



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

16 MAR 1995

MEMORANDUM FOR GENERAL COUNSEL, DEPARTMENT OF THE AIR FORCE

SUBJECT: Applicability of the Joint Ethics Regulation,
DoD 5500.7-R, to Members of the National Guard

This responds to your request for approval to apply DoD 5500.7-R, "Joint Ethics Regulation (JER)," to members of the Army National Guard and Air Force National Guard while such personnel are earning Federal retirement points or performing duties related to Federal duty or functions.

I concur with your analysis and conclude that your proposed application of the JER to such individuals is appropriate. Our point of contact for this matter is Randi Elizabeth DuFresne, Standards of Conduct Office, at (703) 697-5305.


Judith A. Miller



GENERAL COUNSEL OF THE DEPARTMENT OF THE ARMY
WASHINGTON D.C. 20310-0104



17 February 1995

MEMORANDUM FOR DOD GENERAL COUNSEL

SUBJECT: Applicability of Joint Ethics Regulation, DoD 5500.7-R, to Members of the National Guard

In accordance with paragraph E.2.b, DoD Directive 5500.7, Standards of Conduct, dated 30 August 1993, this memorandum requests approval to apply the Joint Ethics Regulation (JER) to members of the Army National Guard and Air National Guard while these personnel are receiving federal pay or earning federal retirement points.

According to DoD Directive 5500.7, paragraph B.1, the JER applies, *inter alia*, to the Military Departments. Members of the Army National Guard and Air National Guard are part of the Army and the Air Force, respectively, while on active duty or while in the service of the United States. But during periods of inactive duty training (IDT), these individuals are considered to be part of the organized militia reserved to the States. Therefore, under the above-cited applicability provision, there is some question as to whether they are subject to the JER.

However, the Secretary of Defense's Foreword to the JER specifies that the JER's provisions are "applicable to all DoD employees[.]" The JER further defines "DoD employee" to include "[a]ny . . . National Guard member performing official duties, including while on inactive duty for training or while earning retirement points, pursuant to title 10, United States Code, or while engaged in any activity related to the performance of a Federal duty or function." DoD 5500.7-R, section 1-211e. We believe that this section unequivocally subjects National Guard members to the JER whenever they are performing "official duties", and that such duties include performing IDT under 32 U.S.C. § 502; earning federal retirement points; and engaging in any other activities associated with their performance of federal duties or functions.

In his memorandum to your office, dated 19 December 1994, the Judge Advocate of the National Guard Bureau correctly acknowledges that the Department of Defense may promulgate regulations necessary to organize, discipline, and govern the National Guard. See 32 U.S.C. § 110. Recognizing that the National Guard is subject to federal rulemaking, the Bureau

Judge Advocate observes that "traditional" Guardsmen who perform monthly IDT drills and two weeks of annual training historically have not been subject to federal ethics regulations, and questions the need to change this policy. We believe that DoD's interest in establishing a single uniform source of standards of ethical conduct and ethics guidance compels a policy decision to include traditional Guardsmen within the scope of persons to whom the JER applies. This interest is especially compelling in view of the facts that most States have no ethics regulations of their own, and the Ethics Reform Act of 1989 requires all federal activities to be subject to comprehensive ethics regulation.

We do not believe that the federalism principles discussed in the Bureau Judge Advocate's memorandum compel DoD to refrain from applying the JER to Guardsmen who are receiving federal pay or earning retirement points. We contend that applying the JER to Guardsmen under these conditions will not have a substantial direct effect on the States, their relationship with the federal government, or the distribution of power and responsibilities among local, state, and federal levels of government. Thus, this matter does not involve federalism implications that trigger the requirements of Executive Order No. 12612. At any rate, DoD substantially satisfied the federal policymaking criteria set forth in Executive Order No. 12612 by providing the National Guard Bureau ample opportunity to comment on the draft JER before it was finalized.

In summary, interpreting section 1-211e of the JER in the manner we propose is consistent with DoD's rulemaking authority over the National Guard, and necessary to attain DoD's policy objective of establishing uniform standards of ethical conduct and ethics guidance in the areas of financial and employment disclosure systems, gifts, relations with private organizations, use of official position, fundraising, enforcement, and training.



