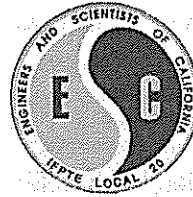




NTEU
The National Treasury Employees Union



MAR 24 2017

Ms. Justina Fugh
Senior Counsel for Ethics
Office of General Counsel
1200 Pennsylvania Avenue, N.W. (2310A)
Washington, DC 20460

Re: Request for Confirmation of First Amendment Rights of Public Employees
Concern regarding EPA Ethics Reminder dated February 3, 2017

Dear Ms. Fugh:

As union officials representing more than 550 employees at the United States Environmental Protection Agency (EPA), Region 9, we request that you promptly clarify an issue raised by EPA's February 3, 2017 Ethics Reminder to all EPA employees, with respect to publicly expressing personal opinions on matters of public concern, such as policy or politics.

Specifically, the EPA Ethics Reminder states:

"To participate in INDIVIDUAL PERSONAL CAPACITY, we urge you not to use your EPA email address or contact information and, if possible, not refer to EPA position or title. If you feel you must refer to your EPA position or title, then the prudential advice is to do so as one of several biographical details with EPA not having any undue prominence. You should be clear you are expressing an individual personal opinion, not speaking on behalf of the Agency." (Emphasis added; *see* Ethics Reminder email attached.)

We agree that EPA employees need to make it clear when they are speaking or writing in their individual personal capacity and that they do so on their personal time, email and equipment. However, we believe the portion of the Ethics Reminder quoted above sets inappropriate limits on the First Amendment rights of EPA employees. The purpose of this letter is to request that you promptly and publicly address this matter. Specifically, we request that you affirm that when EPA employees are engaged in uncompensated speaking, teaching and writing on matters of public concern:

- (1) EPA employees may freely reference their position, title, experience and expertise without fear of adverse personnel action, when it is clear that the employee is representing personal rather than agency views; and
- (2) EPA employees shall not be considered to have violated any ethics rules applicable to their employment, including the prohibition on using their public office for private gain, based on references to position, title, experience and expertise in this context.

The implication of EPA's February 3rd Ethics Reminder is that not only should EPA employees should avoid referencing their EPA position or title, but that even after an appropriate disclaimer, it is unacceptable to discuss EPA experience and expertise because it would give "**undue prominence**" to their EPA affiliation. This interpretation was confirmed to us by an EPA Region 9 ethics official, who indicated that referring to such expertise or experience would be considered "private gain," citing 35 CFR §2635.101(b)(7).¹

As noted above, we ask you to reject this interpretation and to affirm that federal employees engaged in uncompensated teaching, speaking and writing, who provide an adequate statement regarding personal capacity, may freely reference their positions and titles, as well as their EPA experience and expertise. We also ask you to explicitly and unequivocally reject the idea that giving these matters "**prominence**" could violate a federal employee's ethical responsibilities.

Our request is based on U.S. Supreme Court precedent, including *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* affirms that the core of the Free Speech Clause of the First Amendment is "[t]he public interest in having free and unhindered debate on matters of public importance." Specifically, the Court stated it is vital to "**informed decision-making by the electorate**," that public employees be able to speak out freely because they are "**the members of a community most likely to have informed and definite opinions**" on how their agencies function. The Court further stated, "**it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal.**" (Emphasis added.) It is clear that an employee who is fearful about giving "undue prominence" to their EPA position, title, experience and/or expertise cannot speak out freely.

We believe it is inherent in the holding in *Pickering* that public employees engaged in uncompensated speaking, teaching and writing have a First Amendment right to provide information about their experience and expertise in public employment. Consistent with *Pickering*, such information provides the foundation for the public's ability to judge the credibility of the information and personal opinions provided.

Further supporting this view is OGE's March 19, 2010 Advisory Opinion regarding Uncompensated Teaching, Writing, and Speaking, provided at [https://www.oge.gov/Web/OGEnsf/All+Advisories/BE7A42791D712EC785257E96005FBE8E/\\$FILE/5589e190181d4c4ca90e6be8027a6c783.pdf?open](https://www.oge.gov/Web/OGEnsf/All+Advisories/BE7A42791D712EC785257E96005FBE8E/$FILE/5589e190181d4c4ca90e6be8027a6c783.pdf?open). In that Advisory, OGE stated:

¹ 40 CFR §2635.101(b)(7): "Employees shall not use public office for private gain."

“The purpose of section 807(b)(1) and (b)(2), in conjunction with section 702(b),² is to ensure that public is not misled as to whether the views expressed by an Executive Branch employee in **uncompensated teaching, writing, or speaking** are those of the employee or those of the Government. **A too literal parsing of either 807(b)(1) or (b)(2) divorced from this broader purpose could lead to unnecessarily restricting employee’s rights of free speech and commentary.** OGE believes that when it is clear from the actual language or context of an employee’s teaching, writing, or speaking that the employee is representing personal rather than agency views, then purpose of the specific provisions discussed above has been met.”

Consistent with the OGE Advisory, the concern regarding “prominence” should not be applied in the context of uncompensated public employee speech on matters of public concern.

Our request is urgent because there is currently a high profile public debate in progress concerning the value of the work performed by EPA, the need for this work to continue, and the appropriate funding for this work. We believe the public has a right to hear the information and opinions that current EPA employees speaking in their personal capacity can provide, including the experience and expertise on which the information and opinions are based.

² 40 CFR §2635.807:

(b)Reference to official position. An employee who is engaged in **teaching, speaking or writing as outside employment or as an outside activity** shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is **given no more prominence than other significant biographical details**;

(2) An employee **may use, or permit the use of, his title or position** in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a **reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States**;

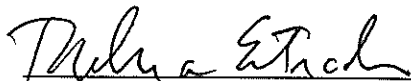
40 CFR §2635.702(b)

(b)Appearance of governmental sanction. Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by § 2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

Given the urgent nature of our request, we are asking you to provide a written response within two weeks. We are also available to meet with you, should you wish to discuss this matter.

Please feel to contact us.

Thank you for your consideration.



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