

Office of Government Ethics

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Letter to an Agency Ethics Official dated March 27, 1996

This is in response to your letter dated February 6, 1996, requesting our advice regarding the application of the post-employment bar at 18 U.S.C. § 207(a)(1) to a former employee of your agency. Additional information pertaining to the issues raised in your letter was provided at a meeting on March 14, 1996, attended by the former employee, [your agency] representatives and members of the OGE staff. You seek advice as to whether the former employee may represent a private party before the Federal Government in two forthcoming rulemaking proceedings, one at [Agency A] and one at [Agency B], pertaining to health and safety standards for the storage or disposal of [hazardous] materials at a particular site. The specific issues you raise are whether the [Agency B] and [Agency A] rulemaking proceedings are the same particular matter involving specific parties as a study by [an Organization], prepared with advice from [Agency A], about safety standards at [a particular site]; and, if the rulemakings are the same particular matter involving specific parties as the [Organization] study, whether the employee's participation in the particular matter was "personal and substantial." 2

Same Particular Matter

The bar at 18 U.S.C. § 207(a)(1) will not apply unless the former employee makes representations back to the Government on the same particular matter involving specific parties that the former employee acted upon when the employee was in Government service.

[A] Section of [an] Act requires [Agency B] to contractually engage the [Organization] to issue a study to provide findings and recommendations on reasonable standards for protection of the public health and safety in connection with the project [at the particular site]. The statute also requires [Agency B] to issue rules that are "based upon and consistent with the findings and recommendations of the [Organization]" study, and [Agency A] is, in turn, required to modify its regulations "to be consistent with [Agency B] standards. . . ." The issue is whether the [Organization] study and [Agency B] and [Agency A] rulemakings required pursuant to [a] Section [of an Act] are the same particular matter involving specific parties.

In consultations with OGE in 1993 about post-employment issues pertaining to [the particular site], [Agency A] identified several separate particular matters involving specific parties. One of the particular matters involving specific parties identified by [Agency A] was [the rulemaking on the particular site]. OGE approved of this designation. OGE and [Agency A] did not discuss at that time whether the study to be conducted by the [Organization] is the same particular matter involving specific parties as [Agency B] and [Agency A] rulemakings pursuant to the Act.

[Agency A] has suggested that a determination could be made that the [Organization] study is a separate particular matter involving specific parties from the [Agency B] and [Agency A] rulemakings. [Agency A] has identified factors that weigh both in favor and against such a conclusion.

Factors suggesting that the [Organization] study could be viewed separately from [Agency B] and [Agency A] rulemakings include the substantial lapse of time from the employee's involvement in the matter while at [Agency A] and the [Agency B] and [Agency A] rulemaking proceedings; the independent sources of information relied upon by [Agency B] and [Agency A] in the rulemaking processes from those relied upon by the [Organization] in preparing its study; and the differing policy considerations as between the rulemakings and the [Organization] study, including the consideration of policy issues in the rulemaking process that the [Organization] study did not address. [Agency A] has also indicated that the former employee did not obtain confidential information when he was an employee that would give him any advantage with respect to representations that he would make back to the Government.

The [Organization] study and [Agency B] and [Agency A] rulemakings seek to fulfill the identical mandate of the Act: to develop public health and safety standards for the protection of the public from releases of [hazardous] materials stored at [the particular site]. The mandate of the Act is required to be carried out in a coordinated manner in furtherance of a single objective, the issuance of health and safety standards for [the particular site]. The fact that [Agency B], in its rulemaking, may not have to adhere to recommendations in the [Organization] study it contracted for and may consider policies not considered by the [Organization] study does not alter the fact that the [Organization] study is part of the same mandate as the [Agency B] and [Agency A] rulemakings. Given the interrelationship between the [Organization] study and the [Agency B] and [Agency A] rulemakings, OGE views the [Organization] study and the rulemakings mandated by [the] section [of the Act] as being parts of the same particular matter involving specific parties.

