice of law, regardless of whether that employment is undertaken for compensation. Moreover, the NLRB has decided that the officials authorized to grant approval under its old prior approval regulation should continue to have such authority under its new rules. Thus, § 7101.102(a)(1) requires written approval from the Board or General Counsel (depending on which independent side of the NLRB the employee is employed) to engage in the private practice of law, and § 7101.102(a)(2) requires written approval from the employee's Chief Counsel, Regional Director, Branch Chief, or the equivalent for outside employment not involving the private practice of law.

Section 7101.102(b) sets forth the procedures for requesting approval to engage in the private practice of law or other outside employment. This paragraph requires that requests for approval be submitted in writing in advance of undertaking the employment, and contain pertinent information regarding the anticipated employment, including the name of the employer, the nature of the legal activity or other work to be performed, the estimated duration of the employment and the amount of compensation to be received.

Section 7101.102(c) sets forth the standard to be applied by the agency designee in acting on requests for prior approval of outside employment. Under that standard, approval shall be granted unless the agency designee determines that the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635. Section 7101.102(c) provides further that, before granting approval, the approving official may consult with the designated agency ethics official to ensure that the request for approval of outside employment meets the standard for approval.

In § 7101.102(d), "employment" is broadly defined for purposes of this section to cover any form of non-Federal employment or business relationship involving the provision of personal services, including writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the

activities of nonprofit charitable, religious, professional, social, fraternal and similar organizations, unless such activities involve the provision of professional services or advice and are for compensation other than the reimbursement of expenses.

Section 7101.103 Standard for Accomplishing Disqualification; Disqualifying Financial Interests

Under 5 CFR 2635.402(c), it is the employee's obligation to disqualify from participation in matters affecting his own financial interests or those of the persons whose interests are imputed to him under 18 U.S.C. 208(a). Section 2635.402(c) generally permits disqualifying to be accomplished simply by not participating in the matter, although § 2635.402(c)(1) provides that an employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment.

Under old 29 CFR 100.116(c), now repealed, NLRB employees were required to complete and submit Form NLRB-4573, "Request for Financial Interest Determination," when they were assigned a case, proceeding, or other matter in which they had a financial interest. Based upon the information provided, a determination was made as to whether the employee could participate in the case or would have to be disqualified.

The NLRB has determined that it is necessary for the efficient management of the agency's relatively small workforce, and to the success of its ethics program, to require employees to provide written notice of their disqualification under 5 CFR 2635.401(c). Therefore, § 7101.103 requires such written notice. This requirement is similar to the NLRB's old requirement for employees to seek a financial interest determination when they were assigned a case, proceeding, or other matter in which they had a financial interest. However, the new provision does not require the written notice to be provided on a particular form.

The NLRB recognizes the problems noted by OGE in adopting a requirement for written notice of disqualification on an executive branch-wide basis. See 57 FR 35024. It is not the NLRB's purpose to impose an overly technical requirement that would result in disciplining an employee for failure to provide written notice by some arbitrary deadline. Thus, the notice requirement contained in § 7101.103 is phrased to give an employee flexibility in

determining precisely when he or she will give notice of disqualification on a matter to which he or she has been assigned. Notice is to be given when the employee determines that he or she will not participate in the matter. In no way does this notice requirement affect the employee's primary obligation not to participate in the matter.

III. Repeal of the NLRB's Old Administrative Regulations Regarding Employee Responsibilities and Conduct

Because the NLRB's regulations prohibiting the private practice of law and requiring prior approval for outside employment, at 29 CFR 100.102, were superseded upon expiration of the last grace period granted by OGE, the NLRB is removing that section in its entirety at this time. The NLRB is also revising 29 CFR 100.101, which now cross-references 5 CFR parts 735, 2634, and 2635, to provide an additional cross-reference to the new supplemental regulations at 5 CFR part 7101.

IV. Matters of Regulatory Procedure
Administrative Procedures Act

The NLRB has found good cause, pursuant to 5 U.S.C 553(b) and (d)(3) for waiving, as unnecessary and contrary to the public interest, the general notice of proposed rulemaking and the 30-day delay in effectiveness as to these interim rules. It is important to a smooth transition from the NLRB's prior ethics rules to the new executive branch-wide Standards that these rulemaking actions take place as soon as possible. Furthermore, this rulemaking is related to NLRB organization, procedure, and practice. Nonetheless, this is an interim rulemaking, with provision for a 60 day public comment period. The NLRB will review all comments received during the comment period and will consider any modifications that appear appropriate in adopting these rules as final, with the concurrence of OGE.

Executive Order 12866

In promulgating these regulations, the NLRB has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These regulations have not been reviewed by the Office of Management and Budget under the Executive order, as they deal with agency organization, management, and personnel matters, and not in any event, deemed "significant" thereunder.

