

USE OF GOVERNMENT RESOURCES

Public service is a public trust.
5 C.F.R. § 2635.101(b)(1)
(Basic Obligation of Public Service)

Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
5 C.F.R. 2635.101(b)(9)
(Seventh Principle of Ethical Conduct)

An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.
5 C.F.R. § 2635.704(a)
(Use of Government Property)

I. INTRODUCTION.

- A. The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, acknowledge that “there may be circumstances when an employee may properly use Government property or official time for activities other than the performance of the official duties of the employee’s position.” Office of Government Ethics (OGE) Informal Advisory Letter 97x3 (Mar. 21, 1997).
- B. Employees who use Government property in accordance with applicable laws and regulations do not violate ethical standards. OGE Informal Advisory Letter 95 X 13, (Dec. 1, 1995).
- C. Authority to Regulate the Use of Government Property.
 - 1. General Services Administration (GSA) and the Office of Personnel Management (OPM) are authorized to promulgate executive branch-wide regulations governing the use of Government resources.
 - 2. Except as limited by statute or regulation, Federal agencies possess the discretion to promulgate regulations governing the use of Government resources. OGE Informal Advisory Letter 93 X 6 (Mar. 10, 1993).
- D. The Office of Government Ethics (OGE) lacks the authority to promulgate any expansion or limitation of other regulations governing the use of Government property. OGE Informal Advisory Letter 95 X 13 (Dec. 1, 1995).

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II. FISCAL FOUNDATION.

- A. Appropriated funds are available only for the objects for which the appropriations were made. 31 U.S.C. § 1301(a) (the "Purpose Statute").
- B. Congress cannot specify every item of expenditure in agency appropriation acts. The "necessary expense rule" allows that appropriations made for particular objects, by implication, confer authority to incur expenses that are reasonably necessary or incident to the proper execution of those objects. *See Internal Revenue Service: Use of Appropriated Funds to Pay for Eldercare Facilities and Counseling Services, 71 Comp. Gen. 527 (1992).*
 - 1. Application of the "necessary expense rule" is a matter of agency discretion.
 - 2. In reviewing the propriety of an expenditure, consider whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. *See Food and Drug Administration - - Use of Appropriations for "No Red Tape" Buttons and Mementoes, B-257488, Nov. 6, 1995.*
 - 3. Accountable officers should seek advance decisions regarding legality of payments from agency's general counsel. Under current law, accountable officers receive no legal protection from Comptroller General decisions purporting to relieve them from liability for erroneous or improper payments. *See Letter from Jack L. Goldsmith III, Assistant Attorney General, to Mr. Arnold I. Havens, General Counsel, U.S. Department of the Treasury (Jan. 28, 2004).*
 - 4. Agencies' general counsels may consult any appropriate persuasive source, including decisions of the Comptroller General, in preparing opinions. *Id.* *See also DoJ Order 2110.39A, Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers, Approved by Janet Reno, Attorney General, Nov. 15, 1995.*

III. DUTY TO PROTECT AND CONSERVE GOVERNMENT RESOURCES.

- A. Employees have a duty to:
 - 1. protect and conserve Government property, and
 - 2. refrain from using or allowing its use for purposes other than those for which it is made available to the public *or those authorized in accordance with law or regulation.* 5 C.F.R. 2635.704 (emphasis added).
- B. 5 C.F.R. § 2635.704(b)(1) defines "Government property" to include:
 - 1. any form of real or personal property;

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2. in which the Government has an ownership, leasehold, or other property interest;
 3. as well as any right or other intangible interest; and,
 4. purchased with Government funds (to include services of contractor personnel).
- C. Examples of Government property include, but are not limited to:
1. office supplies,
 2. telephone and other telecommunications equipment,
 3. printing and reproduction facilities,
 4. Government mails, and
 5. Government vehicles.
- D. An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of appropriated funds. 5 C.F.R. § 2635.204(c)(3) (and example 3 thereafter).
- E. "Authorized purposes" are purposes for which Government property is made available to members of the public, or purposes authorized under law or regulation. 5 C.F.R. § 2635.704(b)(2).
- F. The duty to protect and conserve Government property and to use it only for authorized purposes is attended by an obligation to disclose waste, fraud, abuse, and corruption to appropriate authorities. *See* 5 C.F.R. § 2635.101(b)(11).

