

Office of Government Ethics

89 x 7 -- 05/31/89

Letter to a Designated Agency Ethics Official dated May 31, 1989

This is in response to your letter of August 24, 1987, concerning the application of 18 U.S.C. § 203(a) to a prospective employee of your agency. Because the original of that letter was apparently lost in transmittal, your staff provided us with a copy on July 13, 1988. We note that it does not bear our correct post office box (14108), which may account for the original's nonreceipt.

Your letter requested a formal advisory opinion. We have determined that the issues do not meet the criteria in 5 C.F.R. § 738.303 for a formal opinion. However, we will offer the following informal advice.

You have indicated that the prospective employee is vice-president of a closely-held family corporation, which subcontracts to perform work required under another company's prime contract with the Government. The prospective employee's company provides, for example, word processing services to the Government, as a subcontractor. Some of this word processing is performed in Government offices; some is also performed at company offices, with delivery of the finished product to the prime contractor. In both instances, the prospective employee's company is paid by the prime contractor, not the Government.

You have requested whether 18 U.S.C. § 203(a) would bar the prospective employee from retaining his association with this family corporation in the event he becomes a Government employee. That statute prohibits receipt by the employee, directly or indirectly, of any compensation for services rendered by himself or another before a Government agency in relation to any particular matter in which the United States is a party or has a direct and substantial interest.

Section 203 has historically been interpreted by the Department of Justice as prohibiting compensation only for representational services. See OGE informal advisory letter 81 x 21, of June 25, 1981. Such representations must involve communications made with the intent to influence and must concern

an issue or controversy. The provision of purely factual information or the submission of documents not intended to influence are not representational acts. See OGE informal advisory letter 86 x 9, of August 8, 1986. Thus, for example, receipt of compensation for the preparation and signing by a government employee of another's income tax return was found by this Office not to violate 18 U.S.C. § 203. See the above-cited informal advisory letter 81 x 21, which was concurred in by the Department of Justice, and OGE informal advisory letter 85 x 3 of March 8, 1985. The performance of word processing services by your prospective employee's company does not appear to involve representation, if the company simply transcribes information authored by someone else.

If, however, the prospective employee's company drafts the substantive contents of such documents and they involve an intent to influence on an issue or controversy, then the question for examination is to whom that representation is being made. Section 203 of Title 18 prohibits compensation for representation before the Government, not to private parties. Representational documents prepared and submitted directly to the Government would constitute representations before the Government. However, documents prepared and submitted to the prime contractor for resubmission to the Government might not involve representation before the Government, unless the subcontractor's authorship is apparent. See OGE informal advisory letter 82 x 20, of December 20, 1982.

Since we do not know any of the details of the word processing services being provided or whether other services are performed which involve representation, we are unable to provide a more definitive answer to your question. However, the principles discussed above should serve to guide your resolution of any related issues. For your information, we have enclosed copies of the OGE opinions cited herein.

One additional item of note concerns your suggestion that, since the prospective employee receives company dividends instead of a salary, he might not be viewed as receiving compensation for services rendered by the company to the Government, even if such services are representational. This Office does not subscribe to that position. In 86 x 9, cited above, we concluded that an officer or employee of a company could not receive compensation which was tied to the profitability of the company's activities with the Federal Government, where those activities involved

representation under 18 U.S.C. § 203. On the other hand, an employee who is salaried or whose compensation is not contingent on the Federal source of funding for such representation would not violate the statute.

We trust that the guidance herein serves to answer your inquiry. We have consulted with the Department of Justice prior to the issuance of this opinion.

Sincerely,

Frank Q. Nebeker
Director