

OFFICE OF GOVERNMENT ETHICS

98 x 2

**Letter to a Designated Agency Ethics
Official dated February 11, 1998**

Your letter of December 29, 1997, requested an opinion from the Office of Government Ethics (OGE) as to what is meant by the term "rate of basic pay" when determining whether employees in [a division within an agency of a department] are senior employees under the post-employment statute's coverage at 18 U.S.C. § 207(c), and whether they are persons required to file reports under the public financial disclosure statute at 5 U.S.C. app., § 101(f).

We understand that the Secretary of the Department is empowered by [citation deleted] to appoint in the [agency] a maximum of 500 members in the [division]. The statute directs that pay for these employees will be determined by the Secretary, in an amount not less than the minimum rate payable for GS-15 nor more than the rate payable for level I of the Executive Schedule. Under current pay scales, the range of pay for members of the [division], therefore, is between \$72,525 and \$151,800. Implementing regulations at [citation deleted] indicate that no established pay grades or steps exist within those parameters, but instead the system has a single, flexible pay range. Each employee's actual pay is individually determined by the Secretary or her designee, based on factors in the regulation, and that amount may be periodically adjusted.

APPLICABILITY OF POST-EMPLOYMENT RESTRICTIONS

The post-employment provision at 18 U.S.C. § 207(c) applies special restrictions to former senior employees,¹ defined, inter alia, at section 207(c)(2)(A)(ii) as persons employed in a position "for which the basic rate of pay, exclusive of any locality-based pay adjustment . . . is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service" (SES), which is currently \$118,400. Your inquiry seeks clarification of

¹ The statute actually uses the term "senior personnel," which includes both officers and employees, but all references in this letter will be to the more commonly used term "senior employee."

the statute's term "rate of basic pay"² when applied to [division] employee positions.

As your letter acknowledges, OGE Informal Advisory Letter 92 x 20 of July 23, 1992, reviewed a similar issue for employees at [the department] serving in SL (senior level) or ST (scientific or professional) positions, for which pay is individually established within a pay range. In that matter, OGE determined, after consultation with the Office of Personnel Management, that the term "rate of basic pay" (and the equivalent term "basic rate of pay") for purposes of 18 U.S.C. § 207(c) means the actual amount of pay for each individual employee, with certain adjustments and exclusions, rather than the amount of pay authorized for the lowest level of the SL or ST pay range.

This interpretation in OGE Informal Advisory Letter 92 x 20 is not limited to the SL or ST pay structure. In general, for purposes of 18 U.S.C. § 207(c)(2)(A)(ii), the "rate of basic pay" for any pay system refers to the base amount of actual pay³ for each individual employee, not the minimum rate of pay for a position's authorized pay range. If an employee's base amount of actual pay is equal to or greater than the rate payable for SES level 5⁴ at the time of termination from a position, then he falls within the statutory definition of senior employee.

Thus, [a division] employee whose rate of basic pay, as described above, is equal to or greater than SES level 5 (currently \$118,400) at the time of termination from his position is a senior employee for purposes of 18 U.S.C. § 207(c), notwithstanding that the minimum rate of pay at the lowest level authorized for [the division] (currently \$72,525) is well below that triggering threshold amount.

² While the statutory language includes both "basic rate of pay" and "rate of basic pay," it has been determined that there is essentially no difference between the two terms. (See OGE Informal Advisory Letter 92 x 20 of July 23, 1992.)

³ The base amount excludes locality adjustments and "additional" pay (such as bonuses, awards, and allowances), but includes annual or periodic pay adjustments (such as cost-of-living raises and step or equivalent increases).

⁴ At the time that OGE Informal Advisory Letter 92 x 20 was written, 18 U.S.C. § 207(c) referred to level V of the Executive Schedule as the threshold amount, but that statute was amended in 1996 by Pub. L. No. 104-179, which substituted level 5 of the SES.

