

Office of Government Ethics

90 x 11 -- 06/19/90

Letter to a Designated Agency Ethics Official dated June 19, 1990

This is in response to your letter concerning the applicability of certain post-employment restrictions to a former Senior Executive Service (SES) employee from your agency. According to your letter, [the former employee] had made inquiries some months ago concerning the limitations applicable to him under 18 U.S.C. § 207 after his departure from Federal service. At that time he was advised that, because the position he held [at the time he left] had not been designated as a "Senior Employee" position by this Office pursuant to 5 C.F.R. § 737.25 (redesignated as 5 C.F.R. § 2637.211), the restrictions contained in subsections 207(b)(ii) and 207(c) would not apply to him. In your letter you request our opinion on whether the Senior Employee restrictions affect [the former employee], who for employment purposes was assigned to a position designated as a "Senior Employee" position until October 22, 1989, but did not actually serve in that position after January 9, 1989. According to your letter, [the former employee] recently accepted employment with a private law firm and has contacted a[n] [agency] official on behalf of a client to inquire about the status of a particular matter before [the agency].¹

[For purposes of answering this question, certain positions held by this individual must be distinguished. The employee held the first significant position] from April 1987 to January 1989. This was a new position at the time [the former employee] was initially detailed; because this position had significant decision-making responsibilities, [the agency] recommended (by letter to this Office) that [this] position be designated as a "Senior Employee" position pursuant to 5 C.F.R. § 737.25(b)(i) (now 5 C.F.R. § 2637.211(b)(i)). [This] position was made permanent on April 5, 1987; at that time [the former employee] was converted to an SES appointment. [In November,] this Office subsequently designated the position as a "Senior Employee" position. On January 9, 1989, [the former employee] was detailed from the [first] position to a position of "unclassified duties" within the Office of General Counsel. This detail expired at the close of business [one day in] May 1989; at the opening of business on [the following day, the former employee] was detailed

to a new [third] position. This detail expired [one day in] September 1989 at the close of business. [The former employee] was detailed to [that third] position again at the opening of business [the following day]. [In] October 1989, [the former employee] was reassigned permanently from the [first] position to the [third] position. When [the former employee] was initially detailed from the [first] position, a GM-15 employee was detailed to that position. This GM-15 employee has served in the [first] position from January 1989 to the present and has fulfilled all the duties and responsibilities of the office during that time. [The former employee's] last day at [the agency] was [in] March 1990, at which time the [third] position was abolished.

The question presented is whether, given the above facts, [the former employee] would be considered a "Senior Employee" for the purposes of 18 U.S.C. § 207(c) after January 9, 1989. If so, then [the former employee's] contacts with [the agency] on behalf of clients of his law firm could constitute violations of section 207(c), which prohibits certain contacts between former Senior Government Employees and their former department or agency for one year after such employment has ceased. For the reasons given below, however, we are of the opinion that [the former employee] would not be considered a "Senior Employee" for the purposes of section 207(c) after January 9, 1989.²

The principal objective of section 207(c) is to address "the problem of unfair or undue influence by former officials over their former colleagues and subordinates." S. Rep. No. 170, 95th Cong., 2d Sess. 154. The statute is an expression of Congress's belief that "people who have operated at a policymaking level should not subsequently be able to appear representing someone else other than themselves before that agency within the period of the ban." 124 Cong. Rec. H10183 (daily ed. Sept. 29, 1978) (statement of Rep. Danielson) (emphasis added). This Office regards the prohibitions of section 207(c), when applied to Senior Employees serving in positions designated pursuant to 18 U.S.C. § 207(d)(1)(C), as applying to the position designated, not the individual. The one-year statutory restriction of section 207(c) is therefore measured "from the date when the individual's responsibility as a Senior Employee in a particular agency ends." 5 C.F.R. § 2637.204(j) (emphasis added). Similarly, the section 207(c) restrictions attach to any individual serving in a designated position for more than 60 days. 5 C.F.R. § 2637.211(e). Note that this regulation imposes the restrictions on those serving in a designated position

without regard to whether they have been temporarily or permanently assigned to the position. Id.

Thus, the restrictions of section 207(c), when applied to those positions designated as "Senior Employee" positions, attach to the person actually serving in a designated position. When [the former employee] was detailed from his [first] position to a non-designated position, he was no longer in a position which was designated as a "Senior Employee" position under the statute or the underlying regulations.³ From January 9, 1989, to the present, another individual has been serving [in] the [first position] and fulfilling all of the responsibilities and duties of that position. That individual, therefore, became subject to the restrictions of section 207(c) when his time in the position exceeded 60 days. 5 C.F.R. § 2637.211(e). From that date, [the former employee] has exercised none of the responsibilities or duties of the [first] position. Despite the fact that on two occasions [the former employee] nominally (from the close of business one day to the opening of business the next) filled the [first position] does not change the fact that at no time after January 9, 1989, did [the former employee] serve [in] the [first position]. The employee detailed to the [first] position remained in that position throughout the time period in question. [The former employee] was never (after January 9, 1989) in a position to exercise the authority of the [first] position and, in fact, never attempted to do so. Based upon all of the foregoing, we conclude that [the former employee] ceased to exercise the responsibility of the position designated as a "Senior Employee" position on January 9, 1989. We are therefore led to conclude that the post-employment restriction of section 207(c) ceased to apply to him on January 9, 1990.

Sincerely,

Donald E. Campbell
Acting Director

¹ Unless otherwise noted, all facts given in this opinion are drawn either from your letter of May 14, 1990, or from telephone conversations between [an ethics official] of your office and [an] attorney of this office.

² Because [the former employee] served in a "Senior Employee"

position until January 9, 1989, he remains subject to the two-year restriction contained in 18 U.S.C. § 207(b)(ii) until January 9, 1991. As explained at 5 C.F.R. § 2637.203, this section bars former Senior Employees from knowingly representing, aiding, counseling, advising, consulting, or assisting in representing any other person by personal presence at any formal or informal appearance (1) before the United States, (2) in connection with any particular Government matter involving a specific party, (3) in which he or she participated personally and substantially. We also note that [the former employee] remains subject to the post-employment restrictions found at 18 U.S.C. §§ 207(a) and 207(b)(i).

3 Your letter states that, at the time of his transfer to the [third] position, [the former employee's] "unsettled" employment status prevented [the agency] from referring [the former employee's] new position to OGE pursuant to 5 C.F.R § 737.25(i) (now 5 C.F.R § 2637.21(i)). Based upon descriptions of the position in your letter and through our conversations with you, we are satisfied that the [third] position did not require [the former employee] to function at a policymaking level and would not have been designated as a "Senior Employee" position.