

Department of
Veterans Affairs

Memorandum

Date JAN 24 1996
From Assistant General Counsel (023)
Subject Review of Research Corporation Prohibited Source Letter
To Counselor to the Inspector General (SOC)

QUESTION PRESENTED

You have asked us to reconsider our opinion on whether gifts (in the form of travel support) from VA Research Corporations to VA employees are subject to the conduct rules involving "Gifts from Outside Sources." 5 C.F.R. Part 2635, Subpart B. For the reasons set forth below, we conclude that they are not. However, the authority of a research corporation to make any expenditure, including travel support, is limited by the statutory requirement that they act to further VA research. Thus while an improper gift of travel support (i.e., one that does not further VA research) would not technically violate the gift rule, it would subject individual research corporation officers to individual liability as a result of exceeding their statutory authority.

DISCUSSION

1. You have forwarded to us a memorandum pertaining to a letter from this office dated June 18, 1993 (attached). The letter was written to a VA District Counsel and addressed whether VA research corporations are "prohibited sources" under the conduct regulations. This question initially arose with regard to an employee's acceptance of travel support from a research corporation to attend a medical conference. During the proposed travel, the employee was to be on annual leave rather than official travel. Our letter to the District Counsel concluded that the research corporations are not "prohibited sources."

2. You suggest that, contrary to our conclusions, VA research corporations are prohibited sources because they satisfy the literal definition of the term "prohibited source." Specifically, you argue that the corporations, by their very nature, necessarily and continually seek official action from VA, that they do business and seek business with

Counselor to the Inspector General 507.

VA, and that VA regulates and exercises oversight over them. You state that "[w]e are unaware of any OGE pronouncement that VA does not regulate VA research corporations, nor do we anticipate such an interpretation." You also note that the corporations may be substantially affected by the performance or non-performance of some VA employees' official duties. Based on this analysis, you conclude that research corporations are "prohibited sources," and that the acceptance of travel support by a VA employee would violate the rule at section 2635.202(a)(1).

3. Further, you note that the second general gift prohibition, which prohibits soliciting or accepting a gift given because of an employee's position, is also applicable. 5 C.F.R. § 2635.202(a)(2). You state that our 1993 opinion assumes that the donated travel is for purposes related to approved VA research, and that this assumption indicates that the gift was made because of the VA employee's official position at VA. You suggest that since all of the gifts from research corporations are necessarily given because of an employee's official position with VA, the conduct regulations prohibit accepting or soliciting for such gifts. You ask that we reconsider and revise our previous opinion to conclude that VA research corporations are prohibited sources, and that employees may not solicit or accept a gift from a research corporation given because of an employee's official position.

4. Your discussion is important and relevant. Our review, however, turns not on whether the corporations are prohibited sources or on whether gifts from them may be considered as given because of any VA position. The regulation at section 2635.203(d) defines a prohibited source as any person who meets the remainder of the definition set out in the regulation. Similarly, section 2635.202(e) states that a gift is considered to be solicited or accepted because of an employee's official position if it is from a person who meets the remainder of the definition set out in the regulation. Thus the dispositive issue is whether VA research corporations meet the regulatory definition of a "person."

Counselor to the Inspector General 50C,

5. A "person" is defined at section 2635.102(d). The regulation specifically excludes from the definition "any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity." 5 C.F.R. § 2635.102(d). The regulation includes a definition of the term "agency" at section 2635.102(a) by referencing the definition set forth in 5 U.S.C. § 105. The regulation does not define or elaborate on the meaning of the phrase "entity of the Federal Government." In order to determine whether the research corporations meet the definition of a person so as to make their gifts subject to these gift rules, a determination must be made as to whether the research corporations are "entities of the Federal government."

Background Regarding VA Research Corporations

6. Numerous features of the research corporations suggest that they may be considered Federal entities. VA Research Corporations are created pursuant to 38 U.S.C. § 7361, a Federal statute. The VA Secretary is empowered to authorize the establishment of the corporations and to issue regulations for governing the corporations. *Id.* The statute dictates that the Secretary provide for the appointment of each corporation's board of directors, and stipulates that certain VA employees will be on the board, including the medical center director and chief of staff, and the assistant chief of staff for research. 38 U.S.C. § 7363(a). The authorizing statute states that the sole purpose of a research corporation is to facilitate VA research, a Federal activity. 38 U.S.C. § 7362. Further, the corporation cannot spend funds on research projects unless the project is approved in accordance with procedures prescribed by the Under Secretary for Health, a Federal official. 38 U.S.C. § 7367.

