

Office of Government Ethics

84 x 9 -- 06/11/84

Letter to a DAEO dated June 11, 1984

[In early June a member] of my staff spoke with [a member] of yours regarding your April 10 letter to the Civil Division, Department of Justice. [As your staff] may have mentioned to you, our Office was asked by the Justice Department's Office of Legal Counsel to respond to your question regarding the application of the criminal conflict of interest laws to your question. They did so because of a memorandum of understanding this Office has with the Department which allows us to interpret these statutes on behalf of the executive branch. This letter is to confirm the substance of the conversation between [our staff members].

In your April 10 letter you indicated that the Commission would like its former General Counsel to complete a specific case which he had been handling for the Commission prior to his retirement in January 1984. You had suggested that you felt it would be possible to hire him as a special Government employee without restricting, through the provisions of 18 U.S.C. § 205, his representation of clients in certain income tax suits before the U.S. Claims Court. In [my staff member's] conversation with [yours] she also ascertained that you believe [the former general counsel] intends to practice as a sole practitioner with a possible informal association with a firm in the United States for the tax cases.

Given these facts, the two statutes most prominently involved are 18 U.S.C. §§ 205 and 207. Because the post-employment restrictions of section 207 relate to whether, and more importantly how, the Commission can hire [the former general counsel], we will begin with that in this letter although the telephone conversation between our staff members ended with that discussion.

18 U.S.C. § 207(a) prohibits a former employee from acting as an agent or attorney for anyone else (other than the Government) on a particular matter involving a specific party or parties in which the individual had participated personally and substantially in his official Government capacity. The case [at issue] is a particular matter involving a specific party in which [the former

general counsel] personally and substantially participated. The question then is would he at any step be considered representing anyone other than the Government or himself in this matter if you wished to hire him. If so, he could not represent that party. In [the former general counsel's] case this question is apparently resolved quite easily. Since our understanding is that you intend to hire him directly and not through any law firm he might be associated with, his employment discussions with you will be on his own behalf and not on behalf of a firm. Under those circumstances he has represented no person other than himself in acquiring this employment and once hired, will represent no one other than the Government. If for some reason he had hoped to be paid by you through some business entity rather than directly, this may create a question under section 207(a). I am attaching an informal letter opinion of this Office numbered 82 x 16 and dated November 4, 1982 for your review on this question.

Once you hire [the former general counsel] as a special Government employee, he will be subject to the restrictions of 18 U.S.C. §§ 203, 205, 207 and 208 to the extent indicated in each. For your information, I am attaching an outline prepared for this Office's 1980 conference on the subject of special Government employees and the restrictions applicable to them.

For purposes of [the former general counsel's] more immediate concerns regarding the extent of the effect of the restrictions of section 205 on his intent to handle tax cases, subsection (1) will prohibit him (as a special Government employee) from acting as an agent or attorney for prosecuting a claim against the Government in which he has at any time personally and substantially participated as a Government employee. One would assume that as General Counsel of the Commission he was not in any way personally and substantially involved in tax cases nor would we see that the Commission would in any way be involved. Therefore, this restriction should not pose too much difficulty for him.

Subsection 205(2) will prohibit him from acting as an agent or attorney on a matter in which the United States has an interest if the matter is pending before or within the Commission while he is a special Government employee. [The former general counsel] is not covered by the exception to section 205 which states in part:

[C]lause (2) shall not apply in the case of a special

government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

While his newest appointment is that of a special Government employee, he has served the Commission in one capacity or another for more than 60 days in the last 365 day period. You must count those days he was a full time employee for purposes of applying this exception. If [he] does indeed limit his practice to tax cases, this restriction also should not in any way affect his private practice.

Finally, if [the former general counsel] does associate himself with a firm for matters other than his employment with the Commission as a special Government employee, he should be careful to avoid receiving any compensation from the firm based on any representations they or he might make before the Commission during his appointment. This receipt of compensation would be prohibited by 18 U.S.C. § 203.

Sincerely,

David H. Martin
Director

Enclosures (2)