



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
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February 15, 2000
January 4, 1996
DO-96-001

MEMORANDUM

TO: Heads of Agencies, Designated Agency Ethics Officials and Inspectors General

FROM: Stephen D. Potts
Director

SUBJECT: Short-Term Waiver Under 18 U.S.C. § 207(c)(2)(C)

On December 28, 1995, the President signed Executive Order 12984 which provided for a pay raise for the Senior Executive Service. That pay raise will become effective as early as January 7, 1996. As explained in my DAEOgram of December 19, 1995, one effect of the pay raise will be to make the basic rate of pay for Senior Executive Service (SES) level 4 greater than the rate of basic pay for level V of the Executive Schedule. Thus, employees at SES level 4 will become "senior employees" for purposes of section 207 of title 18 of the United States Code and will be subject to additional post-employment restrictions at 18 U.S.C. § 207(c) and (f). (See 18 U.S.C § 207(c)(2)(A)(ii)).

Historically, new post-employment restrictions have not taken effect without some notice to employees so that they could make any career adjustments they felt necessary and so that agencies could plan for personnel changes that occurred as a result. Further, the scheme underlying the post-employment restrictions is premised on the theory that the more severe restrictions should apply to individuals who have the most senior career and political appointments. Accordingly, the definition of "senior employee" was tied to the rate of basic pay for a position (EL-V) at a time when there was no artificial ceiling at the top of the pay scale.

In this instance, there has been no notice to affected employees. The very limited amount of notice time actually available has been exacerbated by the furlough of a significant number of Federal employees. And although the post-employment restriction at 18 U.S.C. § 207(c) may be waived by my Office, the furlough has also prevented agencies from developing the information necessary to request waivers under 18 U.S.C. § 207 and for the Office of Government Ethics (OGE) to consider such requests.

Moreover, a substantial percentage of individuals in the SES will become senior employees without any accretion of duties or responsibilities. The change has occurred simply because Congress, for totally unrelated purposes, froze the rate of basic pay for the level of position to which this senior employee status is tied. Thus, rate of basic pay at the higher levels is no longer

a true indication of level of position in the Government hierarchy. In effect, the pay raise unexpectedly puts the traditional and significantly large journeyman level of the SES into the "senior employee" category for reasons unrelated to the purposes underpinning the senior employee post-employment restrictions.

Consequently, I have concluded that, under the circumstances, it is reasonable for me to determine that the sudden imposition of the restrictions of 18 U.S.C. § 207(c) and (f) and the substantial uncertainty it will cause at this time, will create an undue hardship in departments and agencies in obtaining qualified personnel to fill the affected positions, at least in the near term. I therefore grant a waiver under 18 U.S.C. § 207(c)(2)(C) to the individuals described below for the period of time indicated. I further determine that granting this waiver would not create the potential for use of undue influence or unfair advantage.

This waiver will give employees some fair notice, will allow agencies to develop individual waiver requests where appropriate and will allow OGE to discuss with Congress any possible changes to 18 U.S.C. § 207 that will take into consideration the effect of pay compression on the applicability of post-employment restrictions.

The following individuals will have the benefit of this waiver until the date specified:

All employees whose basic rate of pay on December 28, 1995 was less than that of the rate of basic pay payable for level V of the Executive Schedule and as a direct result of Executive Order 12984 (or any other Executive order or statute the terms of which are tied to the pay raise effected through Executive Order 12984) would have their basic rate of pay increased to an amount equal to or greater than the rate of basic pay for level V of the Executive Schedule and whose position would then be described in 18 U.S.C. § 207(c)(2)(ii).

This waiver is effective until June 30, 1996.