

Office of Government Ethics
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Letter to a Designated Agency Ethics Official
dated October 27, 1988

We have received your request of September 12, 1988, regarding [an agency employee] and his status as a Senior Employee in his last position with your agency. [The employee] had served as Director of [an office within the agency] which was designated at 5 C.F.R. § 737.33. In January of 1988, [the employee] was assigned [to a different position], a position which is not designated. You have asked for our determination whether he was designated in the latter position because of the position shifting rules of 5 C.F.R § 737.25(i). Because this topic is frequently misunderstood, we have taken this opportunity to go into further detail in clarifying the position shifting mandates and the relevant statutory and regulatory provisions.

Pursuant to 18 U.S.C. § 207, this Office adopted regulations setting forth standards and procedures for designating Senior Employee positions pursuant to § 207(d). See 5 C.F.R. § 737.25. Designation as a Senior Employee proscribes conduct beyond that applicable to all other former Government employees. Because of the onerous limitations this may place on individuals, only those meeting certain statutory and regulatory requirements are designated to fall within these post-employment prohibitions.

There are four ways in which a position is or may be designated as a Senior Employee position. The first designation provision is that found at 5 C.F.R. § 737.25(a). This section lists two groups of employees which are automatically designated under the statute, effective July 1, 1979. The second provision, § 737.25(b), lists certain groups which have been designated by the Director of the Office of Government Ethics (the "Director") in conjunction with an agency's determination that the position carries with it significant decision-making or supervisory responsibility. These designations were effective February 28, 1980. The third process follows the same criteria as those in the second category, but in addition requires publication and notice so that an individual already in a position will not be unfairly bound by greater post-employment prohibitions than those applicable to the position when he first assumed it. See 5 C.F.R. §§ 737.25(d) and (g).

The fourth way in which a position may be designated is by position shifting. The regulation regarding position shifting states that:

[i]n any case where a person transfers from a designated position to one that is not, the agency head shall within one month transmit to the Director a report reciting the functions of each position, the reason for the transfer, and the identities of the prior holder of the position assumed and the successor, if any, to the position departed. If the Director designates the newly assumed position pursuant to section 207(d)(1)(C) of Title 18 U.S.C., such designation shall be effective retroactively to the date of transfer notwithstanding paragraph (d) of this section.

5 C.F.R. § 737.25(i).

The position shifting provision was added to prevent agencies from transferring an individual in a designated position to one that is not, thus allowing one or two years to elapse, enabling the employee to leave public service for a private position without the constraints of 18 U.S.C. §§ 207(b)(ii) and (c). To be consistent with the intent behind the post-employment restrictions on Senior Employees, the position shifting regulations allow the Director to review the transfers of individuals in positions of significant decision-making or supervisory responsibility to determine whether such designation should continue to the newly assumed position. A position would be designated under this position if the employee brought to the position some or all of his prior responsibility, thus combining aspects of a position which require designation with a new position whose duties do not otherwise require designation. Without this review, administrative changes and reorganizations could prevent the applicability of the Senior Employee restrictions to those employees for whom it was intended.

The position shifting requirements do not confer discretionary authority on agencies respecting designation of positions. Rather, they are mandatory steps to be taken by the agency within thirty days of transfer of an individual from a designated position to one that is not designated. This process ensures fair notice to an employee who otherwise might believe that he is not subject to certain post-employment proscriptions

because of his transfer to a nondesignated position only to discover upon leaving the Government that this latter position should have been designated. Because the designation of this second position is retroactive to his assumption of the position, any passage of time for the one or two years' bars from the first position that he may have relied upon in taking a private sector position would be erased and very likely have a negative impact on his ability to function in his post-government position.

We have reviewed the position descriptions forwarded to us by your office, and concur that the [new] position to which [the employee] was transferred should continue to be exempt from designation. We have found nothing to suggest that he took to this position any of the responsibility of his prior position as Director of [an office within the agency] as that position had been filled by another agency employee. Thus, for purposes of 18 U.S.C. §§ 207(b)(ii) and (c), [the employee's] computation of time for his "cooling off" period should begin upon his departure from his prior designated position. Your office may counsel him accordingly.

Sincerely,

Frank Q. Nebeker
Director