

CHAPTER K

RESERVE COMPONENT ETHICS ISSUES

I. REFERENCES

- A. Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635, Subparts G & H
- B. DoD 5500.07-R, Joint Ethics Regulation
- C. Title 10, United States Code, Section 973, 12301, and 12601
- D. Title 18, United States Code, Sections 203, 205, 207, 208 and 209
- E. Title 22, United States Code, Sections 611, et seq.
- F. Political Activities of Federal Employees, 5 CFR Part 734
- G. Federal Acquisition Regulation (FAR) Parts 3.6 and 9.501
- H. DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 19 February 2008.
- I. AFI 51-902, *Political Activities by Members of the US Air Force*, 27 August 2014.
- J. ANGI 36-101, *Air National Guard Active Guard Reserve Program*, 3 June 2010.
- K. AF Form 3902 (Application and Approval of Off-duty Employment).

- L. Army Regulation 27-1, *Judge Advocate Legal Services*, 30 September 1996 (RAR 13 September 2011).
- M. Army Regulation 600-20, *Army Command Policy*, 6 November 2014.
- N. Army Regulation 135-18, *The Army National Guard and Army Reserve Active Guard Reserve Program*, 1 November 2004.

II. INTRODUCTION

- A. Reserve Component (RC) service members (SM) are an integral and vital part of the total military force. Mobilization of RC SMs, as well as their increased day-to-day operational involvement in the missions of the armed services significantly heightens the potential trouble spots that Ethics Counselors must understand and evaluate.
- B. Service Reserve and National Guard (NG) personnel continue to provide substantial forces for missions across the globe.
- C. Reserve and NG personnel serving on active duty are subject to the same ethical restrictions as their Regular service counterparts. NG personnel not in a Federal status MAY be subject to certain Ethics restrictions.
- D. Commanders of Reserve and NG Soldiers, airmen, sailors, and Marines (and Ethics Counselors) must be alert to the common ethics issues that arise with RC SMs. The issues become more important and pronounced when RC SMs are activated or mobilized.
- E. Ethical matters involving Reserve component (RC) personnel include:
 - 1. Identification and prevention of actual and apparent conflicts of financial interest, both individual and organizational.
 - 2. Filing financial disclosure reports

3. Outside (off-duty) employment and off-duty business activities by mobilized RC SMs.
 4. Whether RC SMs can continue to hold civil offices.
 5. Supplementation of salary.
 6. Post-Government employment restrictions.
 7. Gifts.
- F. Commanders have an affirmative obligation under the JER § 5-408 to refrain from assigning RC SMs to perform duties that could enable them to obtain non-public information or gain unfair advantage over competitors, or which present an actual or apparent conflict of interest.
1. Commanders (or designees) **must** screen RC SMs to ensure that no actual or apparent conflict exists between their private interests and their duty assignment.
 2. RC SMs have an affirmative obligation to disclose material facts in this regard. However, receiving commands cannot assume compliance and must independently screen incoming personnel to avoid conflicts of interest.
 3. Screening document should elicit (at minimum) the following information:
 - a. Civilian employer of the reservist, location, job title, phone number;
 - b. Duties and responsibilities of the reservist with his/her civilian employer;
 - c. Government contracts held by the RC SMs civilian employer, as well as any pending or potential contracts;

- d. Reserve assignment and job responsibilities (include office symbol);
 - e. Whether the reservist is being mobilized or involuntarily ordered to active duty;
 - f. Whether the reservist will be performing duty relating to contractual actions (and, if so, the nature of the duty); and
 - g. The reservist's supervisor's name, date and an affirmative (signed) statement that a conflict of interest analysis has been performed.
4. This is not the DoD Civilian Employment Information (CEI) program. DoD gathers information about civilian employment of RC SMs for other purposes unrelated to a conflict of interest analysis.

III. CONFLICTS OF FINANCIAL INTERESTS

- A. The mobilization/activation of RC SMs dramatically increases the potential for conflicts of interest because RC SMs are often called upon to perform duties that call for greater responsibility than when they are in training status. Commanders must pay particular attention to the assignments and duties of RC SMs and refrain from assigning them to positions that could cause conflicts of interest. JER § 5-408, 18 U.S.C. § 208
- B. Employees may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation, or would require their disqualification from matters critical to their office. 5 CFR § 2635.802, 10 U.S.C. § 973
- C. Use of nonpublic information. Federal employees, including RC SMs, may not use nonpublic information to further their own private interests or those of another. 5 CFR § 2635.703. This includes information not releasable under the Freedom of Information Act (FOIA), protected by the Privacy Act of 1974, classified (18 U.S.C. § 798, 50 U.S.C. Code § 783(b)), protected by procurement integrity law (41 U.S.C. § 423), or the Trade Secrets Act (18 U.S.C. § 1905).

