
Office of Government Ethics

97 x 16

Letter to a Designated Agency Ethics Official dated November 24, 1997

This is in reply to your letter of November 4, 1997, in which you request that the position designated at [your agency] as Director of [a certain program] be exempted from coverage by 18 U.S.C. § 207(c). Section 207(c) is a one-year post-employment restriction that prohibits a former “senior employee” from communicating to or appearing before his former department or agency, on behalf of another person or entity, with the intent to influence official action.

Section 207(c) can be waived as to certain positions or categories of positions if the Director of the Office of Government Ethics (OGE) determines that --

- (i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions; and
- (ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

18 U.S.C. § 207(c)(2)(C). As specified in 18 U.S.C. § 207(c)(2)(C) and OGE implementing regulations at 5 C.F.R. § 2641.201(d)(2), any senior employee position is “eligible” for exemption except positions for which the rate of pay is specified in or fixed according to 5 U.S.C. §§ 5311-5318 (the Executive Schedule) and positions whose occupants are appointed by the President or Vice President under 3 U.S.C. § 105(a)(2)(B) or § 106(a)(1)(B), respectively. As explained at 5 C.F.R. § 2641.201(d)(1), once a

position has been exempted from section 207(c), the one-year restriction “will not be triggered upon any employee’s termination from the position.” Section 2641.201(d)(4) of the regulation provides that an exemption “shall inure to the benefit of the individual who holds the position when the exemption takes effect, as well as to his successors, but shall not benefit individuals who terminated senior service prior to the effective date of the exemption.” Exemptions are effective as of the date of OGE’s written response to the designated agency ethics official who submitted the request.

I understand that you and a member of your ethics staff have consulted several times in the past few weeks with two members of my staff concerning the potential impact of section 207(c) in relation to certain post-employment activities proposed to be undertaken by the current Director of [the program]. The current Director plans to terminate Government service in late November or early December. More specifically, my staff indicates that your initial telephone consultations appeared prompted by [your agency’s] concern that section 207(c) would impede the free exchange of ideas between the incumbent Director and her successor concerning the continuing work of the Office of [the program]. Subsequent telephone conversations focused on whether the scope of the representational bar imposed by section 207(c) would extend beyond [the agency] since the current Director has been “on loan” to [another agency] during the last months of her tenure at [the agency]. Your exemption request was submitted a few days after the last of these conversations took place.

OGE has declined to grant exemptions which have been sought to ameliorate the effects of section 207(c) as it would apply to a particular individual. *See, e.g.,* OGE Informal Advisory Letter 94 x 12, in which we emphasized that “[n]either the statute nor the implementing regulation provides any authority to grant a waiver to an individual personally.” More

recently, we refused to grant an exemption to remedy the consequences of an agency's misinterpretation of a personnel law which resulted in the retroactive reinstatement of an individual to his former senior position and the renewal of his one-year "cooling-off" period. The language of section 207(c)(2)(C) clearly contemplates that an exemption will be issued to address programmatic concerns rather than to prevent or remedy individual hardship.

Of course, we recognize that your letter does not focus on the current Director's individual circumstances. We have, therefore, evaluated your request in view of your assertion that "it is imperative that an exemption under 18 U.S.C. § 207(c)(2)(C) be granted for the *position* of Director of [the program] because the continued imposition of the restriction will create an undue hardship on the agency in obtaining qualified personnel to fill this position in the future." [Emphasis added.]

According to your letter and its enclosure and as clarified in a November 13 telephone conversation between [a member of your staff] and [a member] of my staff, the Director of [the program] reports to [another agency official].¹ The Director of [the program] is a relatively new noncareer position created within the Senior Executive Service. The position description states that the Director of [the program] provides advice and assistance to the leadership of your agency on [specific] programs. Moreover, you indicate in your letter that it is a goal of the Clinton Administration to use the [agency] program "as a model for the country as a whole, not just the Federal government." You characterize the mission of the Office of [the

¹ The position description enclosed with your letter had not been updated to reflect the most recent reorganization affecting the Office of [the program].

program] as one “of extreme importance to [the agency] and the Administration.”

We do not take issue with your characterization of the significance of the Director of [the program] position to [the agency] and to the Administration. Your letter does not explain how its importance is relevant, however, to a finding that one or both of the statutory criteria set forth in section 207(c)(2)(C) are satisfied. Thus, for example, we would not agree that a position’s “extreme importance” necessarily augurs recruitment difficulties. Indeed, logic may dictate the opposite prediction.

While you assert that the imposition of the section 207(c) bar “will make it difficult for the agency to attract qualified individuals to the position,” we are unwilling to find that the first statutory criterion is satisfied solely on the basis of this assertion. We expect that a recommendation for exemption will be supported by some evidence that an agency has encountered or is encountering recruiting difficulties.²

The regulatory guidance at section 2641.201(d)(5)(ii) indicates that the Director of OGE will consider all relevant evidence, including the two factors listed as examples at sections 2641.201(d)(5)(ii)(A) and (B). Accordingly, as described in section 2641.201(d)(5)(ii)(A), an agency might show that the position proposed for exemption is one for which a special rate of pay has been authorized. The assignment of a higher rate of pay for a position indicates that the Government has already determined that additional incentives are necessary to attract qualified candidates. Alternatively, an agency might argue that it has experienced or is experiencing recruiting difficulties because a position requires “outstanding qualifications in a scientific,

² We believe it will be the unusual case when an agency can justify an exemption based on recruiting difficulties that are merely anticipated.

technological, or other technical discipline.” 5 C.F.R. § 2641.201(d)(5)(ii)(B).

You state in your letter that “[the subject area relating to the program] is a relatively new and highly specialized area of expertise.” You add that the Director of [the program] must have “outstanding qualifications [and expertise in this area].” We believe that a position requiring specialized expertise in a social science or similar field could, in an appropriate case, warrant exemption from section 207(c). When the required expertise is in such a field, however, we must be able to judge how the expertise required for that position can be distinguished from the abilities required for other senior employee positions at the agency.³ We cannot make this judgment in relation to the expertise demanded of the Director of [the program] absent a more thorough understanding of the special abilities, credentials, and attributes that will be required of the current Director’s successors. Moreover, even if we were convinced that the position demands qualifications in a specialized discipline, we would also have to make the necessary finding concerning [the agency’s] recruitment difficulties.

Finally, in order to satisfy the first of the statutory criteria, an agency must show some nexus between its recruitment difficulties and the section 207(c) restriction. It is not enough to assert that the pool of qualified applicants is limited; the agency must submit evidence of recruiting difficulties which are to some degree attributable to the existence of section 207(c). Your letter does not explain how [an expert in the subject area relating to the program] will be peculiarly burdened by the one-year cooling-off period. You assume that if the pool of qualified applicants is

³ Moreover, OGE must consider the merits of any proposed exemption in the context of its executive branchwide responsibilities.

limited and Government service entails the one-year representational bar, it is more likely that [such an] expert will go to the private sector. We cannot say that this assumption is necessarily correct. If it is expected that the Office of [the program] may serve as a model for the country as a whole, for example, Government service may offer benefits that outweigh any disadvantages posed by section 207(c).

Since we cannot determine that the imposition of section 207(c) will cause undue hardship within the meaning of section 207(c)(2)(C)(i), we need not address whether the granting of the waiver would create the potential for use of undue influence or unfair advantage within the meaning of section 207(c)(2)(C)(ii). Should you have further questions regarding this matter, please contact my staff.

Sincerely,

Stephen D. Potts
Director