



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

January 13, 2003

STANDARDS OF CONDUCT OFFICE

Captain Peter C. Wylie, JAGC, USN (Ret)
Secretary and General Counsel
Military Officers Association of America
201 North Washington Street
Alexandria, Virginia 22314-2539

Dear Captain Wylie:

I am responding to your letter of October 31, 2002, which poses several questions about the participation of active-duty military officers in management and lobbying activities of the Military Officers Association of America (MOAA). I have listed your questions and our responses below.

You also asked about such activities when conducted by drilling Reserve and National Guard officers. The application of Federal restrictions on them depends upon their status and nature of their activation. For example 18 U.S.C. 202 establishes the status of Reserve officers as Federal employees or special Government employees depending upon whether they were activated voluntarily, involuntarily, or solely for training. Similarly, the status of National Guard Officers will affect application of Federal regulations and statutes.

The regulations set out in 5 C.F.R. part 2635 and DoD 5500.7-R, Joint Ethics Regulation, will apply to them when they are: (1) on active duty under orders issued pursuant to title 10, U.S.C., (2) performing duties or functions under the authority of either title 10 or title 32, U.S.C., or (3) while engaged in any activity related to the performance of such duties or functions, including any time the member uses his or her Reserve or National Guard of the United States title or position, or any authority derived therefrom. Accordingly, National Guard and Reserve officers should be strongly encouraged to consult their ethics counselors before undertaking active roles in MOAA.

1. May active-duty officers, as members of MOAA, participate in lobbying activities?

When acting in their personal capacities, (and out of military uniform) active-duty military officers may participate in many MOAA lobbying activities. There are, however, extensive restrictions involving partisan political activities, use of the officer's office, position, or status, or use of appropriated funds, that may limit certain lobbying activities.



Political Activities: Members of the Armed Forces on active duty (which includes Reserves and National Guard personnel) may not participate in partisan political management, campaigns, or conventions. "Partisan political activity" relates to candidates or issues identified with national or State political parties and associated or ancillary organizations. While this restriction may not apply to most MOAA lobbying efforts, where such efforts link MOAA with a particular political party, the bar would apply. DoD Directive 1344.10 (which may be found on-line at <http://www.dtic.mil/whs/directives>) lists specific activities as examples of prohibited activities that could overlap with MOAA lobbying.

The above directive also prohibits active-duty personnel from using their official authority or influence to affect the outcome of an election, solicit votes for a particular candidate or issue, or solicit political contributions from others.

Use of Public Office: Federal personnel may not use their public office for the private gain of any person or organization. This broad prohibition includes using or allowing the use of their Government position, authority, or title in a manner that is intended to coerce or induce another, especially a subordinate, to provide a benefit to another. The prohibition also includes using or permitting the use of public office in a manner that could reasonably be construed to imply Government sanction or endorsement of a private organization. Other examples of misuse of public office include use of nonpublic information, Government property and resources, and official time for unofficial activities. Detailed guidance on these limitations may be found at 5 C.F.R. 2635, Subpart G.

In short, any lobbying activity undertaken by military officers must be strictly off-duty and unrelated to their official position or duties. Military personnel may, however, even when conducting activities in their personal capacities, be identified by their military rank and service, since they are considered terms of address.

Use of Appropriated Funds: While I hesitate to add this section, it may be prudent to remind your members that they may not use appropriated funds in their lobbying efforts. The Department of Defense Appropriations Act for Fiscal Year 2003 (Public Law 107-248) states, at section 8001, that "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress." Section 8012 of the Act states that "None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress." These provisions are included in each year's DoD Authorization Act.

In addition, a criminal statute, 18 U.S.C. 1913, prohibits Federal personnel from using appropriated funds for "grass roots" lobbying. These prohibitions reemphasize that any lobbying by active-duty officers must be carried out by the officers in their personal capacities, clearly separate from their public office.

Lobbying Activities While in Uniform: Each of the Military Services regulates the wearing of that Service's uniform. While "lobbying" may involve a multitude of activities, some of those activities, especially where they involve advocacy activities involving legislators, may be prohibited while in uniform. In addition, activities conducted while in uniform strongly imply that the officer is acting in his or her official role, rather than in a personal capacity.

Encouraging Other Active-Duty Officers to Participate: As indicated above, Federal personnel may not use their office, authority, or title to endorse private organizations. A military environment exacerbates the coercive affect of such endorsements, recommendations, or suggestions. In fact, in a recent joint memorandum to the U.S. Army, the Secretary and Chief of Staff of the Army proscribed, "Any practice that involves or implies compulsion, coercion, undue influence, or reprisal" regarding membership campaigns for private organizations. While military personnel are free to express their personal views regarding lobbying efforts of MOAA, they should be sensitive to perceptions of coercion and undue influence when advocating such views to other military officers, particularly if the latter are junior in rank or command.

2. May an active-duty officer serve as an officer of a MOAA chapter or council?
What restrictions apply?

Active-duty officers may serve as officers of a MOAA chapter or council in their personal capacities, unless they were offered the position or selected because of their Government office. In addition, because MOAA and the Department of Defense may interact on common concerns and issues, there are several potential conflicts of interest that must be avoided.

