

Letter to a Designated Agency Ethics Official
dated June 28, 2007

This is in response to your letter of June 18, 2007. You seek guidance of the Office of Government Ethics (OGE) concerning "the method for determining whether [your Department's] Personal Service Contractors (PSCs) should be considered employees subject to the various government ethics laws and regulations." You are concerned that a law authorizing PSCs at your Department may prevent you from using the usual three-part test that the executive branch follows to determine "employee" status for ethics purposes. As we discuss below, OGE cannot provide a definitive opinion concerning the employee status of PSCs at your Department or the interpretation of your Department's statutory authority for hiring PSCs. Nevertheless, we can point out certain issues for your consideration and provide some general observations concerning PSCs.

Your letter states that [the Department] historically has treated its PSCs as "government employees for ethics purposes." You also indicate that [the Department] follows the three-part test in 5 U.S.C. § 2105(a) to determine whether a PSC is an employee for purposes of the ethics laws and regulations.¹ You

¹ Section 2105(a) provides:

(a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

- (A) the President;
- (B) a Member or Members of Congress, or the Congress;
- (C) a member of a uniformed service;
- (D) an individual who is an employee under this section;
- (E) the head of a Government controlled corporation; or

have applied this test pursuant to guidance from the Office of Legal Counsel (OLC), Department of Justice. As you observe, OLC has indicated that the three-part test must be satisfied before an individual can be deemed an employee subject to the conflict of interest laws in title 18 and other ethics statutes and regulations. See Memorandum of M. Edward Whalen III, Principal Deputy Assistant Attorney General, OLC, for Marilyn L. Glynn, General Counsel, OGE, May 8, 2002, at 3-4.²

However, you now believe that your Department may be precluded by statute from relying on the section 2105 test, and you query what standard may be used instead. Specifically, you cite your Department's authority for hiring PSCs under a provision in [an] Act, as amended, [citation deleted].³ This

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

² With respect to the ethical requirements of Executive Order 12674 and the OGE Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635, OLC has determined that the terms officer and employee are "identical in scope with the terms 'officer' and 'employee' as used in 5 U.S.C. §§ 2104 and 2105." 17 O.L.C. 150, 153 (1993). Likewise, with respect to the criminal conflict of interest statutes, OLC has concluded that, in the absence of a generally applicable definition in title 18, it is necessary to look to the three-part test in the title 5 definitions of officer and employee; indeed, OLC has stated that it is "loath to dilute the three-part test," particularly in view of the rule of lenity. Memorandum of M. Edward Whalen III at 3.

³ Absent specific statutory authority, such as [citation deleted], agencies are prohibited from awarding personal services contracts, under the Federal Acquisition Regulation (FAR). See 48 C.F.R. § 37.104(b). The rationale for this restriction is that "[t]he Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws," and "[o]btaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has

provision makes appropriations available for "contracting with individuals" for certain personal services abroad.⁴ The statute expressly states that "such individuals shall not be regarded as employees of the United States Government for the purpose of any law administered by the Office of Personnel Management." [Citation deleted]. You reason that, "[b]ecause the Office of Personnel Management administers title 5" of the United States Code, you "should not apply the test in 5 U.S.C. § 2105(a) to determine whether PSCs qualify as employees subject to government ethics laws."

We must emphasize at the outset that "OGE is not the arbiter of whether an individual is an employee." OGE Informal Advisory Letter 00 x 7. Although OGE can and frequently does provide general guidance on the factors that have been identified for resolving such questions, it is ultimately up to the agency involved to determine whether a given individual is an employee. This is especially so here, because your question involves the interpretation of a provision in the Act that is specific to your Department and not within OGE's primary competence. You may wish to consult with OLC for a definitive answer to your question; this could be particularly beneficial in this instance, as your question pertains to the authority to follow OLC's own direction to use the test of 5 U.S.C. § 2105, notwithstanding the language in the Act.

Understanding the limits of our role here, you may find the following observations useful, at least for purposes of clarifying the issues at hand.

specifically authorized acquisition of the services by contract." 48 C.F.R. § 37.104(a). As noted below, a personal services contract actually is "characterized by the employee-employer relationship it creates" between the Government and the individual performing the services. *Id.*

⁴ Some statutes, such as 5 U.S.C. § 3109, contemplate that an agency may contract either with individuals or with organizations to acquire personal services. The provision [of the Act] refers only to "contracting with individuals," [citation deleted], and we assume your inquiry pertains only to individuals hired directly as PSCs rather than through an organizational contractor. None of the discussion below pertains to contracts with an organization to provide personal services, as such contracts may pose different issues.

