



TAX EXEMPT AND  
GOVERNMENT ENTITIES

**DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224**

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4946.03-00

**LEGEND**

K =  
M =

Dear :

K is requesting a ruling the compensation paid to a person who serves on K's board and is also a public employee does not constitute self-dealing under sections 4941 and 4946 of the Internal Revenue Code.

**FACTS**

K is exempt under section 501(c)(3) of the Internal Revenue Code and is classified as a private foundation within the meaning of section 509(a) of the Code. K provides economic development in the state where it is incorporated.

M is a district court judge elected by the voters in his district. M subsequently served as an officer and director of K for 8 years. M receives an annual salary in excess of \$20,000 for his services as a Judge and was compensated for his services to K.

A district court judge's duties, which are specified by statute, are to apply existing state laws to the facts of a particular case. A district court judge is required to hear and decide all matters promptly, efficiently and fairly, as well as remain "faithful to the law." A

district court judge cannot write new law or policy, and must apply the law as created by the appellate courts or the state legislature.

### **RULING REQUESTED**

M is not a government official for purposes of section 4946 of the Code and therefore any payments K makes to M as compensation for his services do not constitute self-dealing.

### **LAW**

Section 4941(a) of the Internal Revenue Code imposes an excise tax on each act of self-dealing between a disqualified person and a private foundation. A disqualified person includes a government official described in section 4946(c).

Section 4946(c)(5) of the Code defines a government official as an individual who holds an elective or appointive public office in the executive, legislative, or judicial branch of the government of a state, possession of the United States, or political subdivision or other area of any of the foregoing, or of the District of Columbia and receives gross compensation at an annual rate of \$20,000 or more.

Section 53.4946-1(g)(2)(i) of the Foundation and Similar Excise Tax Regulations distinguishes the term “public office” for purposes of section 4946(c)(5) of the Code from mere public employment. Although a determination whether a public employee holds a public office depends on the facts and circumstances of the case, the essential element is whether a significant part of the activities of a public employee is the independent performance of policymaking functions. Among the factors to be considered is whether the office is created by statute or state constitution or by a governmental body pursuant to authority conferred by Congress, state constitution or state legislature, and whether the powers conferred on the office and the duties to be discharged are defined either directly or indirectly by Congress, state constitution, state legislature, or through legislative authority.

Section 53.4946-1(g)(2)(ii) of the regulations provides illustrations of positions which do not involve policymaking functions, and includes among others, public school teachers and professors, instructors and other positions at state educational institutions, physicians, nurses, and other professional persons associated with public hospitals and state boards of health, and members of police and fire departments.

### **ANALYSIS**

While a district court judge is a “government official” within the commonly understood meaning of the term, the term has a much more restricted meaning for

purposes of section 4946(c) of the Code. To be a government official for that purpose, a public official must occupy a position that has significant policymaking powers. Therefore, even though M in the present case is employed by a governmental unit, that fact alone does not make him a government official. The duties of the position, not its title, determine whether the holder of a position has significant policymaking powers.

Here, the statute provides a judge's duty is to apply existing state law to cases and facts that come before the court. District court judges are not allowed to create new laws, but rather must apply state law to the facts the parties bring before the court. Therefore, M does not exercise significant independent policymaking powers, even though he may independently perform his duties as a government employee.

### **CONCLUSION**

Based on the facts and information submitted, M is not a government official for purposes of section 4946 of the Code and therefore any payments K makes to M as compensation for his services do not constitute self-dealing.

Pursuant to a Power of Attorney on file in this office, a copy of this letter is being sent to your authorized representative. This ruling letter does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described.

This ruling letter is directed only to the organizations that requested them. Section 6110(k)(3) of the Code provides that they may not be used or cited as precedent.

Please keep a copy of this ruling letter in your permanent records.

If you have any questions about this ruling, please contact the persons whose name and telephone number are shown above in the heading of this letter.

Sincerely yours,

Debra J. Kaweck  
Manager, EO Technical  
Technical Group 1

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