- D. Organizational conflicts of interest. Reserve Component SMs and contracting officials must be aware of potential “organizational conflicts of interest” (see Federal Acquisition Regulation, FAR 9.501 *et seq.*) that can be created by the civilian employment held by RC SMs. An organizational conflict of interest may disqualify their private sector employer from participating in procurement actions when the reservist returns to his/her civilian job after serving on active duty.
1. Organizational conflicts of interest arise when, as a result of activities or relationships, a person is deemed unable to render impartial assistance to the Government, the person’s objectivity may be impaired, or the person may have an unfair advantage.
 2. An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required. FAR Part 9.502
 3. The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity. FAR Part 9.503
- E. The FAR also prohibits contracting officers from knowingly awarding a government contract to a government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees. FAR Part 3.6. However, FAR 3.601(b) exempts special government employees (as defined in 18 U.S.C. § 202) from this provision unless the special government employee’s duties directly affect the procurement. Many RC SMs are considered SGEs; accordingly, their civilian businesses could still be awarded government contracts so long as the member was not in a position to influence the procurement.
- F. Conflicts of interest may often be resolved through use of disqualification letters, which may be prepared with the assistance of an Ethics Counselor, or reassignment of duties.

IV. FINANCIAL DISCLOSURE REPORTS

- A. Financial disclosure reports are required for certain RC SMs – dependent upon their rank, position, number of days serving on active duty and responsibilities.

- B. OGE 278e, Public Financial Disclosure Report
 - 1. Required for all O-7s, SES personnel, and others serving in certain “covered positions” if they serve 61 or more days of active duty in a “covered position” during a calendar year to trigger a reporting requirement. The Air Force mandates filing for all O-7s by policy regardless of the number of days of active duty served.

 - 2. THIS IS VERY DIFFICULT TO TRACK. Best advice– inform personnel as soon as possible (and as often as possible) of the potential that they may have to file a financial disclosure report.

 - 3. The 61st day of active duty (when a reserve SM is being paid as an O-7) in a calendar year triggers the requirement to file a new entrant report. Reports are due within 15 days thereafter. Annual reports are due at the same time that their active duty counterparts file their disclosure forms.

 - 4. If a filer is stationed in a Designated Combat Zone on the filing due date, then their OGE 278e filing date may be extended until 180 days after the later of either (i) the last day of the individual's service in the Designated Combat Zone; or (ii) the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in the Designated Combat Zone. Ethics in Government Act of 1978, 5 U.S.C. Appendix § 101(g)(2)(a).

 - 5. Termination reports are not required of Reserve officers who do not serve more than 60 days of active (Title 10) duty during the calendar year in which the officer is transferred to the Retired Reserve. By implication, Reserve officers who are transferred to the Retired Reserve in the same calendar year in which they served more than 60 days of active duty must complete a termination report. The JER does not specify the timing of this report. As a practical matter, the report should be completed and signed on the date the officer is released from active duty if the officer knows at that time that he or she will retire in that calendar year.

6. On 5 February 2011, the Secretary of the Air Force directed that all Reserve Component Air Force General Officers file OGE 278s similar to those officers on active duty, regardless of the number of active duty days the GO performs. That directive was implemented by the Air Force DAEO on 10 May 2011.

C. OGE Form 450, Confidential Financial Disclosure Report

1. According to 18 US Code § 202, “a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special government employee while on active duty solely for training.” However, the JER § 7-300 provides exception to the requirement to file for RC SMs on active duty for less than 30 consecutive days during a calendar year. Furthermore, by policy, the General Counsel’s Office has excluded RC SM from filing the OGE 450 unless it is otherwise determined that the duties of the Reserve SM meet the filing criteria in 5 C.F.R. § 2634.904(a)(1)(i). Memorandum, SAGC, 9 Dec 11, Exclusion of Members of the Reserve Component from Filing the Confidential Financial Disclosure Report.
2. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special government employee.
3. Special Government Employees (SGEs) should file OGE Form 450s before they undertake any duties associated with their reserve position.
4. If a Reserve officer of the Armed Forces or an officer of the National Guard of the United States is voluntarily serving a period of extended active duty in excess of one hundred and thirty days, they are treated the same as active servicemembers for the purposes of 18 U.S.C. § 203 and §§ 205 through 209 and 218. Check RC SMs’ orders – RC SMs who are ordered to Active Duty for Operational Support pursuant to 10 US Code 12301(d) are serving voluntarily.

