

GAO

United States General Accounting Office

Report to the Honorable
Nancy L. Kassebaum, U.S. Senate

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GAO 91-15469

CONFLICT OF INTEREST POLICY

Defense Logistics Agency Employees Whose Spouses Work for Contractors



91-15469



United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-245463

October 21, 1991

The Honorable Nancy L. Kassebaum
United States Senate

Dear Senator Kassebaum:

This report responds to your request that we provide information about the Defense Logistics Agency's (DLA) policy concerning potential financial conflicts of interest—specifically, the conflict of interest created when a government employee monitors the operations of a contractor and has a spouse who works for that contractor. Our review objectives were to identify DLA's conflict of interest policy and the basis for and any changes in that policy. We also present our views about the merit of DLA's policy.

We did not independently make any conflict of interest determinations. We obtained data on conflicts of interest from determinations made by DLA's Defense Contract Management Districts.

Background

Before 1990, each of the military services and DLA maintained separate contract management organizations. In 1990, these organizations were consolidated into the Defense Contract Management Command within DLA. Generally, the employees who were assigned to DLA had performed contract administration functions for their former organizations. Some of the employees who recently transferred to DLA monitor the operations of contractors that employ their spouse or other household members and have done so for many years.

Results in Brief

DLA's Standards of Conduct regulation prohibits a DLA employee from participating in any official action in which the employee or the employee's spouse or other household member has a financial interest. In addition, the regulation states that DLA personnel shall not receive or retain any direct or indirect financial interest that conflicts with their duties and responsibilities. The regulation provides that the financial interest of an employee includes the wages, salaries, or other income of the employee's spouse. When a financial conflict of interest is identified, it must be eliminated or waived. This conflict of interest policy is based on governmentwide policies established by law, executive order, and Office of Personnel Management regulation. The provisions of DLA's Standards of Conduct regulation have not changed recently. In fact,



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these provisions are essentially identical to those included in DLA's regulation since at least 1981.

With the recent consolidation of contract administration activities in the Defense Contract Management Command, DLA's local district offices have identified 153 employees with financial conflicts of interest resulting from their spouse's employment. As of June 26, 1991, DLA was in the process of reviewing 81 of these cases. The remaining 72 cases had been resolved at the local level: employees were most often disqualified from performing specific duties or reassigned to another position or location. In 10 cases, the conflict was resolved because the employee or the household member resigned.

If the financial conflict of interest cannot be resolved, the employee can ask for a waiver on the basis of the provisions of 18 U.S.C. 208 and DLA regulations. The waiver request can be denied locally, but can only be approved after DLA's General Counsel determines that the financial conflict of interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. However, DLA's implementing guidelines state that generally a waiver would not be granted, because a spouse's income would represent a substantial financial interest. DLA records identified only two requests for a waiver in the 1980s. Both were denied. However, 62 of the 153 DLA employees with conflicts of interest have requested a waiver. Of these, responsible district office officials have denied 13 requests and are evaluating 28 others. The remaining 21 waiver requests have been or will soon be sent to DLA's General Counsel for final decision.

We believe that DLA's regulation is consistent with conflict of interest laws and regulations applicable to all government employees. Further, DLA's regulation reflects the government's interest in maintaining high ethical standards while providing for the consideration of DLA employees' individual situations. DLA's implementation of the regulation, particularly the waiver provisions of 18 U.S.C. 208, necessarily involves the exercise of discretion and judgment by the reviewing agency personnel.

DLA's Regulation: Its Basis and Implementation

DLA's Standards of Conduct regulation (DLAR 5500.1, Feb. 24, 1988) is based on governmentwide conflict of interest policies. A principal governmentwide conflict of interest statute is 18 U.S.C. 208, a criminal statute that prohibits a government employee from participating personally and substantially, through decision, approval, disapproval, or

recommendation, in any particular matter in which the employee or the employee's spouse has a financial interest. The statute does not define key terms such as "particular matter" and "financial interest," leaving these terms to be administratively defined or interpreted. DLA's regulation basically restates 18 U.S.C. 208's prohibition against an employee's participating in any particular matter in which he or she or his or her spouse has a financial interest.