Personal and Substantial Participation

The post-employment bar of 18 U.S.C. § 207(a)(1) will not apply unless the employee's official participation in a matter was personal and substantial. Whether an individual's participation was personal and substantial is typically a question resolved by the agency where the former employee worked, as the agency is best able to gauge the extent of the former employee's work in a matter and the importance of that work to the matter.

From your letter and the discussion that took place here on March 14, 1996, detailing [the then employee's] participation in the presentation of [Agency A] views to the [Organization], we have sufficient information to conclude that his participation in the particular matter was personal and substantial.

Issues relating to the disposal of [hazardous materials] were among [the then employee's] "major concerns." [The then employee] initiated a request that [Agency A] staff prepare a paper for [Agency A] containing a comprehensive analysis of the issues that the [Organization] would be addressing in its study. Two papers fully discussing prior staff positions and the advantages and disadvantages of alternative approaches were prepared.

Subsequently, the [Organization] asked [Agency A] staff to provide its views to [an Organization] Committee at a public meeting. [The then employee] requested that the staff brief him on what they intended to say to the [Organization] Committee. The staff briefed [the then employee] on its intended testimony. At this briefing, [the then employee] had few questions and did not suggest any changes in the staff testimony. Had [the then employee] disagreed with the proposed staff testimony, he could have asked staff to rethink its position, or he could have tried to convince [Agency A] to direct the staff to take a different position. At the March 14, 1996, meeting held at OGE, [the then employee] stated that he had, in his [official] capacity, wanted to ensure that [Agency A] staff did not present to the [Organization] positions that conflicted with prior [Agency A] positions.

From the facts that [Agency A] and [the then employee] have provided, [the then employee's] involvement in the presentation of [Agency A's] views to the [Organization] was personal and substantial. He requested the analysis that became the basis for the staff presentation to the [Organization], and he was briefed on the substance of the presentation made by [Agency A] staff to the [Organization]. His oversight of the staff was important to the nature of the presentation that was made to the

[Organization] as he ensured that the substance of the presentation to the [Organization] was consistent with prior [Agency A] positions. [The then employee], through his attendance at a briefing and his withholding of any objection, tacitly approved the substance of what was to be presented to the [Organization]. [The then employee] sanctioned the substance of the presentation as he had, at the time he was being briefed, a responsibility to provide [Agency A] oversight of the proposed staff action and to assure that the presentation would be consistent with the policies and objectives of [Agency A].

At the meeting on March 14, 1996, it was brought to our attention that [Agency A] staff had several meetings with the [Organization] pertaining to the [Organization] study after [the then employee] left his position at [Agency A]. We discussed how [the then employee's] participation in the matter was somewhat attenuated from the [Agency B] and [Agency A] rulemakings. These facts are insufficient to negate the personal and substantial nature of [the then employee's] involvement in the [Agency A's] presentation of its views to the [Organization]. [The then employee's] involvement was material at the time of his involvement; that subsequent events relating to the particular matter occurred after he departed Federal employment does not change the nature of his involvement at the time he was an employee. He worked on the matter, and his participation was personal and substantial.

As [the then employee's] participation in [Agency A's] presentation to the [Organization] was personal and substantial, his participation in the establishment of safety standards pursuant to [a] Section of the Act was also personal and substantial.

We are hopeful that this analysis is useful to you.

Sincerely,

Stephen D. Potts
Director

1 Ed. Note: Ordinarily, rulemaking or other action of general application is not a "particular matter involving specific parties." See 5 C.F.R. § 2637.201(c). However, information provided by the agency regarding the rulemakings at issue here indicated that the rulemakings were the rare type that does involve specific parties.

2 The relevant post-employment prohibition, 18 U.S.C. § 207(a)(1), prohibits a former executive branch employee from making, with an intent to influence, a communication to or appearance before a Federal agency on behalf of another person in connection with the same particular matter involving specific parties in which he participated personally and substantially while a Government employee.