5. Anticipated change to *JER* will exclude SGEs who are not occupying covered positions as defined in the *JER*. DoD currently does not require ALL RC SMs considered SGEs to file OGE Form 450s. Service Secretaries have excluded most SGEs from filing unless they would otherwise have to file based on the nature of their position or duties.
 6. JER 7-300(b) Exclusion from filing
 - a. Any DoD employee or group of DoD employees may be excluded from all or a portion of the reporting requirements when the DoD Component Head or designee makes a determination under 5 CFR 2634.905. The DoD, Air Force, Navy and Army have excluded from filing those individuals who make or approve annual purchases totaling less than the simplified acquisition threshold, as defined in the Federal Acquisition Regulations (currently \$150,000). See, e.g., 11 Oct 01 categorical exclusion letter from Army Secretary Thomas E. White.
 - b. DoD employees who are not employed in contracting or procurement and who have decision-making responsibilities regarding expenditures of less than \$2,500 per purchase and less than \$20,000 cumulatively per year are excluded from the requirement to file the OGE Form 450 (formerly SF 450)¹. However, Agency Designees may require such DoD employees, in individual cases, to file the OGE Form 450. Such DoD employees remain subject to conflict of interest statutes and regulations.
 - c. OGE has granted extensions of time to file due for personnel participating in deployments due to the current declared national emergency. 5 CFR 2634.903(d)(2)
- D. All financial disclosure forms must be carefully screened to identify actual or potential conflicts of interest.

¹ Even though the threshold amount for micropurchases has been raised to \$3,000.00, the *JER* still reflects the amount as \$2,500.

V. OUTSIDE (OFF-DUTY) EMPLOYMENT AND OFF-DUTY BUSINESS ENTERPRISES

- A. Active duty officers may not accept outside employment that interferes with their performance of military duties. 10 U.S.C. § 973(a).
- B. Employees may not engage in outside activities that conflict with their official duties if such activities are prohibited by statute or regulation, or would require their disqualification from matters critical to their office. 5 C.F.R. § 2635.802
- C. Supplemental regulation may be helpful in outlining the responsibilities of RC personnel, their supervisors and ethics counselors in approving or disapproving off-duty employment or off-duty business activities, e.g., Wright-Patterson AFB Directorate of Ethics and Fraud Remedies Instruction 51-201. Approval of Air Force personnel to have an off-duty job or engage in an off-duty business enterprise is accomplished via an AF Form 3902 (approved by supervisor prior to the off-duty employment or business enterprise).
- D. Army Regulation (AR) 27-1, paragraph 4-3c, prohibits Army judge advocates called to active duty for 30 days or more from engaging in the outside practice of law or appearing as counsel in civilian courts, tribunals, or boards. Exceptions to this policy may only be granted by the Army TJAG.
- E. Office of Government Ethics Rules, 5 CFR 2635.704 and 705, prohibit the use of government property and government time for other than official purposes. While there are limited exceptions for the use of phones and computers for personal use, there are generally no exceptions for business use.
- F. The use of DoD communication systems, resources, and official time may be authorized to complete an orderly transition to military service, consistent with JER §§ 2-301(a)(2) and (b)(1). Examples of permissible uses include using government phones or e-mail to inform the courts of the attorney's situation, request court delays, transfer cases to other attorneys, or other similar uses. Such exceptions must be weighed for reasonableness and consider the amount of notification the RC judge advocate had before mobilization, the length of the mobilization, and the relative experience of the judge advocate.
- G. "Telling their story" -- 5 C.F.R. § 2635.807 prohibits the acceptance of compensation for teaching, speaking, or writing when:

- a. The activity is undertaken as part of the employee's official duties;
 - b. The invitation was extended because of the employee's official position rather than his/her expertise;
 - c. The invitation is from a person whose interest may be affected by the employee's official duties;
 - d. The presentation is based on nonpublic information;
 - e. The topic deals with the employee's current duties or those during the previous year; or
 - f. The topic deals with a policy, program, or operation of the employee's agency.
2. Rationale: prevent an employee from selling to others what the Government already pays him/her to do.
 3. "Compensation" includes all payments, including royalties, meals, but excludes gifts that could be accepted from prohibited sources and free attendance at the event in which the speaking or teaching takes place.
 4. Does not preclude matters within the employee's discipline or expertise based on education or experience.
 5. Does not preclude teaching certain courses, e.g., multiple presentation course as part of a regularly established curriculum.
 6. Policy & Security Reviews: A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant DOD concern shall be reviewed for clearance by appropriate security and public affairs offices. JER § 3-305
 7. RC SMs are free to "tell their story" once they are released from active duty.

