

Office of Government Ethics

91 x 29 -- 08/12/91

Letter to an Alternate Designated Agency Ethics Official dated August 12, 1991

This is in response to your letter of June 20, 1991, in which you posed several questions relating to the application of 18 U.S.C. § 207 to the post-Government service activities of a former employee of [your agency]. Your letter enclosed correspondence from [the former employee] in which he briefly described certain of his responsibilities at [his current employer] that could involve contact with current [agency] officials. In a telephone conversation with a member of my staff, you indicated that [the former employee] terminated Government service in April 1991. Consequently, he is subject to the provisions of 18 U.S.C. § 207 as amended by the Ethics Reform Act of 1989.

As a former employee of the executive branch who terminated service on or after January 1, 1991, [the former employee] is subject to the lifetime restriction of 18 U.S.C. § 207(a)(1) and the two-year restriction of 18 U.S.C. § 207(a)(2). Since it does not appear that [the former employee] was personally and substantially involved in an ongoing trade or treaty negotiation during his last year of Government service, our inquiry need not focus on the restriction set forth in 18 U.S.C. § 207(b). Although [the former employee] was not a "Senior Employee" as described in 18 U.S.C. § 207(c)(2) when he terminated Government service, he did serve in a senior position until shortly before the termination of his Federal employment. As described in regulatory guidance published in the Federal Register on February 1, 1991 (56 Fed. Reg. 3961), the one-year restriction of section 207(c) "is measured from the date when the employee ceases to be a senior employee, not from the termination of Government service, unless the two occur simultaneously." Consequently, [the former employee] is subject to section 207(c) until the one-year anniversary date of his termination from senior service. [The former employee] did not serve as a "very senior" employee within the meaning of 18 U.S.C. § 207(d), but as a former "Senior Employee" is subject to the restriction set forth in 18 U.S.C. § 207(f). However, since it does not appear that [the former employee] intends to represent, aid, or advise a "foreign entity," our discussion will focus on sections 207(a)(1), (a)(2),

and (c).

Section 207(a) prohibits former employees from communicating to or appearing before a current employee of a department, agency, or Federal court, with the intent to influence, concerning any particular matter involving a specific party or parties in which he participated personally and substantially and in which the United States is a party or has a direct and substantial interest. This is a permanent restriction. Section 207(a)(2) is a two-year restriction that is identical to the permanent restriction except that it requires only that an individual have had official responsibility for the matter (during his last year of Government service), not that he have participated personally and substantially in that matter. Both restrictions prohibit representational activities before current employees of the Government; they do not prohibit "behind the scenes" assistance in connection with the representation of another person.

Sections 207 (a)(1) and (a)(2) are each composed of a number of elements. Each of these elements must be present in order for either of the provisions to restrict [the former employee's] post-employment activities. Thus, for example, [the former employee's] post-employment communications to and appearances before current employees of the United States will not be affected by the permanent restriction of 18 U.S.C. § 207(a)(1) unless he participated personally and substantially as a Government employee in the same particular matter that is the subject of his post-employment communication or appearance. Similarly, section 207(a)(2) will not restrict his communications and appearances unless he had official responsibility for the same particular matter that is the subject of his representation at some time during his last year of Government service.

In his letter to you of June 3, 1991, [the former employee] indicated that he might take part in a meeting "with regard to [specific] issues surrounding [a] project in [a foreign country] in which both [his former agency] and [his current employer] are involved." He goes on to note that he "was not involved with this project in any fashion while at [the agency]." Provided that [the former employee] was neither personally and substantially involved in the project nor had official responsibility for it while a Government employee, he is not prohibited by section 207(a)(1) or (a)(2) from discussing the project with current [agency] officials. A similar analysis would apply with respect

to other projects in which [the agency] is providing insurance or financing.