The regulation also incorporates waiver provisions that are contained in section 208. The statute provides that the prohibition may be waived if the employee discloses the financial interest and the government official responsible for the employee's appointment determines that the interest is not so substantial as to be deemed likely to affect the integrity of the employee's services.

Government employees are also subject to certain administrative standards of conduct. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," dated April 12, 1989, (as modified by Executive Order 12731, dated October 17, 1990) provides that employees "shall not hold financial interests that conflict with the conscientious performance of their duty." The Office of Personnel Management regulations, which direct government agencies to issue their own regulations prescribing standards of conduct, provide that an employee shall not have a direct or indirect financial interest that conflicts substantially with his or her work-related duties and responsibilities. DLA's regulation implements the executive order and the regulation, stating

"DLA personnel shall not receive or retain any direct or indirect financial interest which conflicts with the interests of the Government they serve through the duties and responsibilities of their DLA positions."

The provisions of DLA's Standards of Conduct regulation have not changed recently. In fact, these provisions are essentially identical to those included in DLA's regulation since at least 1981.

The regulation defines the terms "particular matter" and "financial interest" used in 18 U.S.C. 208. According to DLA's regulation, a "particular matter" is involved if an individual can reasonably anticipate that his or her government action will have a direct and predictable effect upon his or her financial interests. The regulation includes wages, salaries, or other income of a spouse as a "financial interest" of a DLA employee.

DLA's regulation also requires all DLA personnel to conduct themselves, both on and off the job, in such a manner that they avoid the existence or appearance of a conflict of interest between their official responsibilities and their personal affairs. The regulation states further that a direct or indirect financial interest in a defense contractor, in any amount and in any form including the employment of a spouse, may be a prohibited conflict or create the appearance of a conflict of interest.

DLA's Guidelines Implement Its Standards of Conduct Regulation

In response to questions resulting from the Department of Defense's consolidation of contract administration activities, DLA's Office of General Counsel issued guidelines regarding DLA's conflict of interest regulation on May 16, 1990. DLA evaluates each spousal employment case individually on the basis of the specific facts involved. During this evaluation, DLA focuses on the following questions:

- Does the DLA employee have a financial interest in the contractor?
- Is the DLA employee responsible for taking action that has or could have a financial impact on the contractor?
- If a prohibited conflict of interest does exist, can the conflict be resolved, and if not, can it be waived?
- Does the contractor's employment of a DLA employee's spouse otherwise create the appearance of a conflict of interest?

What follows are the factors that DLA considers in answering these questions.

Does the DLA Employee Have a Financial Interest in the Contractor?

DLA has long considered the salary of a spouse to be a financial interest of the DLA employee. This position is clearly stated in DLA's regulation that specifically defines "financial interest" to include the wages, salaries, or other income of a spouse. The guidelines expand on this position by noting that the activities of the spouse are not material to the question of whether a financial interest exists. The prohibited economic interest is the spouse's salary: a salary the employee might wish to protect or increase and an economic leverage the contractor could use to influence the employee.

Is the DLA Employee Responsible for Taking Action That Has or Could Have a Financial Impact on the Contractor?

If an employee has a financial interest, DLA evaluates the employee's official duties and responsibilities to determine whether the employee can make decisions or recommendations or take other actions that have or could have an economic impact on the company. Specifically, the guidelines state that DLA will evaluate the extent to which

- the exercise of the employee's duties and responsibilities can directly or indirectly affect the employee's financial interest,
- the company could affect or influence the employee, and
- the employee could affect the government's interest.

If a Prohibited Conflict of Interest Does Exist, Can the Conflict Be Resolved, and if Not, Can It Be Waived?