VI. HOLDING CIVIL OFFICE WHILE ON RESERVE DUTY

- A. Retired regular officers and reserve officers serving on active duty under a call or order to active duty for a period **in excess of 270 days**, may not exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government). 10 U.S.C. § 973 (b). This statute no longer prohibits such officers from holding civil office except if prohibited by state law or if the holding of the office would interfere with military duties as determined by SECDEF.
- B. DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 19 February 2008.
1. DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty has been recently revised.
 2. The following provisions of DoD Directive 1344.10 that affect Reserve members have been changed:
 - a. Expands coverage for some provisions to include Service members not on active duty.
 - b. For the purpose of this instruction only, defines active duty to include full-time National Guard duty. See Enclosure 2.
 - c. Consolidates the lists of allowed and prohibited activities in the August 2, 2004, version found in subparagraph 4.1., moving some from their previous location at appendix 3 and deleting some that were located in both places.
 - d. Withholds to the Secretary Concerned the authority to make decision regarding certain political activities that might have previously been delegable. See paragraphs 4.1.1.4. (to serve as an elections official), 4.2.2.1. (to be a nominee or candidate as a regular member, or retiree or RC member when on a call or order to active duty for more than 270 days), and 4.5.3.2. (to hold a State office as a retiree or RC member when on a call or order to active duty for more than 270 days.)

- e. Requires a military member on AD for more than 270 days to have non-delegable Service Secretary permission to hold or continue to hold a covered non-Federal office. See para 4.5.3.2. Under the previous directive, such member was presumed to be allowed to hold such office unless the Service Secretary affirmatively determined that holding the office interfered with the performance of duty. (See former 4.3.5.4.)
- f. Clarifies and modifies the rules concerning campaign contribution given to and from members of the Armed Forces. Prohibits giving and receiving only when both giver and receiver are on active duty. Emphasizes, however, that when one is not on active duty, provisions of the Joint Ethics Regulation could still affect the transaction.
- g. Clarifies and emphasizes that the prohibitions of subparagraph 4.1.2. do not apply to members of the Armed Forces not on active duty as long as the Service members are not in uniform or otherwise give rise to an appearance of official endorsement or sponsorship.
- h. Simplifies the previous directive by creating separate sections focusing on specific actions and statuses.
- i. Expands the prohibitions and limitations of holding civil office under this instruction to those who are appointed by the President regardless of whether confirmed by and with the consent of the Senate. With respect to holding and executing Federal civil offices, this expands the statutory prohibitions. See subparagraphs 4.2.1.1.2., 4.3.1., and 4.4.1.2.
- j. Removes the authority of the Secretary concerned to delegate the authority to grant or deny permission to a regular member, or to a retired regular member or Reserve Component member on active duty under a call or order to active duty for more than 270 days to be a nominee or candidate for covered civil office. See subparagraph 4.2.2.1.
- k. Retains unchanged the authority for the Services to determine the proper procedures and proper persons for determining whether the nomination or candidacy for a covered office of a retired regular member or Reserve Component member under a call or order to active duty for 270 or fewer days interferes with that member's duty performance. See subparagraph 4.2.3.
- l. Adds a new subparagraph setting out limitations on nomination,

candidacy, and campaigning for members. These provisions address use of military information in campaign biographies and websites for those not on active duty, and it establishes significant limitations on campaigning for those who may be on active duty but who are allowed to be (or not otherwise prohibited from being) a candidate or nominee for office. See subparagraph 4.3.