William T. Coleman III
General Counsel
Department of the Army



Sheila C. Cheston
Acting General Counsel
Department of the Air Force

I. Background to the Instant Controversy

On 23 July 1991, the Office of Government Ethics, hereinafter OGE, published for comment a proposed rule to establish uniform standards for ethical conduct for all employees of the executive branch. The proposed rule was issued pursuant to section 201 of Executive Order No. 12674 dated 12 April 1989 as modified by Executive Order No. 12731 which directed the Office of Government Ethics to "establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable" and gave the Office of Government Ethics authority, with the concurrence of the Attorney General, to issue regulations interpreting Title 18 U.S.C. secs. 207-209. Title III of the Ethics Reform Act of 1989 amended Title 5 U.S.C. added a new section 7353 which restricted the solicitation and receipt of gifts from outside sources and authorized OGE to issue implementation regulations for the executive branch. Subpart B of this regulation was proposed as OGE's implementation of both Title 5 U.S.C. sec. 7353 and the Executive order. Subpart C of the rule, which concerns gifts between employees, was proposed as the OGE implementation of the long-standing statutory prohibition against gifts to superiors found at Title 5 U.S.C. sec. 7351. As amended by the Ethics Reform Act of 1989, Title 5 U.S.C. sec. 7351 authorized the Office of Government Ethics to issue implementing regulations applicable to employees of the executive branch. The proposed rule provided a 60-day comment period and invited comments by agencies and the public. Timely comments were received from 1,068 sources. On 7 August 1992, in volume 57, number 153 of the Federal Register, the Office of Government Ethics published its final rule entitled Standards of Ethical Conduct for Employees of the Executive Branch.

In a memorandum addressed to the Legal Advisor, National Guard Bureau, dated 5 August 1993, COL Jack F. Lane, Jr., the Chief, Standards of Conduct Office in the Army TJAG's office, stated that although at that time the standards of conduct did not apply to members of the Army National Guard in Title 32 status, he thought that when the DOD Joint Ethics Regulation (JER) (DOD 5500.7-R) was published, that language would be included affecting National Guard members on active duty under orders issued pursuant to Title 10 and National Guard members "performing official duties, including while on inactive duty for training or while earning retirement points pursuant to title 10, or while engaged in any activity related to the

performance of a Federal duty or function.” He opined that “once the JER is approved by the Secretary of Defense, the Standards of Ethical Conduct and related OG regulations will be applicable to National Guard personnel virtually any time they are on duty.” In the last paragraph, he stated “We have reviewed the above with Mr. Berkson in your office. If you have different thoughts concerning this issue or wish to discuss it further, I or my successor, Colonel Marshall M. Kaplan, will be willing to discuss this further with you at your convenience.”

On or about 1994, attorney Bill Berkson, Chief of the General Law/Administrative Law Branch in the Office of the Judge Advocate, National Guard Bureau, received information from the successor Army standards of conduct officer, COL Kaplan, indicating that the JER was going to be applied to members of the Army and Air National Guard in Title 32 status. In response, a memorandum addressed to DLSA-SOCO dated 19 December 1994 was sent by COL Brad Farber, the Bureau Judge Advocate, stating an interim response and a request from his office that any action be deferred until the final input of LTG Baca, the newly installed Chief of the National Guard Bureau, could be forwarded.

In a memorandum addressed to the DOD General Counsel dated 17 February 1995 on a letterhead from the General Counsel of the Department of Army, William T. Coleman, III, the General Counsel, Department of the Army and Sheila C. Cheston, the Acting General Counsel, Department of the Air Force, requested the DOD General Counsel to apply the Joint Ethics Regulation to members of the Army National Guard and Air National Guard while “these personnel are receiving federal pay or earning federal retirement points.” This request was made pursuant to paragraph E.2.d, of the DOD Directive 5500.7, Standards of Conduct, dated 30 August 1993, which stated “No DOD Component document supplementing or implementing reference (t) are issued without the approval of the General Counsel of the Department of Defense.” In their memorandum, General Counsels Coleman and Cheston contended “that applying the JER to Guardsmen under these conditions will not have a substantial direct effect on the States, their relationship with the federal government, or the distribution of power and responsibilities among local, state, and federal levels of government.” They opined that this matter “does not involve federalism implications that trigger the requirements of Executive Order No. 12612.” And further, stated that “at any rate, DOD substantially satisfied the federal policymaking criteria set forth in Executive

Order No. 12612 by providing the National Guard Bureau ample opportunity to comment on the draft JER before it was finalized.”

In a two-paragraph memorandum directed to the General Counsel, Department of Army, dated 16 March 1995, the General Counsel of the Department of Defense, Ms. Judith A. Miller, responded to the request “for approval to apply DOD 5500.7-R, ‘Joint Ethics Regulation (JER),’ to members of the Army National Guard and Air Force National Guard while such personnel are earning Federal retirement points or performing duties related to Federal duty or functions.” General Counsel Miller continued and stated “I concur with your analysis and conclude that your proposed application of the JER to such individuals is appropriate.”

As of this date no further documents have been received from either the General Counsel of the Department of Defense or the General Counsels of the Departments of Army or Air Force concerning this matter.