IV. RESTRICTIONS ON USE OF PARTICULAR TYPES OF GOVERNMENT RESOURCES.

- A. Official Time. Employees shall use official time in an honest effort to perform official duties, unless authorized under law or regulation to use official time for other purposes. 5 C.F.R. § 2635.705(a).
- B. Public Office for Private Gain. "An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations." 5 C.F.R. § 2635.702. Specific prohibitions include:

1. Coerce or induce any person to provide any benefit to the employee or any person with whom the employee is affiliated in nongovernmental capacity. 5 C.F.R. § 2635.702(a).
 2. Imply official endorsement of personal activities.
 - a. Employees shall not use or permit to be used their Government position or title or authority associated with their public office in a manner that could *reasonably* be construed to imply that their agency or the Government sanctions or endorses their personal activities or those of another. 5 C.F.R. § 2635.702(b). See also JER, para. 3-209.
 - b. Employees may refer to official title or position, as permitted by 5 C.F.R. § 2635.807(b), when teaching, speaking, or writing in a personal capacity. For example, employee may use official title or position when one of several biographical details given to identify him or her in connection with the speech, publication, teaching, and it is given no more prominence than other significant biographical details.
 3. Endorse any product, service or enterprise except as statutorily authorized, or pursuant to agency programs that recognize accomplishments or compliance with agency standards. 5 C.F.R. § 2635.702(c).
- C. Nonpublic Information. Information gained through federal employment that the employee knows or should know is unavailable publicly may not be used in financial transactions, or to further private interests. 5 C.F.R. § 2635.703.
- D. Subordinates.
1. "An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." 5 C.F.R. § 2635.705(b).
 2. Enlisted aides. See DoD Instruction 1315.09, Utilization of Enlisted Personnel on Personal Staffs of General and Flag Officers, 2 Oct 07. See also AR 614-200, Enlisted Assignments and Utilization Management, 27 Jun 07; Air Force: AFI 36-2123, Management of Enlisted Aides, 2 Oct 08.
 3. Limited use of personnel is authorized to prepare papers for presentation at non-profit professional associations and learned societies, or for professional journals. The participation or paper must be related to the employee's official position or is mission-related, agency must derive some benefit, and cannot interfere with official duties, JER, para. 3-300b.

4. Examples: Subordinates may not: Be asked to draft a letter accepting an invitation to an Air Force reception; Asked to address a superior's personal holiday cards; Pick up/drop off dry cleaning for superior.
- E. Communication Systems. Federal Government communication systems and equipment (including Government-owned telephones, facsimile machines, electronic mail, Internet systems, and commercial systems when the federal Government pays for use) shall be for official use and authorized purposes only. JER, para. 2-301.
1. "Official use" includes emergency communications; communications deemed necessary in the interest of the Government; and "morale and welfare" communications by DoD employees on extended deployments. JER, para. 2-301a(1). See AR 25-1, para. 6-1d. See also AFI 33-100, para. 3.1, 3.9, and 4.9.
 2. "Authorized purposes," as discussed in JER para. 2-301a(2), include:
 - a. Brief calls home while TDY to notify family of official transportation or schedule changes.
 - b. Personal communications from the workplace that are most reasonably made while at the workplace when the Agency Designee determines that such communications:
 - (1) Do not adversely affect official duty performance;
 - (2) Are of reasonable duration and frequency, and, whenever possible, made during personal time (such as after duty hours or lunch periods);
 - (3) Serve a legitimate public interest (such as keeping employees at their desks, enhancing professional skills of the employees; job searching in response to Government downsizing).
 - (4) Do not reflect adversely on DoD; and
 - (5) Do not overburden the communication system and create no significant additional cost to DoD (including long distance telephone charges).
 - c. Other examples include checking in with spouse or minor children, scheduling doctor and auto or home repair appointments, brief Internet searches, e-mailing directions to visiting relatives. *Note:* Practitioners should determine whether agency guidance exists that permits specific uses of communication resources. *See, e.g.,* Administrative Assistant to the Secretary of the Army memorandum, dated 20 August 2001, Subject: Personal Use of Telephones, E-mail, and the Internet, (for Principal Officials of HQDA). Air Force personnel should check Air Force Instruction Series 33 - Communication and Information, for guidance on proper use of E-mail, telephones, Internet and other

communication resources. Air Force authorizations include: job searching if authorized and related to separations or retirements; educating or enhancing professional skills of employees. AFI 33-119, *Air Force Messaging*, 24 January 2005.

