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Dual Compensation and the Ethics Rules

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Biography

Jeffrey Green was promoted to the position of senior attorney and Deputy Designated Agency Ethics Official at the Department of Defense in November 2000. Prior to that, Jeff was a deputy ethics official for the Department of Veterans Affairs Office of General Counsel, serving in that job for over 8 years. In 1997, he was selected for a 6 month detail to serve in the Office of the Counsel to the President. He has given numerous presentations on the Standards of Ethical Conduct for Employees of the Executive Branch. He has published several articles on ethics that have been approved for use by the Office of Government Ethics in lieu of an "in person" regulatory training requirement. He also has written a law review article on the History of the Federal Conflicts of Interest Law, and on the Emoluments Clause to the Constitution. He has served as a Guest Lecturer at the Georgetown University School of Law. Prior to Government work experience, Jeff worked in private practice where he developed ethics compliance programs for corporations and taught a business ethics course. Jeff graduated with a BA from Northwestern University and with both a JD and MBA from Washington University in St. Louis. He is a member of the bars of Texas, Pennsylvania and the District of Columbia.

Dual Compensation and the Ethics Rules

Mark Twain once said, "Always do right. This will gratify some people and astonish the rest." Complying with the Standards of Ethical Conduct for employees of the Executive Branch should not only gratify some people but should not astonish the rest. As the Secretary of Defense has said in his August 19, 2019, memo, "Reaffirming Our Commitment to Ethical Conduct," we must aim beyond compliance with basic standards and always be willing to choose the harder virtue over the easier vice.

Federal employees often encounter questions about the proper use of Government facilities and time. 5 C.F.R. 2635.703, 704 and 705. In a rare instance, the United States Court of Federal Claims dealt directly with this issue in a case regarding copyright infringement, *Victor Herbert v. United States*, 36 Fed.Cl. 299 (1996).

In this case, a dispute arose over a contract between the National Institutes of Health (NIH) and the National Academy of Sciences. Under the contract, the Academy was to develop the 10th edition of the Recommended Dietary Allowances ("RDA works" or "RDA"). Dr. Herbert, at the time a Federal employee who also was affiliated with a university medical center, volunteered to participate on the volunteer committee to help prepare the 10th RDA works. Dr. Herbert contributed work to the Committee on iron, folate, and vitamin B-12. For other reasons, the overall Committee report was not delivered to the NIH. Dr. Herbert subsequently revised and published his works and had them copyrighted. The Committee was subsequently re-formed without Dr. Herbert and issued its new RDA report, including information Dr. Herbert previously provided to the Committee. Dr. Herbert brought a copyright infringement action against the Government since he registered his copyright prior to release of the report.

In order to prevail in a copyright action, Dr. Herbert (as does any plaintiff) had the burden to prove that (i) he was not in the employment or service of the United States where the copyrighted work was prepared as part of his official functions, or (ii) he did not use Government time, material, or facilities in preparation of the copyrighted work. 28 U.S.C. section 1498(b). The Government prevailed, and the Court's rationale is instructive as to what constitutes "official functions" and "Government time or facilities."

First, the Court addressed the issue of whether Dr. Herbert was a Government employee. He was employed at a Federal agency and, as a second job, at an affiliated university medical center. He argued that at the time he created the RDA works, he was a doctor treating patients for the Government and that all his research was performed at the affiliated university. The Court ruled that the evidence showed his primary job to be with the Government, whether or not he worked at least 80 hours every two weeks on Government responsibilities in a Government office. In addition, the Court stated that Dr. Herbert included his Government affiliation first before his university status on his publications. The Court

From the desk of Jeffrey Green, Senior Attorney at the DoD's Office of General Counsel

concluded that all of these factors indicated his primary employment is with the Government.

Then, the Court turned to the question of whether producing the copyrighted works was a part of Dr. Herbert's official duties or functions. The Court noted that he was known for his research as well as his patient care at the Federal agency. He won an award for research at the Government agency. Also, another Government employee testified that it is impossible to characterize the research of one doctor as being part of either his Government or affiliated university duties.

Dr. Herbert argued that the assignment to write and publish the 10th RDA works was not a specific duty or condition of employment. The Court stated, "the specific task need not be individually assigned in order to qualify as part of the official functions of a Government employee." The Court found that the research was part of Dr. Herbert's duties and that the type of research and writing involved in the creation of the 10th RDA works was part of his official functions as a Government employee. Further, the Court held that the Government funded the Committee, and, therefore, Dr. Herbert was in the service of the Government.

The Court next considered the use of Government facilities. Dr. Herbert claimed that the equipment he used was his or the affiliated university's even though some of his work was performed in a Government building. The Court held that the walls, floor, and ceiling of the laboratory are enough to qualify as Government facilities. Further, the Court stated that Dr. Herbert produced no evidence to show that the 10th RDA work was done anywhere other than his Federal office or laboratory. The Court concluded that Dr. Herbert used Government facilities and time in the preparation of his 10th RDA writings.

While it is a copyright infringement case that dealt with many issues that are not discussed in this article, this case is instructive of how a Federal judge might determine what is the proper use of Government time and facilities when someone is a Government employee and working a second job. Rather than attempt to "astonish" others, Federal employees that are uncertain as to use of Government time and facilities when working a second job may want to consider this case and call their agency ethics official.

This article was previously published and has been revised.

The views expressed in this article are my personal views and are not necessarily the views of the DoD or of the United States Government.