Active-duty officers, who are also officers of MOAA chapters or councils, may not participate personally and substantially in particular matters that are likely to have a direct and predictable effect on the financial interests of MOAA. The same criminal statute, 18 U.S.C. 208, which bars Federal personnel from taking official action on their own financial interests, also bars such action on matters that affect the interests of organizations in which they are officers, directors, or employees.

A regulation, 5 C.F.R. 2635.502 extends a similar ban on official action by an active-duty officer in cases in which the officer knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interests of a MOAA chapter or council if the officer is an active participant in the chapter or council, and that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality. For such conflicts of interest, the most common remedy is for the officer to be disqualified from taking official action involving the particular matter affecting MOAA.

Another criminal statute, 18 U.S.C. 205, may also circumscribe the activities of active-duty officers in their roles as directors of MOAA chapters and councils. This statute bars them from acting as an attorney or agent for MOAA before agencies of the

Government in particular matters in which the Government is a party or has a direct and substantial interest. For example, this would preclude an active-duty officer from writing, on behalf of MOAA, to DoD (or any other Federal agency) seeking its support on particular legislation. This statute does not apply to Federal personnel who act as attorneys or agents for non-profit organizations where a majority of the organization's members are current Federal personnel, their spouses, or children. (Although unlikely to occur, please note that 18 U.S.C. 203 prohibits Federal personnel from accepting compensation for such representations, even if they did not personally make the representations to the Government.)

Of course, active-duty officers must take care to ensure that they do not use Government resources, time, personnel, or non-public information in support of their personal activities in MOAA. Additionally, when conducting fundraising activities, they may not solicit from subordinates or businesses that contract with the Department of Defense.

Active-duty officers may not use their official title, position, or authority in MOAA correspondence or on MOAA letterhead. Use of their military rank and service, however, is permitted.

The Department of Defense also prohibits Flag and General Officers, who sit on boards of directors of private organizations such as MOAA, from accepting compensation for that service. (They may accept reasonable expenses.)

Finally, those active-duty officers who file financial disclosure reports (either the SF 278 or OGE Form 450) and who are directors of MOAA chapters or councils, are required to identify those positions in their disclosure reports.

3. Could an active-duty officer participate in "storming the hill"?

Active-duty officers who serve as a MOAA chapter officials and participate in the one day "storming the hill" lobbying effort may do so only if they act in a personal capacity. That means that they may not wear military uniforms to such events. They should be scrupulous in their advocacy to ensure all Congressional contacts understand that they are representing MOAA and not their military service or the Department of Defense.

Because "storming the hill" involves an active and representational role on behalf of MOAA, active-duty officers who participate should be cognizant of the same conflict of interest and misuse of office limitations identified in response to question #2, above.

4. By amending the MOAA bylaws, can an active-duty member serve on the MOAA Board of Directors? If so, what are the restrictions?

The response to question #2, above, also applies to service on the MOAA Board of Directors.

5. May an active-duty officer, on behalf of MOAA, advocate a legislative or regulator position that is counter to the position of the Executive Branch?

An active-duty officer may advocate MOAA positions whether or not they correspond with those of the Executive Branch. It must be clear, however, that such advocacy is being made in the officer's personal capacity, and not on behalf of the Department of Defense. Since the officer is permitted to use his or her military rank and service even when speaking in a personal capacity, an unambiguous disclaimer would be necessary to dispel potential misperceptions that the officer is advocating on behalf of the Department.

The Military Services have specific regulations that address communications with Congress. For example, Article 1154 of Naval Regulations prohibits members of the naval service, in their official capacities, from contacting Congress regarding legislation or appropriations without the consent of the Secretary. Similarly, Article 1155 bans any restriction on members of an armed force, in their personal capacity, from communicating with members of Congress.

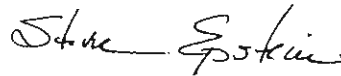
6. May an active-duty officer serve as an unpaid advisor or consultant to the MOAA Board of Directors? What restrictions apply?

Active-duty officers may serve as advisors to MOAA. However, they should guard against conflicts of interest arising between their official responsibilities and service to MOAA. Section 2635.802 of Title 5, Code of Federal Regulations, bars Federal personnel from engaging in outside activities if such activities would require his or her disqualification from matters so critical to the officer's duties as to materially impair the officer's performance. In addition, the concerns raised in response to question #2, also apply.

As the length of this letter attests, active participation in MOAA by active-duty officers is possible, but holds ample opportunity for unwitting violations of Federal regulations and statutes. I strongly encourage you to recommend that your active-duty members consult with their ethics counselors before undertaking an active role in MOAA. Violations, especially when they are unintentional, do great damage to this Department, our military officers, MOAA, and the public's confidence in all of us.

The above responses to your questions are general in nature and broad in scope. I will be happy to assist you with the application of these statutes and regulations to specific instances as they arise. If you should have any further questions, please don't hesitate to call me at 703-697-3422 or email me at epsteins@dodgc.osd.mil.

Sincerely,

A handwritten signature in cursive script that reads "Steve Epstein".

Steve Epstein
Director