

Office of Government Ethics

86 x 2 -- 03/20/86

Letter to a DAEO issued March 20, 1986

On March 4, 1986, we received your request for an opinion on the scope of the provisions of 5 C.F.R. § 737.7(b)(5), which states: "A former employee cannot avoid the restrictions of this section on the ground by [sic] self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, self-disqualification is effective to eliminate the restriction of section 207(a)."

You state that you are aware of the District Court's opinion interpreting section 737.7(b)(5), *United States v. Dorfman*, 542 F. Supp. 402 (N.D. Ill. 1982). However, you indicate that most employees of [your] Department who face a potential 18 U.S.C. § 207(b) restriction are not in statutory positions and have responsibilities as assigned. You suggest that because the *Dorfman* situation involved a statutory office and a clear case of simple self-disqualification, it is not necessarily definitive of the situations in your Department. You cite, for example, a division chief who would normally have responsibility for a contract for cancer research asking that responsibility for a particular proposed contract be transferred to another division. As a second example, you use the case of a division chief who asks that responsibility not be transferred to another division, that his employees who participate personally and substantially with respect to the contract report directly to his superior rather than to him and that the superior direct such action.

The regulations of this Office found at 5 C.F.R. § 737.7 attempt to define the scope of 18 U.S.C. § 207(b)(i). In particular, the provisions of 5 C.F.R. § 737.7(b)(5) speak to the consequence of recusal in light of the proscriptions contained in 18 U.S.C. § 207(b)(i), which provides for a two-year restriction on any former Government employee's acting as a representative as to a particular matter for which the employee had official responsibility. As pointed out by the court in *Dorfman*, the dichotomy between personal and substantial participation in 18 U.S.C. § 207(a) and official responsibility in 18 U.S.C. § 207(b) implicitly recognizes degrees of involvement during Government service. 5 C.F.R. § 737.7(b)(5) accommodates that dichotomy. Accordingly, as suggested by the court, a recusal by an

officeholder from a matter does not remove the matter from the scope of the authority of the office. The act of recusal recognizes the continuing responsibility.

This Office, therefore, sees no distinction between statutorily created positions such as that of the United States Attorney in Dorfman or those cited in your letter of inquiry where position responsibility is administratively created by position description. The key in both instances remains the definition of "official responsibility" under 18 U.S.C. § 202(b). In essence, if an individual has direct administrative or operational authority over a matter, whether statutorily or administratively created, he or she fits within the definition.

In your second example, since the responsibility for contract implementation has not been transferred from the division chief, we are of the opinion that section 737.7(b)(5) still applies and he cannot remove the contract from the scope of his activities by simply having his subordinate report to another person. Your first example, however, is a much closer case. If the division chief who would normally have responsibility for a contract for cancer research has not only the contract but also the actual function dealing with the contract removed from his duties under his position description, then we would agree that no self-disqualification is involved. Without a review of the position description, we are reluctant to comment further on the first example.

Sincerely,

David H. Martin
Director