

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

March 27, 2013

VIA EMAIL TO:

xx. xxxx xxxxxxxx-xxxxx, Chair
xxxxxxxxxxxxxxxx xxxxxx xxxxxx
D.C. xxxxxxxxxxxxxxxx xx xxxxxxx
xxxx.xxxxxxx-xxxxx@dc.gov

This responds to your March 5, 2013, email in which you seek a formal Advisory Opinion regarding whether D.C. xxxxxxxxxxxx xx xxxxxx (“xxx”) employees may be asked to participate in and be compensated for an xxx xxxxxxxxxxx education research study (the “study”), funded by the xxxxxxxxxxx xxxxxxxxxxx xx xxxxxxx, entitled, xxxxxxx: xxxxxxxx xxx xxxxxxxx for xx xxxxxxx. While working on this Advisory Opinion, a member of my staff obtained additional information from both you and xxxxxxx xxxxxxx, the Research Scientist at xxx xxxxxxxxxxx, xxx. who seeks to conduct the study.

According to the information provided to this office, the study will be a test module for a training-based education study about xxx-xxxxxx xxxxxxxxxxx found in the workplace. The study focuses on xxx supervisors and employees with children under the age of 18. The study is completely confidential and voluntary, but would involve payment of a monetary incentive to those participating in the study. In addition, you state that you have received an informal opinion from the xxx “Ethics Counsel” advising that compensating District government employees for participating in this study would be inappropriate.

In supplemental materials provided to this office, xx. xxxxxxxx states that xx already has received the federal grant to fund this study, but the grant was funded based on a research plan that included compensation for participants. xx. xxxxxxxx states that it is standard practice for participants to be paid, citing adverse impact to the study itself when compensation is not provided. As xx explains, when studies do not provide compensation, the participants “are very often under-powered” and “the questionnaires have no inherent value to the participant.” Therefore, xx. xxxxxxxx represents that compensation to participants, and these participants in particular, is an essential component to the success of this or any such study. With respect to this study, participants are to be paid \$xxx, total, for approximately x to x hours over a xxxx-month interval.

All employees of the District of Columbia government have responsibilities, codified in Chapter 18, Title 6B of the D.C. Municipal Regulations,¹ to which they must adhere as District employees. As this study will use certain xxx employees as test subjects, we will analyze the issues that arise under federal statutes as well as District laws and rules.

Here, the study participants are to be xxx supervisors and employees with children under age 18. Therefore, it is clear that those being asked to participate or offered the opportunity to participate, are being targeted because they fall within a specific criteria and being District government employees is a crucial element of that criteria.

As an initial matter, it must be determined whether it is permissible to ask the group of xxx supervisors and employees (the “xxx group”) identified above to participate at all. If the xxx group who chose to participate were not to be compensated for their participation, we first would have to determine whether this activity falls within the scope of their job duties. Accordingly, xxx would have to determine whether participation in this study would benefit xxx in some way. Although there are indications from the information received that xxx may view participation in this study as a training of some sort, xx. xxxxxxxx states that the questionnaires to be used in this study have no inherent value to the participant, which seems to indicate that participating in this study will have no training value to xxx. If xxx determines that this activity falls within the scope of the job duties of the xxx group, even as a training opportunity, then clearly the participants cannot receive compensation for their participation in the study.

DPM § 1803.7 states:

“An employee shall not receive any salary or anything of monetary value from a private source as compensation for his or her services to the government.”

This also is a federal crime, known as the salary supplementation rule. (18 USC § 209).

Accordingly, the xxx group cannot be paid by an outside entity, regardless of the source of that funding, for engaging in an activity such as participating in this study, if xxx considers it part of each person’s job duties. District employees are entitled to receive their District compensation for performing their jobs. They are prohibited from receiving any additional compensation from another source for performing their jobs and all of their job-related functions.

If, however, xxx determines that participating in this study does not fall within the scope of the job duties of the xxx group, then the analysis shifts to whether the activity, as outside employment or an outside activity, is permissible.

