

This is in response to a request for an opinion regarding a DoD employee participating in a non-federal entity (NFE) in an unofficial/personal capacity. JAA had no legal objection to this request. However, please note the limitations to NFE participation cited below.

### BACKGROUND

The Missile Defense Advocacy Alliance (MDAA) asked a DoD employee to act as the Master of Ceremonies (MC) for their Missile Defender of the Year ceremony. The member was requested for this duty solely because his father, who normally acts as MC for this event, was ill and unable to perform. The member was not asked based on their official duty position.

### LAW AND ANALYSIS

#### *What constitutes an NFE?*

NFEs are generally self-sustaining, non-Federal organizations, established, operated and controlled by any individual(s) acting outside the scope of any official capacity. DoD 5500.07-R, Joint Ethics Regulation (JER), para.1-217. The entity in this case, MDAA, is a non-profit organization which seeks to generate support for the continued testing, development and deployment of missile defense systems and the urgent need for them. MDAA is a non-partisan organization governed by a Board of Directors which does not have a financial interest in the decision the US Government makes with regard to its missile defense systems. MDAA's Board of Directors is comprised of individuals from outside the defense industry. Therefore, MDAA would qualify as an NFE.

#### *Can DoD employees participate in NFEs in their personal capacities?*

Yes. DoD employees may participate in NFEs in their personal capacity so long as it is clear that they are acting exclusively outside the scope of their official positions. JER, para. 3-300.a. However, DoD employees may not serve in a personal capacity as an officer, member of the Board of Directors, or in any other similar position in any NFE offered because of their DoD assignment or position. JER, para. 3-301. Employees may request an authorization to participate from their Agency Designee based on a determination that the interests of the Government outweigh potential questions about the integrity of the agency's programs. 5 CFR §2635.502; JER, para. 3-302.

Several restrictions apply when participating in NFEs. DoD employees may not:

- a. participate personally and substantially in a particular Air Force matter that will directly affect the financial interests of the outside entity. 18 U.S.C. §208;
- b. use public office for the private gain of the outside entity. 5 CFR §2635.702;
- c. with or without compensation, represent the outside entity before any Federal agency. 18 U.S.C §203 and §205;

- d. make unauthorized use of official time or Government property for activities with the outside entity. 5 CFR §2635.704;
- e. give the appearance that the Air Force sanctions or endorses the outside entity. 5 CFR §2635.702(b) and (c); and
- f. disclose or misuse any information acquired as part of employee's official duties which is not generally available to the public. 5 CFR §2635.703.

*Is it acceptable to wear military uniform while participating in a NFE?*

No, unless it is an official Air Force award program sponsored by an NFE in accordance with AFI 36-2805, *Special Trophies and Awards Programs*. Unless the proper steps were taken in accordance with JER, para. 3-206, the wearing of the uniform in the performance of a key role could give the perception that the DoD co-sponsored the event.

*Can DoD employees use their official titles as a personal identifier?*

DoD employees may not use their official duty titles, positions, or organization names in connection with activities performed in their personal capacities as this tends to suggest official endorsement by DoD of any NFE involved. JER, para. 3-300a(1). Military grade and military department as part of the employee's name (e.g., Captain Smith, U.S. Navy) may be used, the same as other conventional titles such as Mr., Ms., or Honorable, in relationship to personal activities. JER, para. 3-300a(1). In addition, if speaking at an NFE event in their personal capacity, it is acceptable to refer to official titles, but *only if* it is one of several biographical details that are mentioned, and if more prominence is not given to the official title than to the other biographical details. 5 CFR 2635.807(b)(1).

*Is the acceptance of a gift authorized in conjunction with participating in an NFE?*

Yes. DoD employees may accept a gift given by the NFE on this occasion. Even though acceptance of a gift may be permitted by this exception, it is never inappropriate and is frequently prudent for an employee to decline a gift if acceptance would cause a reasonable person to question the employee's integrity or impartiality. 5 CFR §2635.204. This exception is subject to limitations. An employee may not: (a) accept a gift in return for being influenced in the performance of an official act; (b) use, or permit the use of, Government position, or any authority associated with public office, to solicit or coerce the offering of a gift; (c) accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using the employee's public office for private gain; (d) accept a gift in violation of any statute<sup>1</sup>; accept a gift in violation of any Executive Order; or accept any gift when

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<sup>1</sup> Statutes include, but are not limited to: 18 U.S.C. 201(b), which prohibits a public official from, directly or indirectly, corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value personally or for any other person or entity in return for being influenced in the performance of an official act; being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or for being induced to do or omit to do any action in violation of his or her official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials; and (2) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality.

acceptance of the gift is specifically prohibited by a supplemental agency regulation issued with the concurrence of the Office Of Government Ethics, pursuant to §2635.105. 5 CFR §2635.205.

*Is supervisor approval required?*

No, unless the DoD employee files financial disclosure reports (OGE Form 278 or OGE Form 450). If an employee files a financial disclosure reports, he or she must disclose the position with the NFE on his or her next annual report. CFR §2634.307(a) & .907(e)(1).

### CONCLUSION

In closing, DoD employees are authorized to participate in NFEs in their personal capacity so long as they refrain from wearing military uniforms and using military organizations and duty titles, unless already part of an official biography. Additionally, if the employee is not required to file a financial disclosure report, then supervisor approval is not required.

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