If DLA determines that an employee has a conflict of interest (a financial interest that conflicts with work responsibilities), DLA will attempt to resolve that conflict at the local level. This action may be accomplished by various means, including disqualifying the employee from performing specific duties involving the particular contractor or transferring the employee to another organization.

If the financial conflict of interest cannot be resolved, the employee can ask for a waiver based on the provisions of 18 U.S.C. 208 and DLA regulations. The waiver request can be denied locally but can only be approved by DLA's General Counsel. However, the guidelines state that a waiver would rarely if ever be given when the DLA employee has responsibilities that directly impact the economic interests of the company. Although each waiver request is reviewed on its own merits, the guidelines note that generally it would be impossible to conclude that the salary income of a spouse is inconsequential or an unsubstantial financial interest.

DLA reported that a review of its records identified no record of DLA's approving a waiver in a conflict of interest resulting from a spouse's employment during the 1980s. DLA identified only two requests for a waiver. In both cases the waivers were denied.

Does the Contractor's Employment of a DLA Employee's Spouse Otherwise Create the Appearance of a Conflict of Interest?

DLA considers the appearance of a conflict of interest in addition to whether an actual conflict exists. That is, DLA's policy is to avoid compromising the public's confidence in the integrity of the government. DLA therefore considers such factors as the nature and location of the work, the level and extent of the government employee's responsibility, and the history of the circumstances.

Financial Conflicts of Interest Identified by DLA

DLA does not maintain agencywide statistics concerning the number and resolution of financial conflict of interest cases. Financial conflicts are generally identified and resolved at the local level unless an employee requests a waiver. A request for waiver can be denied at the local level but can only be approved by the DLA General Counsel.

As a result of evaluations conducted since the consolidation, DLA's five Defense Contract Management Districts have identified 153 DLA employees with financial conflicts of interest resulting from the employment of spouses or other household members. As of June 26, 1991, DLA was in the process of reviewing 81 of these cases. The remaining 72 cases had been resolved at the local level, primarily by disqualifying the employee from performing specific duties or reassigning the employee to another position or location. In 10 cases, the conflict was resolved because the employee or the household member resigned.

The Defense Contract Management District West, one of five district offices, told us that 38 of over 4,000 district employees had financial conflicts of interest resulting from the employment of a spouse or other household member. A district official reported that all 38 employees had been transferred from the military service contract administration organizations to the district office as part of the consolidation of contract administration functions under the Defense Contract Management Command. As shown in table 1, the employees were involved in a wide variety of positions, ranging from quality assurance specialists to contract administrators.

Table 1: Spousal Conflict of Interest Cases in One Defense Contract Management District

Job title	Number of employees
Quality assurance specialist	14
Contract administrator	5
Operations support branch supervisor	2
Secretary	2
Industrial specialist	2
Other	13
Total	38

Six of the 38 employees had previously received waivers from the Air Force Contract Management Division before its consolidation into the Defense Contract Management Command. The Division had determined that the employees' financial interests could be waived under 18 U.S.C. 208. The six employees performed a wide range of functions such as contract administration, quality assurance, logistics management, and industrial property management.

Former Air Force officials who helped implement the Division's waiver policy told us that the Division revised its waiver policy in March 1987. The Division's former chief ethics officer told us that the decision of

whether a conflict of interest existed and whether it should be waived was made by local management. According to the former chief ethics officer, before March 1987, local supervisors routinely granted waivers whenever they were requested.

After March 1987, the Division established the policy of limiting waivers to employees who (1) were not warranted (did not have contracting authority), (2) did not have a similar grant of authority, or (3) did not exercise significant supervisory responsibility. According to the former chief ethics officer, this policy was strictly enforced for conflicts created after March 1987. However, the Division allowed employees who would have a conflict of interest under the Division's new policy to continue in their current position.

Officials from the district office reported that 12 of the 38 conflict of interest cases had been resolved—one by the resignation of the employee, four by the resignation of the employee's spouse, and seven by the reassignment or transfer of the employee. Of the unresolved cases, 22 employees have requested that their conflicts be waived. The district office has submitted or is in the process of submitting 21 of the waiver requests to DLA.