7. The authorizing statute also contains certain oversight mechanisms. Specifically, corporate records are available to the Secretary, and corporate records, programs and operations are subject to Comptroller General and Inspector General inspection and audit. Employees of the research corporations are subject to Federal laws and regulations

Counselor to the Inspector General 500

applicable to Federal employees with respect to conflict of interest in the performance of their official functions. 38 U.S.C. § 7366(c).

8. Other features of the research corporations are less supportive of a conclusion that they are Federal entities. For example, the corporations are established in accordance with the nonprofit corporation laws of the state and are subject to the laws of the state, 38 U.S.C. § 7365; the corporations are obliged to seek tax exempt status from the Internal Revenue Service, 38 U.S.C. § 7361(b); and the statute describes the corporations as private and, except as noted above, required to comply with Federal laws only to the extent that other private, nonprofit corporations are required to comply with Federal laws. 38 U.S.C. § 7366.

9. The legislative history is also relevant in discerning the nature of these corporations. The House Committee Report accompanying this statute discusses the cumbersome mechanisms previously in place to allow VA to accept and spend private and corporate funds for research activities, and notes that the authority to establish research corporations was being granted in order to resolve these problems. The House report states that "[t]hese corporations would not be considered for any purposes as corporations owned or controlled by the United States, except for the limitations made applicable to these corporations by this Act." H. Rep. No. 100-373, 100th Cong., 1st Sess. 5 (1987).

10. Interestingly, the House report cites with approval two other entities that Congress created in order to solve similar problems in funding research at the Armed Forces Institute of Pathology and the Uniformed Services University of the Health Sciences. See generally, 20 U.S.C. §§ 177, 178. Both of these statutes explicitly state that the corporation or foundation "shall not for any purpose be an agency or instrumentality of the United States." In contrast, while the legislative history of the statute authorizing the establishment of VA corporations states that the corporations will not be considered "corporations owned

Counselor to the Inspector General (OC)

or controlled by the United States" (i.e., they will not be considered government agencies, see generally 5 U.S.C. §§ 103, 105), the VA statute does not include this or similar language. Nor does the VA statute explicitly state that the corporations are not to be considered instrumentalities of the United States.

*Past DAEO Opinions addressing the Status
of VA Research Corporation*

11. As you know, our office has issued several opinions addressing the status of VA Research Corporations and the question of whether the payment of travel support by a Research Corporation constitutes a gift from a prohibited source. In 1992, we responded to an inquiry from a District Counsel in which we concluded that research corporations meet the definition of a prohibited source and that a gift to a VA employee, in the form of travel support, was therefore prohibited (attached). We reconsidered this conclusion in the aforementioned opinion from June, 1993. In the 1993 opinion letter, we noted that there is a complementary, reciprocal relationship between VA and the research corporations, as the only purpose of the corporations is to facilitate VA's mission. The letter concludes that a research corporation which is making a gift is necessarily acting in furtherance of, rather than in conflict with, the interests of VA, and that a research corporation that provides such travel support is not a prohibited source. The analysis compared the purpose of the gift rule with the nature of the corporations and of VA research. Although not explicitly stated, the opinion essentially concludes that because of their unique nature and their statutory relationship to VA, the question of whether research corporations meet the definition of a prohibited source is never reached.

Other Opinions Regarding the Status of Research Corporations

12. In addition to the ethics opinions discussed above, the General Counsel's office has issued several other opinions regarding the status of research corporations. On May 3, 1990, the office issued an opinion that considered whether

Counselor to the Inspector General (50C)

funding for the research corporations would be excluded from sequestration under the Gramm-Rudman Hollings Act (attached). The opinion discussed the various statutory features of the corporations and ultimately concluded that they are not "federal agencies" subject to the provisions of the Gramm-Rudman Hollings Act.

13. On May 8, 1991, we responded to an inquiry from Congressman and Chairman G. V. (Sonny) Montgomery regarding the status of these corporations and VA's authority to regulate investment by the corporations (attached). The letter ultimately concludes that VA research corporations are not authorized to invest or place at risk a corporation's funds, as the funds are, essentially, public funds. In reaching this conclusion, the letter discusses the status of the corporations, notes that the corporations must comply with VA regulations, and concludes that although Congress has exempted research corporations from the limitations on the use of public funds, the research corporation funds are nevertheless "public monies."