3. Prohibited Uses. Use of communications systems that would adversely reflect on DOD, including all Military Departments, include uses involving pornography, chain e-mail messages, unofficial advertising, soliciting, or selling via E-mail, and other uses incompatible with public service. JER, para. 2-301a(2)(d), AR 25-1, para. 6-1f, AR 25-2, para. 4-5r(7). See also AFI 33-100, para. 3.9.1.1 through 3.9.1.14.
4. Government telephones in personal residences. Permitted when necessary for national defense purposes. 31 U.S.C. § 1348(c). DoDI 4640.07. Additionally, DoD may install telephone lines in certain volunteers' residences. Such volunteers are those who provide medical, dental, nursing, or other health-care related services; volunteer services for museum or natural resources program; or, programs that support service members and their families. 10 U.S.C. § 1588(f).

F. Cell Phones and Other Wireless Phones

1. Special category of communications resources.
2. Service policies.
 - a. Army: AR 25-1, Army Knowledge Management and Information Technology, paragraph 6-4u - Portable, mobile, cellular, and wireless telephones and devices.
 - (1) These types of telephones will not be used in lieu of established 'wired' telephones.
 - (2) These devices are to be used for official business and authorized use only.
 - (3) They may be approved for handheld portable use and/or installed in Government vehicles.
 - (4) Authorized personal use of cell phones is subject to the same restrictions and prohibitions that apply to other communications systems. Authorized use is limited since these types of telephones cannot be used in lieu of established 'wired' telephones.
 - (5) Cellular phones may not be used while operating a vehicle, unless the vehicle is safely parked or a hands-free device is being used. See AR 190-5, paragraph 4-2(c)(3).

- b. Navy: No specific policy except that provided in the JER or by local policy.
- c. Air Force: AFI 33-111, Voice Systems Management, paragraph 26 (24 March 2005). Use a regular telephone (land line) as a first priority when and where available. Use these services only when they are the most cost-effective way to provide necessary communications or mobility is required. They are to be used only for official and authorized purposes.

G. Use of E-Mail and Internet.

1. Limitations

- a. Use of communications systems that could reasonably be expected to cause, directly or indirectly, congestion, delay, or disruption of services to any computing facilities or cause unwarranted or unsolicited interference with others' use of communications. AR 25-1, Army Knowledge Management and Information Technology, para. 6-1f(5)(b). Air Force E-mail use is governed by AFI 33-119, *Air Force Messaging*, para. 3.9.1.
- b. Unauthorized uses include (from AFI 33-119):
 - (1) Distributing copyrighted materials by electronic messaging without consent from the copyright owner;
 - (2) Sending or receiving electronic messages for commercial or personal financial gain;
 - (3) Intentionally or unlawfully misrepresenting your identity or affiliation in electronic messaging communications;
 - (4) Sending harassing, intimidating, abusive, or offensive material to, or about others;
 - (5) Causing congestion on the network by such things as the propagation of chain letters, junk E-mails, and broadcasting inappropriate messages to groups or individuals;
 - (6) Using government systems for political lobbying;
 - (7) Accessing commercial web mail accounts and instant messaging services (i.e., Yahoo, AOL, or MSN mail accounts).

2. Official website links to private websites. See DoD Web Site Administration Policies and Procedures, dated 25 November 1998 (updated 11 January 2002), found at <http://www.defenselink.mil/webmasters/>

- a. Requirements:
 - (1) Must include a disclaimer.
 - (2) Do not imply official DoD endorsement.
 - (3) Must include links to similar organizations if requested.
- b. Services' web policies. Individual services may be accessed from the DoD Web Policy website: <http://www.defenselink.mil/webmasters/>
3. Use of Government systems indicates consent to monitoring. 18 U.S.C. 2510 (The Electronic Communications Privacy Act); 50 U.S.C. 1809; 18 U.S.C. 1030 (Computer Fraud and Abuse Act)(The Hacker Statute); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (ad hoc approach to reasonableness); AR 380-53 (Information System Security Monitoring), para. 2-1b. Monitoring guidelines are contained in AR 25-2 (Information Assurance), para. 4-5m(2); *Policy on Use of Department of Defense (DoD) Information Systems Standard Consent Banner and User Agreement*, DOD Chief Information Officer Memorandum, 9 May 2008.
4. May use official e-mail to notify DoD personnel of events of common interest sponsored by non-Federal entities. Email contents must be factual (who, where, when) and should not contain expressions of support of a particular non-Federal entity, which may be construed as official DOD endorsement of the NFE. JER, para. 3-208; para. 3-209.
5. Other Guidance:
 - a. AFI 33-129, *Web Management and Internet Use*.
 - b. Navy guidance. *See* Office of the Under Secretary of the Navy, dated 5 February 1997, Subject: Guidelines for Internet Web Browsing within the Department of the Navy Headquarters Network. *See also* CINCLANFLT message, dated 30 August 93, Subject: Internet Policy, (discussing prohibited uses of Government information systems).