Nationally, DLA reports that a total of 62 employees have requested waivers as of June 26, 1991. Local district office officials have denied 13 requests and are evaluating 28 others. The remaining 21 waiver requests, all of which are from one district office, have been or will soon be sent to DLA's General Counsel for final decision.

Merits of DLA's Policy

DLA's Standards of Conduct regulation is consistent with governmentwide conflict of interest laws and regulations applicable to financial conflicts resulting from a spouse's employment. In this respect, the regulation restates the prohibition and waiver provisions established in 18 U.S.C. 208 and uses language that is nearly identical to the Office of Personnel Management's regulations. Further, DLA's regulation reflects the government's interest in maintaining high ethical standards while considering DLA employees' individual situations.

We found no reason to question DLA's position that the salary of an employee's spouse constituted a financial interest of the employee. In this situation, DLA does not automatically require that the employee remove the financial interest. Instead, DLA appropriately examines

whether that employee can take action that has or could have a financial impact on the defense contractor. If so, DLA attempts to resolve the conflict at the local level by various means, including disqualifying the employee from specific duties or transferring the employee to another organization.

DLA's position appears consistent with the views expressed by the Office of Government Ethics in its July 15, 1985, letter (85 OGE 10) concerning a spousal employment case. In that case the Office of Government Ethics ruled that the husband would have a conflict of interest if he were promoted to a position in which his responsibilities included recommending whether component parts that had not passed inspection should be repaired by the defense contractor at its assembly facility. The employee's wife was employed by the contractor at the same facility. The wife's duties included administrative control and coordination of all documentation relating to the systems assembled and delivered under the contract. In reaching its conclusion, the Office of Government Ethics stated that the husband had a financial interest resulting from his spouse's employment and that the husband's duties, if he were promoted, would constitute personal and substantial participation in the operation of the contract.

Section 208's broad standard for a waiver—that the employee's interest is not so substantial as to be deemed likely to affect the employee's services—necessarily places a great deal of discretion and judgment on the reviewing agency personnel. We are not in a position to question the propriety of DLA's waiver policy, either as a general matter or in the context of specific cases.

Agency Comments

The Department of Defense agreed with the information presented in a draft of this report.

Scope and Methodology

We reviewed DLA's financial conflict of interest policies as documented in DLA's Standards of Conduct regulations and other DLA guidance. In addition, we discussed with DLA Office of General Counsel officials how these policies related to conflicts of interest resulting from spousal employment. We compared DLA's policies and procedures with the governmentwide conflict of interest policies established by law, executive order, and Office of Personnel Management regulation. In addition, we reviewed applicable decisions issued by the Office of Government Ethics.

To obtain data on conflict of interest determinations identified at the local level, we reviewed summary data on the results of financial conflicts of interest identified at DLA's five Defense Contract Management Districts. In addition, we obtained and reviewed data on the types of work conducted by employees with conflicts of interest at District West, one of the five Defense Contract Management Districts. We also obtained information concerning the waivers granted to District West employees by the Air Force Contract Management Division and discussed the basis for the waivers with former Division officials who were involved with implementing the Division's waiver policy. We did not obtain similar information on employees in the other four districts.

We conducted our review from April 1990 through July 1991 in accordance with generally accepted government auditing standards. Responsible officials of the Department of Defense provided comments on this report and their comments have been incorporated where appropriate.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to the appropriate congressional committees, the Secretary of Defense, and the Director of DLA. We will also make copies available to others upon request.

Please contact me at (202) 275-8400 if you or your staff have any questions concerning this report. Other major contributors to this report were David E. Cooper, Assistant Director; Louis G. Lynard, Evaluator-in-Charge; and Raymond J. Wyrsh, Attorney.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul F. Math". The signature is stylized with a large, sweeping initial "P" and a distinct "M".

Paul F. Math
Director, Research, Development,
Acquisition, and Procurement Issues