Regulatory Flexibility Act

The NLRB has determined under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that these regulations will not

have a significant economic impact on a substantial number of small entities because they affect only NLRB employees.

Paperwork Reduction Act

The NLRB has determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because these interim regulations do not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects

5 CFR Part 7101

Conflict of interests, Government employees.

29 CFR Part 100

Employee responsibilities and conduct, Government employees.

Dated: January 24, 1997.

By direction of the Board.

John J. Toner,

Executive Secretary, National Labor Relations Board.

Approved: January 29, 1997.

Stephen D. Potts,

Director, Office of Government Ethics.

For the reasons set forth in the preamble, the National Labor Relations Board, with the concurrence of the Office of Government Ethics, is amending title 5 and Chapter I of subtitle B or title 29 of the Code of Federal Regulations as follows:

TITLE 5—[AMENDED]

1. A new chapter LXI, consisting of part 7101, is added to title 5 of the Code of Federal Regulations to read as follows:

CHAPTER LXI—NATIONAL LABOR RELATIONS BOARD

PART 7101—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE NATIONAL LABOR RELATIONS BOARD

Sec.

7101.101 General.

7101.102 Prior approval for outside employment.

7101.103 Standard for accomplishing disqualification, disqualifying financial interests.

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 29 U.S.C. 141, 156; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42457, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.402(c), 2635.803, and 2638.202(b).

§ 7101.101 General.

(a) *Purpose.* In accordance with 5 CFR 2635.105, the regulations in this part apply to Board members and other employees of the National Labor Relations Board (NLRB) and supplement the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2635. Board Members and other employees are subject, in addition, to the executive branch financial disclosure regulations contained in 5 CFR part 2634.

(b) *Ethics program responsibilities—*(1) *Designated Agency Ethics Official.* The Director, Division of Administration, is designated under 5 CFR 2638.202(b) as the NLRB's Designated Agency Ethics Official with responsibilities that include:

(i) Acting as liaison with the Office of Government Ethics with regard to all aspects of the NLRB's ethics program;

(ii) Coordinating the NLRB's counseling and advisory service under 5 CFR 2635.107;

(iii) Collecting, reviewing, evaluating and, where applicable, making publicly available the public financial disclosure reports filed by NLRB officers and employees;

(iv) Upon request, advising NLRB officials responsible for reviewing the Confidential Financial Disclosure Reports filed by designated NLRB employees; and

(v) Coordinating and maintaining the NLRB's ethics education program.

(2) *Alternate Designated Agency Ethics Official.* The Deputy Director of Administration is designated under 5 CFR 2638.202(b) as the NLRB's Alternate Designated Agency Ethics Official.

(c) *Agency designees.* Except as provided in § 7101.102, the Designated Agency Ethics Official shall serve as the NLRB's designee for purposes of making the determinations, granting the approvals, and taking other actions under 5 CFR part 2635 and this part.

§ 7101.102 Prior approval for outside employment.

(a) *General Requirement.* Before engaging in compensated or uncompensated outside employment, an employee must obtain written approval:

(1) From the Board of General Counsel to engage in the private practice of law; or

(2) From the employee's Chief Counsel, Regional Director, Branch Chief, or the equivalent for outside employment not involving the practice of law.

(b) *Procedure for requesting approval* (1) The approval required by paragraph (a) of this section shall be requested in

writing in advance of engaging in outside employment, including the outside practice of law.

(2) The request for approval to engage in the outside practice of law or in other outside employment shall be submitted to the appropriate official as set forth in paragraph (a) of this section, and shall set forth, at a minimum:

(i) The name of the employer;

(ii) The nature of the legal activity or other work to be performed;

(iii) The estimated duration; and

(iv) The amount of compensation to be received.

(3) Upon a significant change in the nature of scope of the outside employment or in the employee's official position, the employee shall submit a revised request for approval.

(c) *Standard for approval.* (1) Approval shall be granted unless the agency designee determines that the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.

(2) The agency designee may consult with the Designated Agency Ethics Official to ensure that the request for outside employment meets the standard in paragraph (c)(1) of this section.

(d) *Definition of employment.* For purposes of this section, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It includes, but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner, trustee, teacher, or speaker. It includes writing when done under an arrangement with another person for production or publication of the written product. It does not, however, include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization, unless such activities involve the provision of professional services or advice or are for compensation other than reimbursement of expenses.

§ 7101.103 Standard for accomplishing disqualification; disqualifying financial interest.

An NLRB employee who is required, in accordance with 5 CFR 2635.402(c), to disqualify himself from participation in a particular matter to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.402(c) (1) and (2), provide written notice of disqualification to his or her supervisor upon determining that he or she will not participate in the matter.