PUBLIC FINANCIAL DISCLOSURE REPORTING

Your inquiry also seeks guidance for [division] employee positions about the meaning of the term "rate of basic pay" in 5 U.S.C. app., § 101(f)(3), which defines, inter alia, persons required to file public financial disclosure reports. Among employees required by that section to file are those occupying a position outside the General Schedule "for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule" (which currently equals \$87,030). The issue is whether the term "rate of basic pay" in this context has the same meaning as discussed above in ascertaining who is a senior employee under 18 U.S.C. § 207(c). For the reasons indicated below, we have determined that it does not.

As your inquiry mentioned, OGE Informal Advisory Letter 81 x 22 of July 20, 1981, which interpreted a similar provision in the predecessor statute, suggested that the term "rate of basic pay" means the lowest step authorized for a position's pay grade. That informal advisory letter, citing a 1977 Senate Governmental Affairs Committee report, noted that coverage under the disclosure law is determined by an employee's level of responsibility, as indicated by the grade within which his pay is set, rather than the actual amount of an individual employee's pay. Similarly, OGE Informal Advisory Letter 81 x 3 of January 23, 1981, observed that "it is clear from both the wording of the statute and the legislative history surrounding Title II⁵ of the Ethics in Government Act that it is the position and not the individual which controls the public financial disclosure reporting requirements."

While we recognize that using the lowest step authorized for a pay grade in determining coverage under the financial disclosure statute results in an interpretation of the term "rate of basic pay" which is different from the meaning discussed above for purposes of 18 U.S.C. § 207(c), the basis for that difference is sound. These divergent meanings are derived from separate statutory provisions, each serving a particular purpose and having a unique legislative history. Nor is the financial disclosure statute the only law in which the term "rate of basic pay" has been interpreted to mean the lowest level of pay authorized for a position's pay grade. For example, OGE's regulation at 5 C.F.R. § 2636.303(a), which implements statutory restrictions on outside earned income and employment for certain noncareer employees,

⁵ Title II of the Ethics in Government Act was replaced by the current Title I, as a result of the Ethics Reform Act of 1989 (Pub. L. No. 101-194).

interprets the term "rate of basic pay" in 5 U.S.C. app., §§ 501 and 502 as meaning the lowest step of an employee's pay grade.

Even though the pay structure for [division] employees contains a broad pay range, with only a minimum and maximum level rather than a series of steps, our opinion remains the same. "Rate of basic pay" in 5 U.S.C. app., § 101(f)(3) means the lowest step or entry level pay authorized for a particular pay grade or range. It is that pay grade or range that defines the level of responsibility. Since the entry level minimum pay authorized for positions in the [division] pay range is set by statute as the minimum rate payable for GS-15, which will always be less than the statutory pay threshold for requiring public financial disclosure reports (120 per cent of the minimum rate payable for GS-15), members of the [division] are not required by 5 U.S.C. app., § 101(f)(3) to file such reports.⁶

As you suggest, the result is that some [division] employees who receive relatively high amounts of pay would not be required to file. We agree that this may occur, but that is also the case with a number of other pay systems. It would be up to Congress to amend the financial disclosure statute, if they intended a different result. As an alternative, [division] employees may be required by [the Department] to file confidential financial disclosure reports, under subpart I of 5 C.F.R. part 2634, if the criteria therein for defining confidential filers are met. While less intrusive of filers' privacy, the confidential system serves the same goal as the public system, which is primarily to prevent conflicts of interest.

Please let us know if further questions remain about the term "rate of basic pay" in the context of either 18 U.S.C. § 207(c) or the public financial disclosure reporting requirement.

Sincerely,

Stephen D. Potts
Director

⁶ The statute allows OGE, in unusual cases, to determine on an individual basis that an employee must file because his position is of equal classification, even though the position's rate of basic pay falls below the normal filing threshold. Your inquiry suggests, however, that this may not provide a practical solution for [division] employees.