

July 26, 1995

## MEMORANDUM

TO: Jeremy Gunn

CC: David Marwell

FROM: Dennis Quinn

**SUBJECT: Ethical Implications of Jack Tunheim Serving as ARRB Chair and Federal District Court Judge**

At your request, I have reviewed the ethical statutes and regulations to determine if there are any potential ethical problems raised by Jack Tunheim serving as both the Chair of the Review Board and a Federal District Court Judge. Specifically, you asked that I focus on the financial conflict of interest issues.

### I. SHORT ANSWER:

From a strictly, ethical standpoint, there is no prohibition to Jack serving in both positions. Neither the Ethics in Government Act,<sup>1</sup> the Standards of Conduct<sup>2</sup> nor any of the related statutory authorities contain a provision that would prevent such dual service. However, the Dual Pay and Employment provisions of the Pay Administration Act<sup>3</sup> do prohibit an employee from receiving pay from more than one position. This statute may apply to Jack's situation. Also, the Judicial Conference may have adopted separate ethical provisions that might contain such a prohibition, although I could find nothing like it in the law library.

### II. DISCUSSION:

The Ethics in Government Act and the Standards of Conduct have extensive provisions dealing with conflicts of interest, financial and otherwise. But these conflicts are described in terms of public vs. private interests, not intra-government interests. By definition, they are not applicable to an

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<sup>1</sup> 18 U.S.C. §§ 201-209

<sup>2</sup> 5 C.F.R. § 2635

<sup>3</sup> 5 U.S.C. §§ 5531-5533

individual serving in two different government positions, since from the standpoint of the ethics laws, such service does not present a financial conflict of interest. For example:

A. The Ethics in Government Act prohibits an officer or employee of the United States Government from supplementing his salary from any source other than the Government of the United States.<sup>4</sup> This provision does not apply to Jack for three reasons:

1. The statute excludes Federal Judges from the definition of “officer or employee” as used in Section 209.<sup>5</sup>
2. The statute is not applicable to Special Government Employees such as Jack in his position on the Review Board.<sup>6</sup>
3. Even if the statute did apply to judges, Jack’s per diem salary from the Review Board comes from the same source (the Government of the United States) that would be paying his judicial salary. Thus, it is not an unlawful supplementation as specified by the statute.

B. The Standards of Conduct prohibit covered noncareer employees (generally, Senior Executive Service or Senior Schedule C Appointees) from having outside earned income which exceeds 15 percent of the annual rate of basic pay for Level II of the Executive Schedule.<sup>7</sup> Once again, and for similar reasons, this does not apply to Jack.

1. The Standards of Conduct only apply to employees of the Executive Branch, not those of the Judicial or Legislative.<sup>8</sup>
2. This regulation does not apply to Special Government Employees.<sup>9</sup>

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<sup>4</sup> 18 U.S.C. § 209

<sup>5</sup> 18 U.S.C. § 202(c)

<sup>6</sup> 18 U.S.C. § 209(c)

<sup>7</sup> 5 C.F.R. § 2636.304

<sup>8</sup> 5 C.F.R. § 2635.102(a) & (h). See also 5 C.F.R. 2636.102(c)

<sup>9</sup> 5 C.F.R. § 2636.303(c)

3. Even if it did apply to judges or SGEs, Jack's pay from the Review Board would not be considered "outside earned income" since it is paid by the United States Government.<sup>10</sup>

After doing my research, I spoke with our OGE Desk Officer, who confirmed that nothing in the ethics laws prohibit Jack from serving in both positions. But she recommended calling Townsend Robinson [(202) 273-1260], the ethics officer at the Judicial Conference, to make sure they do not have a rule against it. I have not made that call.

### III. Statutes Dealing with Pay Administration

Why there is no ethical bar to Jack serving in both positions, there may be other legal prohibitions. For example, the Pay Administration statute has a provision dealing with dual compensation. Specifically, section 5533 prohibits an employee from receiving basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week.<sup>11</sup> As written, this would seem to apply to Jack's situation, but there may be exceptions not listed in the statute. I did a quick check for case law on the subject, but there were very few cases that provided guidance. There probably are OPM opinions or regulations that would help. I did not check on these since they are outside the ethical question you presented. If you want additional research done on this topic, I would be happy to help.

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<sup>10</sup> § 2636.303(b)

<sup>11</sup> 5 U.S.C. § 5533(a)