As noted above, [the former employee] is also subject to 18 U.S.C. § 207(c) until the expiration of one year from the date he terminated his "senior" position. Section 207(c) prohibits communications and appearances, made with the intent to influence, that are directed to or before current employees of any department or agency in which a former Senior Employee served in any capacity during the one-year period prior to the individual's termination from senior service. As explained in the enclosed summary of 18 U.S.C. § 207 forwarded to you in October 1990, the section 207(c) representational bar applies "with respect to any matter, whether or not involving a specific party, concerning which the former Senior Employee is seeking official action by a current employee of such department or agency on behalf of any other person" This bar applies even though the former Senior Employee may never have been involved in the matter in any way during Government service.

In [the former employee's] case, this means that his contacts with [the agency] officials on behalf of [his current employer] will be restricted by 18 U.S.C. § 207(c) until the anniversary date of his termination from senior service. He will be prohibited from seeking official action from [agency] officials concerning matters with which he had no involvement while employed by [the agency], as well as those that arose after his departure from the agency.

Even when all elements of a section 207 violation are otherwise present, the statute provides for a number of exceptions. Two of those exceptions warrant special attention in view of [the former employee's] letter. First, sections 207(a)(1), (a)(2), and (c) do not bar communications or appearances that are made on behalf of the United States. The statutory language of these sections restricts certain communications and appearances "on behalf of any other person (except the United States . . .). . . ." Moreover, section 207(j)(1) states that "[t]he restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States" [The former employee] suggests in his letter of June 3 that since the interest of the United States Government, [his current employer], and [the agency] in environmental issues is "quite consonant, and because the 'beneficiary' of our mutual efforts will be U.S.

investors, it seems logical to assume that my involvement would be in the interest of the U.S." As stated in the enclosed summary, however, "[a] former employee does not act on behalf of the United States . . . merely because the United States may share the same objective as the person whom the former employee is representing." This statement is consistent with our past interpretations of this exception for activities undertaken on behalf of the United States. See, e.g., OGE Informal Advisory Letter 89 x 5.

A second exception that warrants discussion, in light of [the former employer's] letter, is found at section 207(j)(3). That exception provides that:

The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

A similar exception for communications and appearances made on behalf of an "international organization" was previously incorporated into the regulatory guidance that interpreted the version of 18 U.S.C. § 207 that was in effect prior to that statute's amendment by the Ethics Reform Act of 1989, and which still applies to former employees who terminated Government service prior to January 1, 1991. That regulatory provision continues to be published at 5 C.F.R. § 2637.210. It reads in relevant part:

A former employee does not engage in unlawful activity when he or she acts on behalf of . . . (2) any public international organization if he or she serves by nomination or request of the United States or on temporary assignment from any agency.

In OGE Informal Advisory Letter 82 x 8, this Office provided some insight into the meaning of the regulatory provision. OGE stressed that former employees who join international organizations would be subject to the restrictions of section 207, except those serving under the conditions set forth in the regulatory provision at section 2637.210. The facts in that case involved an employee on a long-term transfer to [an international organization] pursuant to 5 U.S.C. §§ 3581-3584. At the

conclusion of her service with [the international organization], the transferred employee would be entitled to reemployment by her agency. OGE determined that the individual would not be subject to section 207 during the term of her transfer to [the international organization].

This Office has not yet issued regulatory guidance concerning the new statutory provision, section 207(j)(3). Unlike the existing regulatory provision, section 207(j)(3) requires an advance certification by the Secretary of State. To date, neither OGE nor the Department of State has been approached to consider such a request. In his letter to you of June 3, [the former employee] indicated that he might wish to "explore the possibility of a Subsection 207(j)(3) waiver." In the event [the former employee] does decide to seek a certification under that section, OGE (and the State Department) would require additional information. Specifically, we would require information about the status and function of [the current employer], as we must be able to determine whether it is an international organization for purposes of the statutory exception. We would also need information about the duties that [the former employee] performs for [the current employer] and the matter or the types of matters concerning which he would be unable to make a communication or appearance absent the Secretary of State's certification.

We hope that this information will be of assistance to you and to [the former employee].

Sincerely,

Stephen D. Potts
Director