14. In addition, this office sought guidance from the U.S. Department of Justice (DOJ) regarding the status of individuals who work for the corporations. In a letter dated April 13, 1989 (attached), the Director of the Torts Branch within DOJ concluded that such individuals are not "employees of the government" and would, therefore, be excluded from coverage under the Federal Tort Claims Act.

Analysis and Conclusions

15. As noted above in paragraphs 4 and 5, these gift rules are applicable only if VA research corporations fall within the definition of a "person," and the regulatory definition of a person specifically excludes "any agency or other entity of the Federal Government." The legislative history and the basic statutory framework establish that these corporations are not Federal agencies, as defined in 5 U.S.C. § 105. However, as discussed above in paragraph 6 a number of features in the statute suggest that they fall within the meaning of a "Federal entity." For example, the corporations are created pursuant to a Federal statute

Counselor to the Inspector General (50C)

and through the actions of the VA Secretary, the statute requires that the Secretary appoint each board of directors, and that the board of directors include certain VA employees. The statute stipulates that the sole purpose of the research corporations is to further VA research and that corporations cannot spend funds on VA research projects unless they are approved through procedures prescribed by the Under Secretary for Health. Whether these features are sufficient to qualify the corporations as "entities of the Federal government" requires a legal interpretation as to the intent of the restrictions on gifts, as neither the regulations nor the history associated with the regulations define the meaning of that phrase.

16. The gift regulations were promulgated by the Office of Government Ethics (OGE). Therefore, and since the regulations do not define or explain the meaning of the phrase "entity of the Federal government," this office informally consulted with OGE's General Counsel on this matter. The General Counsel agreed that the purpose and effect of an entity are central to whether it is a Federal entity for purposes of the gift rules. Noting that the purpose of the research corporations is Federal and that their effect furthers a Federal purpose, he concurred in our view that under the circumstances here, they are "entities of the Federal government" for the narrow purposes of the gift rule. As such, the research corporations are not included within the definition of the word "person." 5 C.F.R. § 2635.102(d). Therefore, a research corporation is not a "prohibited source" for purposes of the rule at section 2635.202(a), and is not a "person" for purposes of the rule involving gifts solicited or accepted because of an employee's official position. 5 C.F.R. § 2635.202(e).

17. Although research corporations are not "persons" as defined in the regulations, this does not mean that the corporations are free to provide travel support (or, for that matter, make any other expenditure) without limit or oversight. As noted earlier, the sole purpose of a VA research corporation is to facilitate VA research. 38 U.S.C. § 7362. Further, the Inspector General has statutory authority to inspect and audit the research

Counselor to the Inspector General (50C)

corporations. Thus, in the event that a research corporation grants a gift of travel support for some purpose other than furthering VA research, that gift would be a misuse of its authority. We believe that the Inspector General has the authority to pursue such a violation notwithstanding our conclusion that the employee gift rules would not be implicated in such a case. 38 U.S.C. § 312; 5 U.S.C App. 3, §§ 2, 11. The remedies available to the Government in such a case may be criminal as well as civil. For example, an individual corporate officer who acts beyond the statutory authority of the corporation to expend funds may be personally liable for the improper expenditures. Litigation to pursue such civil or criminal actions would be undertaken by the DOJ. We would be pleased to work with you when any such case arises.

HELD

VA research corporations are not "persons" within the meaning of the conduct regulations at 5 C.F.R. Part 2635, Subpart B. Therefore, the rules pertaining to gifts from "prohibited sources" and gifts solicited or accepted because of an employees' official position are not applicable to gifts from research corporation. However, the sole purpose of a VA research corporation is to further VA research. Further, the Inspector General has authority to inspect and audit research corporation records, programs and operations. Therefore, notwithstanding our conclusions as to the applicability of these gift rules, the Inspector General has authority to investigate fully and recommend appropriate civil and criminal action against research corporation officials who exceed their statutory authority.

Walter A. Hall

Attachments

cc Gary F. Davis

| | |
|-------------------|------------------|
| PRECEDENT OPINION | _____ |
| CONCURRENCE | _____ |
| ADVICE | _____ ✓ _____ |
| INDEX | ✓ YES _____ NO ✓ |

jcj:JC OYNER

1/23/96

023C

023

0250908010