H. Business Cards.

1. DoD Policy: In-house printing of business cards using existing software and commercially purchased card stock is permitted. Contracting with Lighthouse of the Blind is also permissible if costs do not exceed those of in-house printing. *See* Office of the Secretary of Defense, Administration and Management, 15 July 1999, *Printing of Business Cards*.

2. Services Policies.

a. Army Limitations:

- (1) Cards should contain only the necessary business information.
- (2) Color or customized cards must be purchased at the employee's expense.

b. Air Force guidance on using Government computers to create business cards is found at paragraph 5.5.1.7 of the Air Force Supplement (dated 28 February 2007) to DoDI 5330.03, *Defense Automated Printing Service (DAPS)*, 25 Jun 97. Procurement and use must be in accordance with AFI 65-601, Volume I, *Budget Guidance and Procedures*.

I. Holiday Cards. Are not considered official. It is improper to use Government resources to produce holiday greeting cards. See DA OGC Memo, dated December 7, 1998, Subject: Christmas Cards.

J. Use of Appropriated Funds for Postage on Congratulatory Notes. AR 25-51, para. 2-22.

- a. Congratulatory notes to individuals within the technical responsibility or chain of command who have been selected for promotion or advanced schooling serve an official morale and esprit de corps function appropriated fund postage is authorized.
- b. Similar notes to friends, former subordinates or colleagues, or those not within the sender's technical responsibility or chain of command are personal in nature. Appropriated fund postage may not be used.
- c. This issue is also addressed in two other publications: DoD 4525.8-M, DoD Official Mail Manual, December 2001, para. C1.4.7, and Opinion of The Judge Advocate General of the Air Force (OpJAGAF) 1995/103, "Appropriated Fund Postage," 28 Nov 95.

V. PERSONAL USE OF GOVERNMENT RESOURCES (OTHER THAN COMMUNICATIONS SYSTEMS).

A. Section 2-301b, JER authorizes limited **personal** use of Government resources (equipment and property such as typewriters, calculators, and libraries), if the agency designee determines that such use meets the following criteria:

1. Does not adversely affect official duty performance;
2. Is of reasonable duration and frequency and occurs only during the employee's personal time;

3. Serves a legitimate public purpose (such as supporting local charities or volunteer services to the community, developing professional skills, job searching in response to downsizing);
 4. Does not reflect adversely on DoD; and,
 5. Creates no significant additional cost to DoD.
- B. Use of official time and Government equipment for Guard or Reserve duty purposes may be authorized. 5 C.F.R. § 251.202. *See* Comp. Gen. Letter, B-277678, January 4, 1999.
- C. Remember - the use always requires supervisor approval

VI. ENFORCEMENT.

- A. Military members. Penalties for violating the rules republished in, and prescribed by, the JER include the applicable criminal, civil and administrative sanctions for current DoD employees, including punishment under the UCMJ for military members. JER, para. 10-100.
1. The regulations at 5 C.F.R. 2635 in subsection 2-100 of the JER apply to enlisted members pursuant to DoD Directive 5500.07, Standards of Conduct, para. 2.2.5. (29 Nov 07), and JER, 1-300b.
 2. The prohibitions and requirements printed in bold italics in the JER are general orders and apply to all military members without further implementation. DoD Directive 5500.07, para. 2.2.6.1. (29 Nov 07).
- B. Civilian employees.
1. The Merit Systems Protection Board regards misuse of Government resources as a serious charge. The Board has upheld suspensions of 30 days or more for sustained charges of misuse of Government resources. *Barcia v. Department of the Army*, 47 M.S.P.R. 423 (1991) (30-day suspension was reasonable for appellant's misuse of Government computer to maintain private business records and contact computer firms by modem).
 2. The agency is not required to prove intent to sustain a charge of misuse of Government property. *Sternberg v. Department of Defense, Dependents Schools*, 52 M.S.P.R. 547 (1992).
 3. Charge of misusing Government property can be sustained regardless of whether the employee paid for such usage. *Wenzel v. Department of the Interior*, 33 M.S.P.R. 344 (1987).

VII. CONCLUSION.