TITLE 29—[AMENDED]**SUBTITLE B—REGULATIONS RELATING TO LABOR****CHAPTER I—NATIONAL LABOR RELATIONS BOARD****PART 100—ADMINISTRATIVE REGULATIONS**

2. The authority citation for part 100 is revised to read as follows:

Authority: Sec. 6, National Labor Relations Act, as amended (29 U.S.C. 141, 156).

Subpart A is also issued under 5 U.S.C. 7301.

Subpart B is also issued under the Inspector General Act of 1978, as amended by the Inspector General Act Amendments of 1988, 5 U.S.C. app. 3; 42 U.S.C. 2000e-16(a).

Subpart D is also issued under 28 U.S.C. 2672; 28 CFR part 14.

Subpart E is also issued under 29 U.S.C. 794.

3. Subpart A is revised to read as follows:

Subpart A—Employee Responsibilities and Conduct**§ 100.101 Cross-reference to financial disclosure requirements and other conduct rules.**

Employees of the National Labor Relations Board (NLRB) should refer to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635; the NLRB's regulations at 5 CFR part 7101, which supplement the executive branch-wide standards; the employee responsibilities and conduct regulations at 5 CFR part 735; and the executive branch financial disclosure regulations at 5 CFR part 2634.

[FR Doc. 97-3376 Filed 2-11-97; 8:45 am]

BILLING CODE 7545-01-M

OFFICE OF PERSONNEL MANAGEMENT**5 CFR Part 930**

RIN 3206-AH31

Funding of Administrative Law Judge Examination

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final regulation to require agencies employing administrative law judges to reimburse OPM for the cost of

developing and administering examinations for judge positions. The regulation implements OPM's authority to delegate examining authority for all competitive service positions except for administrative law judges, and to require employing agencies to reimburse OPM for the cost of administrative law judge examinations.

EFFECTIVE DATE: March 14, 1997.

FOR FURTHER INFORMATION CONTACT: Richard A. Whitford on 202-606-2525, TDD 202-606-0591, or FAX 202-606-1768.

SUPPLEMENTARY INFORMATION: On July 29, 1996, OPM issued an interim regulation at 61 FR 39267 to implement the new funding arrangement for administrative law judge examinations as required by the Treasury, Postal Service, and General Government Appropriations Act, 1996 (Pub. L. 104-52, November 19, 1995). This act amended 5 U.S.C. 1104 to require OPM to continue examining for administrative law judges and to require employing agencies to reimburse OPM for the cost of doing so.

OPM's interim regulation added a new paragraph (c) to 5 CFR 930.201 to require affected agencies to reimburse OPM annually for the cost of developing and administering administrative law judge examinations. Each employing agency's share of reimbursement will be based on its relative number of such judges as of March 31 of the preceding fiscal year. The regulation also provided that OPM would work with employing agencies to review the examination program for effectiveness and efficiency and identify needed improvements, consistent with statutory requirements. On this basis, OPM would compute and notify each agency of its share, along with a full accounting of costs.

We received two written comments, both from agencies employing administrative law judges. One agency questioned the basis for the fee, pointing out that the law does not specify any specific reimbursement method. This agency agreed with OPM's proposal to establish a working group of officials from OPM and affected agencies but suggested that this group determine how costs are to be allocated and have a continuing role in overseeing the operation of the examination.

OPM will continue consulting, as we have been, with the stakeholders in the administrative law judge program, including Chief Administrative Judges from agencies with the largest judge populations. For this fiscal year, however, OPM has not allocated any of its appropriated funds and has no other

funding source to operate this examination. Therefore, we must bill affected agencies, as indicated in the interim regulation, based on their relative share of the administrative law judge workforce.

Another agency did not object to the fee or the reimbursement method but requested that OPM refer for its appointment consideration only those candidates who possess specialized experience related to its programs. Inasmuch as this action would require a substantive change to 5 CFR part 930 that is outside the scope of this rulemaking, OPM cannot act on the proposal at this time. We will, however, consider it in the future.

OPM is adopting without change the new paragraph (c) to § 930.201 contained in the interim regulation published on July 29, 1996.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it pertains only to Federal agencies.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 930

Administrative practice and procedure, Government employees, Motor vehicles.

Office of Personnel Management.
James B. King,
Director.

Accordingly, OPM is adopting its interim regulation at 5 CFR part 930 as published on July 29, 1996 (61 FR 39267) as final with the following change:

1. The part title is corrected to read as follows:

PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)**Subpart B—Appointment, Pay, and Removal of Administrative Law Judges**

2. The authority citation for subpart B continues to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 1305, 3105, 3323(b), 3344, 4301(2)(D), 5372, 7521.

[FR Doc. 97-3423 Filed 2-11-97; 8:45 am]

BILLING CODE 6325-01-P