- m. Clarifies and records current policy that candidates for covered civil office who are on active duty may not participate in any campaign activities, including all behind-the-scenes activities. See subparagraph 4.3.3.
 - n. Establishes an Acknowledgement of Limitations form for those on active duty or those called to active duty who are or wish to become candidates or nominees for a covered civil office. See Enclosure 4.
 - o. Excludes issues relating to *Federal* constitutional amendments from the list of examples of issues normally associated with nonpartisan political activity by adding the qualifying word “State” to the list of such issues. See paragraph E2.4.
3. When retirement or discharge is not an option, the only options are to refrain from exercising the functions of the civil office while on extended active duty (typically done by taking a leave of absence) or to resign the office. In the case of retired regular members and reserve members, resignation is not required unless mandated by State law or holding the civil office interferes with military duties. With regard to Reserve or National Guard members under a call or order to active duty in excess of 270 days, paragraph 4.3.5.2 requires the Secretary of each Military Department to grant permission to hold the office after determining whether the holding of a civil office interference with military duties.
- C. DoD now requires that active duty commanders and mobilizing RC SMs are trained on the above provisions (*see* Memorandum, Under Secretary of Defense (Personnel and Readiness), Subject: Mobilization of Civil Officeholders, 2 October 2003).
- D. The provisions of DoDD 1344.10 (and AFI 51-902) have again been made applicable to Full-Time National Guard Duty personnel (Paragraph E2.1) as well as to members not on active duty under certain circumstances.

VII. SUPPLEMENTATION OF SALARY

- A. 18 U.S.C. § 209 has four elements. It prohibits: (1) receipt of salary or contribution to or supplementation of salary, (2) as compensation, (3) for services as an employee of the United States, (4) from any source other than the United States. See also JER 5-404 Compensation From Other Sources
- B. The statute applies even if the payor has no dealings or relations with the employee's agency and is not attempting to influence the employee. See OGE Informal Advisory Letter 83 x 15 dated October 19, 1983
- C. 18 U.S.C. § 209 does not apply to Special Government Employees (see Section IV.C, *supra* to determine if a reservist is subject to supplementation of salary restrictions).
- D. 18 U.S.C. § 12601 permits any Reserve member who, before being ordered to active duty, was receiving compensation from any person to continue to receive compensation while on active duty.

VIII. POST-GOVERNMENT EMPLOYMENT

- A. RC SMs are subject to the same restrictions regarding post-government employment as their active duty counterparts. Accordingly, RC SMs may need to disqualify themselves from matters that may affect their civilian government employment (or their potential employers).
- B. Each time a reservist completes a tour of active duty (whether serving for one day or one year), a new period of "post-Government employment" begins. Note, however, that the post-government restrictions may differ for RC SMs who were considered Special Government Employees or who served fewer than a certain number of days. *See, e.g.*, 18 U.S.C. §§ 205 and 207(c).
- C. Restrictions imposed by post-Government employment regulations and statutes are explained elsewhere in the Ethics Counselor Course materials and are not set forth here.

- D. 18 U.S.C. § 207 prohibits RC SMs from appearing before or making representations to officials of the Federal Government with the intent to influence, on particular matters involving specific parties in which the reservist participated while on active duty.
- E. 18 U.S.C. § 208 prohibits RC SMs from engaging in actions that constitute a financial conflict of interest.
- F. Emoluments Clause of the Constitution (Article I, section 9, Clause 8) applies to RC SMs. 37 U.S.C. § 908
- G. Both the Secretary of State and the Secretary of the appropriate Military Department must approve a request to receive foreign pay. Failure to obtain approval in advance may result in the loss of retired or reserve pay in an amount equal to the foreign pay received.

IX. GIFTS

- A. Due to the public outpouring of support for the military, military members have been offered gifts by the public for their wartime service. The offers have consisted of plane tickets, first class upgrades, home improvements, cash, and appearances on reality TV.
- B. Ethics Counselors should keep in mind the applicability provisions of the JER. Generally, unless a Reserve or National Guard member is on orders or using his or her status or authority as a military member, neither the CFR nor the JER will apply to that member. Members have legally accepted gifts because of this lack of applicability.
- C. Notwithstanding the fact that Reserve and National Guard members may accept gifts under certain circumstances, such members run the risk of violating the “Washington Post” test or the “legal but stupid” test.
- D. Legislation regarding gifts to servicemembers injured in combat and gifts to the Department of Defense for the benefit of servicemembers was contained in the FY06 National Defense Authorization and Appropriations Acts. Change 6 to the JER was added to implement these changes.

- E. In recent years, Congress has provided authority for servicemembers and their families, DoD, and the Coast Guard to directly accept gifts. 10 U.S.C. § 2601a. This authority has been amended numerous times and has not yet been fully implemented by DoD regulation.

X. CONCLUSION

As RC SMs continue to be unitized with recurring frequency, agency ethics counselors must have a working knowledge of the rules and issues associated with RC SMs that enter their commands. Furthermore, RC SMs present unique challenges to their RC commands as they navigate the ethical rules associated with their multiple roles as SMs and civilians.

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