

Office of Government Ethics

99 x 23

**Letter to a Designated Agency Ethics Official
dated December 6, 1999**

This is in response to your letter dated October 29, 1999, requesting an opinion regarding the application of 18 U.S.C. § 207(a)(1) to an employee of [your agency]. Specifically, you ask whether this employee has participated personally and substantially in a particular matter involving specific parties such that section 207(a)(1) might restrict his ability, after leaving Government service, to represent persons in connection with the matter.

Your submission states that a proposed merger between two companies was announced in the media. The Office of Government Ethics' (OGE) understanding, based on telephone conversations with you, is that the [agency's] primary role in mergers involving companies [in a certain industry] is to review the applications of the merging companies that address [certain] matters [regulated by your agency]. Merging companies often hold various types of [agency authorizations]. When a merger occurs, an application will be filed by the merging companies proposing how the merged entity will hold the various [authorizations]. Often, [authorizations] will have to be transferred to the entity resulting from the merger, and the application will deal with those transfer issues. The application may also address issues that such mergers typically raise, such as the preservation of competition in various [industry] markets.

The official duties of the employee in question, a GS-15 attorney-advisor, had previously involved various aspects of the [agency's] review of similar mergers. His responsibilities have now been modified such that he will no longer be working on the agency's handling of mergers. During the employee's transition from his responsibilities concerning mergers to his new role, the employee was assigned to provide his insights on the proposed merger that had been announced in the media. His involvement occurred prior to the [agency's] receipt of a merger application.

The employee provided an oral overview of the merger at a meeting of senior attorneys in the agency's Bureau who would be

working on the application the agency expected to receive in connection with the proposed merger. In addition to the briefing, the employee distributed a follow-up memorandum on the subject of the proposed merger. The employee stated that he knew very little about the merger and described his thoughts as being "sketchy." The employee's views were requested due to his experience as a senior attorney in handling mergers' issues.

The briefing and the memorandum focused on three topics: procedures the agency might follow, potential issues, and the respective roles of the [agency] and [a] Department. While the employee provided some historical perspective on procedures and other issues associated with processing mergers, he also addressed issues that he thought the agency would face in addressing the specific merger based on his knowledge of the companies involved. He identified five issues that might arise in connection with the proposed merger; you have informed us that these issues relate to the specific makeup of the two companies that had announced a proposed merger. The employee indicated his views on resolving the issues and expressed his beliefs that particular approaches to some of the issues might prove most successful. The employee also helped to edit a draft of the Chairman's brief public statement on the proposed merger.

You have inquired as to whether the matter involving the proposed merger was a particular matter involving specific parties at the time the employee worked on it. 18 U.S.C. § 207(i) defines particular matter to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." A particular matter involving a specific party or parties typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. 5 C.F.R. § 2637.201(c)(1).

Your letter notes that while a public announcement of a proposed merger is the impetus for planning on procedural and, as here, substantive issues, the agency's ultimate course of action is dependent on what is contained in private entities' applications. But does an application have to have been received in order for a particular matter involving specific parties to be pending at the agency?

When the agency identifies the issues specifically associated with a potential merger, and has meetings associated with handling those issues, matters of controversy have been identified and considered and courses of action planned. The fact that an application has yet not been received by the agency does not mean that the matter is not before the agency. When the agency elects to consider a matter and that consideration concerns "the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties," the matter is a particular matter involving specific parties. Where, as here, the agency, before an application is received, reviews substantive, or even procedural, concerns that are unique or specific to an application that the agency anticipates receiving, a particular matter involving specific parties will have begun.

OGE has addressed the issue of when a particular matter has begun in a number of different contexts. With respect to contracts, a contract does not have to have been entered into, or even the request for proposals formulated, for a particular matter involving specific parties to exist. See OGE Informal Advisory Letter 90 x 12, where a number of steps towards a procurement had been taken, parties had expressed interest, and the matter was viewed as being a particular matter involving specific parties. Where an employee had participated in a matter concerning a potential claim prior to its being filed with the agency, the employee could be barred from appearing with respect to the claim filed against the Government subsequent to his departure from Government service. See OGE Informal Advisory Letter 90 x 3. Also see OGE Informal Advisory Letter 93 x 32, where OGE stated that an informal resolution attempt was the same particular matter involving specific parties as a subsequent investigation with proposed actions. Also see OGE Informal Advisory Letter 94 x 13 considering a two-tiered registration and application process.

In OGE Informal Advisory Letter 99 x 21 dated November 12, 1999, OGE stated that:

When a particular matter involving specific parties begins depends on the facts. Dealings with a particular company prior to its submission of an application may be part of a particular matter involving specific parties. . . . [Given the facts], it would be perfunctory and rather mechanical to say

that the matter began with the submission of an application . . . and not at some earlier time.

The statement of the facts that you presented did not indicate that there were discussions between the entities proposing to merge and the agency. Nonetheless, the agency on its own embarked on an analysis of the transaction which would come before the agency in the form of one or more applications. Under these circumstances, we view that the matter was a particular matter, that the matter involved specific parties, and, given the facts you have provided, that the employee worked personally and substantially in the matter.

Should you have further questions regarding this matter, please contact [my Office].

Sincerely,

Stephen D. Potts
Director