September 18, 2000
DO-00-034

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: F. Gary Davis
Acting Director

SUBJECT: Recent Court Case Interpreting 18 U.S.C. § 205

This is to bring to your attention a recent decision by the United States Court of Appeals for the Federal Circuit that interprets 18 U.S.C. § 205. Section 205, among other things, bars an employee from acting as agent or attorney for anyone before any Government agency in any particular matter in which the United States is a party or has a direct and substantial interest. In O'Neill v. Department of Housing and Urban Development, 220 F.3d 1354 (2000), the court of appeals determined that an employee does not act as "agent" for another person, under 18 U.S.C. § 205, unless the employee has actual or apparent authority to act on behalf of that person in dealings with the Government.

The O'Neill case was an appeal from a decision by the Merit Systems Protection Board that had upheld the removal of an employee based on four charges, including acting as an agent of a private party before a Government agency, in violation 18 U.S.C. § 205(a)(2). The employee had contacted various officials at her department and another department urging them to look favorably on a proposal by a non-profit organization called Altamont Program, Inc. Although the employee purported to represent Altamont when she contacted her agency, the employee later argued in her defense that she was not an "agent" of Altamont as that term is used in section 205(a)(2). The Board found that in fact the employee did not have Altamont's permission to represent it. However, the Board found that to be of no consequence with respect to 18 U.S.C. § 205 and sustained the charge.

The court of appeals affirmed the removal action. But as to the charge that the employee had acted as an agent of a private

party before a Government agency in violation of 18 U.S.C. § 205, the court said:

> Applying the well-settled common-law meaning of the term "agent," we conclude that the Board erred in finding that Ms. O'Neill acted as an agent under section 205(a)(2), because the government presented no evidence that Ms. O'Neill had actual or apparent authority to act on behalf of Altamont. In her submission to the Board, Ms. O'Neill claimed that Father Peter Young, the director of Altamont, would have testified at a hearing that Ms. O'Neill had no authority to conduct business on behalf of Altamont. The administrative judge, however, deemed such testimony irrelevant based on her conclusion that section 205 did not incorporate agency principles. The evidence offered by the government, and the findings of the administrative judge, established no more than that Ms. O'Neill purported to represent the interests of Altamont. The evidence did not establish, and the administrative judge did not find, that her purported representation was authorized, either actually or apparently. She was therefore not shown to have been an "agent" of Altamont in the sense that the term is used in the law of agency and in the sense that we understand the term to be used in section 205(a)(2). The Board therefore erred in concluding that Ms. O'Neill acted as an agent of a private party before a government agency, and her removal cannot be sustained on the ground that she violated 18 U.S.C. § 205(a)(2).

The court's conclusion in this regard is consistent with past advice from the Office of Government Ethics (OGE). As indicated in OGE Informal Advisory Letter 98 x 18, where an employee makes a communication to the Government in support of the interests of another person, the employee does not violate 18 U.S.C. § 205, unless there is "some degree of control by the principal over the agent who acts on his or her behalf."[1]

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[1] The court did not address what circumstances would constitute "apparent authority" to represent another person before the Government. However, under the common law "apparent authority to do an act is created as to a third person by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27 (1958).

As noted above, the employee in this case was charged with misconduct in addition to violating 18 U.S.C. § 205. Among those other charges was misusing Government property in violation of the provision in the executive branchwide Standards of Ethical Conduct (Standards) at 5 C.F.R. § 2635.704. The employee argued in her defense that 5 C.F.R. § 2635.704(a) must be read to have an implicit de minimis exception. The court did not give full consideration to 5 C.F.R. 2635.704 and its background, finding under the circumstances of the case that the misuse of Government property charge was not necessary to the decision because other sustained charges formed a sufficient basis to affirm her removal. Nevertheless, the court suggested as an aside or dictum that the employee's argument regarding an implicit de minimis exception "has some force."

Section 2635.704(a) provides that "[a]n employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes." "Authorized purposes," in turn, are defined at 5 C.F.R. § 2635.704(b)(2) as those purposes for which Government property is made available to the public or "those purposes authorized in accordance with law or regulation." As acknowledged in the O'Neill decision, there is not any express de minimis exception in the regulatory language of 5 C.F.R. § 2635.704. Moreover, during the development of the Standards as a final rule, OGE specifically rejected informal recommendations to create an exception permitting de minimis personal use of agency photocopying equipment. See the preamble accompanying the issuance of the Standards as a final rule, at 57 Fed. Reg. 35032 (Aug. 7, 1992). Nothing in the Executive order underlying the Standards or in any statute gives OGE authority to issue executive branchwide regulations specifically authorizing use of Government property for any purpose, de minimis or otherwise.

Section 2635.704 does not attempt to set forth all the purposes that are "authorized in accordance with law or regulation." To determine which uses of Government property are authorized, one must look to sources outside of OGE's purview. These sources might include, for example, regulations issued by the General Services Administration or department-specific regulations, some of which may include provisions permitting certain de minimis uses of property for non-official purposes.

A copy of O'Neill v. Department of Housing and Urban Development may be found at OGE's web site.