It is not clear to us that the language [of the Act] necessarily precludes you from looking to the section 2105 test in the way envisioned by OLC. For one thing, we think your premise that OPM "administers title 5" is overbroad. Title 5 contains many provisions apart from laws administered by OPM, including the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the Privacy Act, 5 U.S.C. § 552a, and even certain ethics laws administered by OGE, such as the gift restriction in 5 U.S.C. § 7351. Moreover, the definition of "employee" in 5 U.S.C. § 2105 is not limited in its applicability just to laws under OPM jurisdiction but rather applies to title 5 generally. 5 U.S.C. § 2105(a) ("*For purposes of this title, 'employee', except as otherwise provided by this section or when specifically modified, means . . .*"). Many provisions in title 5, besides those administered by OPM, use the term "employee" and presumably derive meaning from the general definition in section 2105. *E.g.*, 5 U.S.C. § 301 (housekeeping authority); 5 U.S.C. § 303 (administration of witness oaths); 5 U.S.C. § 554(a)(2) (Administrative Procedure Act); 5 U.S.C. § 601(7) (Regulatory Flexibility Act); 5 U.S.C. § 7351 (gifts to superiors).

We acknowledge, however, that one part of the section 2105 test requires that the individual be "appointed in the *civil service*." 5 U.S.C. § 2105(a)(1) (emphasis added). Of course, OPM is charged with "executing, *administering*, and enforcing . . . the *laws governing the civil service*." 5 U.S.C. § 1103(a)(5)(A) (emphasis added). One might argue, therefore, that OPM administers at least that part of section 2105(a) pertaining to appointments in the civil service. Still, it is not apparent to us that the Act would preclude looking for guidance, even in a general way, to the three-part test, particularly where the question concerns the applicability of title 18 laws and other ethical restrictions that are not themselves administered by OPM. Presumably, the main thrust of the provision [of the Act] is to exclude PSCs from the various civil service procedures and programs implemented by OPM, such as classification, pay, retirement, health insurance, etc. It is not obvious to us that it would be inconsistent with this statutory goal if you relied on the definition in section 2105(a) solely for purposes unrelated to OPM programs. Again, you may wish to consult OLC, and perhaps also OPM, for a definitive answer.

We also want to note that comparable language in another provision of the Act has long been construed by [another] Agency as authority for hiring "employees" subject to the title 18

conflict of interest statutes. In 1987, [the Agency] forwarded OGE an opinion in which [the Agency] determined that PSCs hired under [a different provision of the Act] were employees within the meaning of 18 U.S.C. § 207. Similar to the provision cited in your letter, [a] section [of the Act] provides that PSCs "shall not be regarded as employees for the purpose of any law administered by the Office of Personnel Management." [Citation deleted]. [The Agency] reasoned that OPM does not administer the criminal conflict of interest laws, and, therefore, the exclusion from "employee" status does not extend to 18 U.S.C. § 207. In a summary, one-paragraph letter, OGE concurred in [the Agency's] determination. Letter from Donald E. Campbell, Acting Director, OGE, to Assistant General Counsel, [the Agency], November 6, 1987. While OGE was simply endorsing the reasonable determination of [the Agency] with respect to its statutory authority and personnel, we are aware of several later occasions in which OGE informally discussed similar interpretations of the same or comparable statutes with other agencies.⁵

Finally, as a general matter, there is a considerable Executive branch history of treating as least some PSCs as employees for various purposes, including ethical requirements. The Federal Acquisition Regulation (FAR) states that a "personal services contract is *characterized by the employer-employee relationship* it creates between the Government and the contractor's personnel." 48 C.F.R. § 37.104(a)(emphasis added). Where agencies have procured such services directly from an individual (as opposed to an organization)--for example, pursuant to 5 U.S.C. § 3109--agencies often have given the PSC a personnel appointment.⁶ Under the former Federal Personnel Manual, individuals procured as experts and consultants were to

⁵ For example, your letter notes discussions and correspondence with OGE in 1992 concerning the treatment of PSCs under [a] section [of the Act].

⁶ A general discussion of this practice and the history of PSCs may be found in a document recently published by the Acquisition Advisory Panel, which was established under the Services Acquisition Reform Act, Pub L. No. 108-136, § 1423, November 24, 2003). See Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, Final Working Draft, December 2006, at 6-5ff., <http://www.acquisition.gov/comp/aap/documents/Introduction%20and%20Executive%20Summary.pdf>.

be given appointments and deemed covered by the conflict of interest laws, as long as the contract created "an employer-employee relationship rather than an independent contractor relationship." OPM, Federal Personnel Manual, ch. 304, at 304-3, 304-7, January 22, 1982 (revoked 1994). The FAR continues to contemplate similar treatment. See 48 C.F.R. § 37.104(f)(contracting officer to coordinate with personnel office to deal with issues such as conflict of interest). Such practices even have received some judicial notice. See *Quinn v. Gulf and Western Corp.*, 644 F.2d 89, 92-94 (2d Cir. 1981)(personal service contractor treated as special Government employee for purposes of conflict of interest requirements).

In the end, however, OGE cannot opine authoritatively on whether your Department may continue to follow the same practice, consistent with the language of the Act and the guidance of OLC concerning 5 U.S.C. § 2105. Your Department will have to make its own determinations, although we are available to assist you in raising this question with OLC and/or OPM if you so choose.

I hope you have found this helpful. If you have any questions about this matter, please contact our Office.

Sincerely,

Marilyn L. Glynn
General Counsel