



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO – 2009-1005

Subject: 45 C.F.R. § 1612.7(a) Public Demonstrations and Working Hours

Date: June 23, 2009

Question Presented

Whether a recipient full time staff attorney's participation in a public demonstration while on leave during a normal work day violates 45 CFR § 1612.7(a).

Brief Answer

If a recipient full time staff attorney has properly taken leave time, then he or she is on personal time, and not working hours, and is therefore permitted under 45 C.F.R § 1612.7(a) to participate in a public demonstration so long as the attorney does not identify himself or herself as acting on behalf of the grantee, does not use recipient resources covered by § 1612.7, and the attorney does not engage in activities as part of the demonstration that would constitute legal assistance or representation to the clients of the grantee.

Background

As we understand it from the information provided to us, a staff attorney at an LSC grantee participated in a public demonstration against the opening of a new chain store. At the time of the demonstration, the attorney was involved in the on-going representation of two clients who were also opposed to the opening of this store. While the attorney's participation occurred during the work day, he was on paid vacation leave when at the demonstration. At the protest, he held a sign and was photographed by the Associated Press, who identified him as a staff attorney at the grantee. The attorney did not, however, identify himself or his employer to the AP—the AP apparently obtained this information independently.

As the Legal Services Corporation ("LSC") regulations prohibit a person from participating in public demonstrations during his/her "working hours," we were asked to clarify

Analysis

45 C.F.R § 1612.7 provides that:

(a) During working hours, while providing legal assistance or representation to the recipient's clients or while using recipient resources provided by the Corporation or by private entities, no person shall:

(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation;

There is no dispute that the attorney was present at or participated in the public demonstration against the chain store. The remaining issues, therefore, are whether the attorney's participation while on vacation leave occurred "during working hours," as the regulation contemplated, and whether he was providing any legal assistance to his clients in the related matter at the demonstration. The facts provided to us did not include any allegation that the attorney was using recipient resources provided by LSC or by private entities.

45 C.F.R § 1612.7 distinguishes between "working hours" and non-working hours in sections (a) and (b). While subsection (a) prohibits certain activities "during working hours," subsection (b) prohibits recipient employees from participating in certain activities "at any time."¹ Subsection (b) specifically emphasizes that it applies "whether during working hours or not," which indicates that the "working hours" clause limits all of subsection (a).² Thus, it would appear that 45 C.F.R. § 1612.7(a) prohibits a person from participating in a public demonstration in two situations: (1) while providing legal assistance or representation to the recipient's clients during working hours, or (2) while using recipient resources during working hours. However, the regulations, preambles, legislative history, and prior opinions do not provide any definition on what exactly constitutes "working hours."

The U.S. Department of Labor's Wage and Hour regulations provide some useful guidance on other uses of this term. 29 C.F.R § 778.223 defines for overtime purposes "hours worked" to include "all time during which an employee is required to be on duty," as well as "all time during which an employee is suffered or permitted to work whether or not he is required to do so."³ In addition, 29 C.F.R. § 785.16(a) regarding hours worked states that an employee is "off duty" when "an employee is completely relieved from duty and [the period is] long enough to enable him to use the time effectively for his own purposes."⁴ To be "completely relieved

¹ See 45 C.F.R § 1612.7(a), (b); see also 62 Fed. Reg. 19400, 19403 (Apr. 21, 1997).

² See 62 Fed. Reg. 19400, 19403 (Apr. 21, 1997).

³ See 29 C.F.R. § 778.223 (1981).

⁴ See 29 C.F.R. § 785.16(a) (1961).

from duty,” the employee must “definitely [be] told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.”⁵

As the attorney was on paid vacation leave, it would appear that he or she was “off duty” on approved leave and not required to be working.⁶ In addition, taking vacation leave would favor the argument that the attorney’s time off was long enough to allow him to use “the time effectively for his own purposes”—that is, to participate in the demonstration.

The preambles and regulatory history further clarify the distinction between work activities and personal activities. The preamble of September 30, 1994, explains that a recipient staff attorney’s “own time...means any time outside of normal working hours (e.g. evenings, weekends, and *leave time*) so long as the attorney is not representing or providing legal assistance to the recipient’s clients.”⁷ Consequently, the regulatory history indicates that if the attorney was on leave, then he was on his own time and thus did not participate in the demonstration during his working hours. In addition, external opinions and other correspondence support this indication that participation in a public demonstration may be permitted if done on approved leave.⁸

The regulatory history also emphasizes that the regulation is not aimed at regulating “activities that are personal in nature” and done on the employee’s “own expense.”⁹ Thus, it would be important to make sure that the attorney did not use LSC or covered recipient funds for participation at the demonstration (e.g. travel to/from the demonstration, resources used to make/obtain the sign).

Furthermore, another aspect in the determination of whether the attorney has violated 45 C.F.R. § 1612.7(a) is whether the attorney’s clients were also present at the demonstration, and if so, whether he interacted with them as their attorney and/or provided any legal assistance to them. If he did either, then a more specific inquiry would be called for to determine whether his

⁵ *See id.*

⁶ We are assuming that the leave taken was itself proper and there were no indications that leave was applied retroactively to cure a potential violation.

⁷ *See* 59 Fed. Reg. 49891, 49892 (Sept. 30, 1994) (Proposed Rule) (emphasis added) (The preamble continues to state that “thus, an attorney employed by a recipient should not transport a recipient’s clients to the polls on a workday, even if it is in the evening outside of normal working hours, if he or she could be presumed to be working for the recipient. But that same attorney *could take leave to do so, or could do so if clearly identifying him or herself as a private citizen rather than as a legal services attorney*, because the attorney would clearly be doing it on his or her own time.”).

⁸ *See* External Opinion to Wayne County NLS (Apr. 16, 1979) (finding that engaging in a “sympathy strike” on own time and without the use of LSC resources is permitted); External Opinion to CALS (Feb. 14, 1977) (attorney providing legal assistance should not participate in a demonstration, but is permitted to participate if done on her own time); External Opinion (June 14, 1976) (participation in “peaceful demonstrations,” which occurred during non-working hours and on leave, does not mean “carrying out legal assistance activities”); LSC President Letter to LSC of Alabama (June 29, 1990) (finding that participation while on approved leave was permitted).

⁹ *See* 51 Fed. Reg. 27539, 27541 (Aug. 1, 1986) (Final Rule).

actions were in fact work-related and less “personal in nature.” In particular, the regulatory history indicates a concern for attorneys to remain objective while representing their clients:

An attorney’s duties to his clients cannot be confined to the working hours of the normal business day. Accordingly, the legal services attorney is deemed to be carrying out legal assistance activities under the Act whenever the attorney is providing legal advice or representation to an eligible client with whom the attorney has established an attorney-client relationship or whenever the attorney could reasonably be expected to provide such advice It is of the highest importance that attorneys retain their ability to render legal advice and representation to clients with the detached judgment that is undermined when an attorney becomes enmeshed in the very matters about which a client seeks or may need to seek legal counsel. Thus attorneys must avoid all situations in which their ability to provide effective advice and representation is compromised. The organization of client’s public demonstrations . . . was of special concern to Congress in enacting the Act.¹⁰