DPM § 1804.1(e) prohibits employees from “engaging in any outside employment, private business activity, or interest which permits an employee, or others, to capitalize on his or her official title or position.” Here, the xxx group is being offered the opportunity to participate in this study, for compensation, because they are both District employees and part of a select group within xxx. Therefore, those from the xxx group who choose to participate in the study will be realizing a financial gain, simply because

¹ Hereinafter, Title 6b of the D.C. Municipal Regulations will be referred to as the District Personnel Manual or DPM.

they are District employees within the select xxx group. Clearly, then, each such employee would be capitalizing on his or her official title or position by participating in this study for compensation. Accordingly, such participation in the study for compensation is impermissible under DPM § 1804.1(e).

DPM § 1803.1(a)(1) is also relevant. It provides that “[a]n employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of . . . using public office for private gain.”

Again, the xxx employees who comprise the xxx group are being offered the opportunity to participate in this study solely because they are District employees who fulfill xxx xxxxxxxxxx specific requirements that they are: (1) xxx supervisors; or (2) xxx employees with children under 18. Therefore, participating in this study, for compensation, by any members of the xxx group certainly would create the appearance that each such group member is using his or her public office for private gain. Accordingly, such participation in the study for compensation is impermissible under DPM § 1803.1(a)(1).²

Finally, we look to federal law in this area. The U.S. Office of Government Ethics (“OGE”) has addressed the issue of government employees participating in research studies in two separate ethics opinions. Both OGE opinions reference 18 U.S.C. § 209 as the basis for authority. In the first opinion, OGE stated, “When a Government employee receives a payment from an outside source for supplying information that the employee is required to provide in the course of his or her official duties, the employee is using his or her position and the information he or she has acquired in that position for private gain.”³ The employees there provided publicly-available procurement information of the type that the outside source was seeking, so the OGE stated that compensation from the outside source would be an ethics violation.⁴ The OGE also said that even if the employees were not financially compensated, their participation still might involve some form of private gain because the gain would be realized by the outside source.⁵ This is similar to the situation described above regarding xxx xxxxxxxxxx.

In a later opinion, OGE found that government employees who were asked to participate in a study involving personal decisions regarding insurance were permitted to participate in the study, for compensation, because such participation was completely unrelated to their official duties and responsibilities.⁶ Therefore, OGE distinguished the facts that comprised this advisory opinion from the earlier one, cited above, because the government employees would not receive compensation from an outside source for performing their jobs or use their official titles or positions for personal financial gain. The purpose of the study was to identify areas of improvement to the insurance offered to federal employees under two companies’ insurance plans.⁷ The OGE opinion stated that

² In contrast, District employees have been permitted, in the past, to take advantage of discount opportunities, such as the offer of discounted sports tickets, if the incentives are made available to all District employees, without any limitations to agency, title, job function, etc.

³ See, Office of Government Ethics Advisory Memorandum 86 x 8: Honorarium and Outside Compensation for Government Work.

⁴ Id.

⁵ Id.

⁶ See, Office of Government Ethics Advisory Memorandum 05 x 8: Employees’ Participation in Paid Surveys.

⁷ Id.

“[u]nless their Government job involves the administration of the insurance contract, the employees are not providing services to the Government when they make decisions regarding insurance for themselves or family members.”⁸ Here, of course, the proposed study would focus on how District employees are treated (or perceived to be treated) in the course of carrying out their official government duties. Unlike the permissible insurance survey, the link between an employee’s duties and the study is undeniable.

Accordingly, the xxx group is not permitted to participate in the xxxxxxxx: xxxxxxxx xxx xxxxxxxx for xx xxxxxxxx research study. If xxx views training as a function of its employees’ positions, then participating for compensation is prohibited by DPM § 1803.7 and federal law. If xxx does not view participating in the study as training, then such participation, for compensation, is analyzed under the various applicable regulations, as an outside activity. As described above, such participation is prohibited because it violates the DPM provisions on the use of public office for private gain.

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to provide such guidance. If you disagree with my conclusions, you may appeal this Advisory Opinion to the three-member Board of Ethics and Government Accountability for their consideration pursuant to D.C. Official Code § 1-1162.19(c). If you wish to do so, please let me know within 10 business days from the date of this letter so I may provide you with instructions.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

⁸ Id.