

Office of Government Ethics

96 x 14--08/02/96

Letter to a Designated Agency Ethics Official dated August 2, 1996

This is in reply to your letter of May 29, 1996, concerning the applicability of 18 U.S.C. § 207 to the proposed post-employment activities of an individual who, until recently, was detailed from a State university to [your agency] pursuant to the Intergovernmental Personnel Act (IPA), 5 U.S.C. §§ 3371-3376. The individual served [in a position] at the [agency] from February 1994 until January 1996. He has since returned to the faculty of the university from which he was detailed. He has also resumed his work as a consultant to various companies and associations.

Applicability of 18 U.S.C. § 207

Under the IPA, a Federal agency may arrange for an employee of an institution of higher education to be assigned to the agency. Such an assignment is treated in the same way as the assignment to an agency of an employee of a State or local government. 5 U.S.C. § 3372(e)(2). Under 5 U.S.C. § 3374(a), an individual who is assigned to a Federal agency may be "appointed" in the agency or, as in the case of the individual who served at [your agency], may be deemed "on detail" to the agency. Section 3374 provides that an individual on detail "is not entitled to pay from the agency, except to the extent that the pay received from the State or local government [or institution of higher education] is less than the appropriate rate of pay which the duties would warrant" However, an agency may reimburse such a government or institution for the salary and benefits paid to the individual during his participation in the program.

While on detail to the [agency], the individual in question continued to receive pay from the university totaling \$96,688 per year, \$81,800 of which constituted his salary and \$14,888 of which constituted benefits. The [agency] reimbursed this full amount to the university. In addition, since the individual was unable to engage in outside consulting during the period of his detail, your letter indicates that the [agency] agreed to pay an additional \$38,794 per year directly to the individual "to cover the loss of this outside income." The \$38,794 figure represented the amount necessary to cause his total annual salary (excluding benefits paid by the university) to equal \$120,594 -- the ES-6 rate of basic pay for the Senior Executive Service (SES), including locality pay. 1

The IPA specifically provides that an individual on detail to a Federal agency "is deemed an employee of the agency for purposes of . . . sections 203, 205, 207, 208, and 209 . . . of title 18." 5 U.S.C. § 3374(c)(2). Pursuant to 18 U.S.C. § 207(c)(2)(A)(ii), individuals employed in positions for which the rate of basic pay is equal to or greater than level V of the Executive Schedule (EL-V) are "senior employees" subject to the one-year "cooling-off" restriction of 18 U.S.C. § 207(c). When the former [agency] detailee left the agency in January 1996, the ES-6 rate of basic pay for the SES exceeded \$108,200, the rate of basic pay then payable for EL-V. However, you argue that the individual did not become subject to 18 U.S.C. § 207 when he terminated his detail with the [agency] because he was not receiving "basic pay" in excess of the EL-V threshold. More specifically, it is your position that "the supplement to the detailee's salary to cover lost outside contract income is better analogized to an allowance or fringe benefit than to basic pay." You also argue that "the payment from the university, even though reimbursed, does not constitute basic pay within the meaning of section 207(c)."

The IPA provides that an individual is generally not entitled to pay from an agency during the period of his detail. Apparently, the [agency] paid the supplemental \$38,794 per year because it determined, in accordance with 5 U.S.C. § 3374(c)(1), that the individual's university pay was less than the "appropriate rate of pay" warranted by his Federal duties. 2 Assuming this is the case, we believe it is proper to consider this additional payment as "basic pay" rather than as analogous to an allowance or fringe benefit. When the [agency] supplement (excluding locality pay) is combined with the sum of the salary and benefits paid by the university, the individual's total compensation easily exceeds the EL-V threshold. 3

You also suggest, however, that the \$96,688 paid by the university and reimbursed by the [agency] should not be considered "basic pay." While we recognize that section 3374(c)(2) was enacted before 18 U.S.C. § 207 was amended to include section 207(c), the lawmakers who enacted the IPA clearly contemplated that employees on loan from non-Federal entities would have to comply with post-employment restrictions when they terminated Government service. 4 As already noted, 5 U.S.C. § 3374(c)(2) specifically states that an individual on detail to a Federal agency is considered an employee for purposes of 18 U.S.C. § 207. As section 207 was clearly intended to apply to individuals on detail to Federal agencies pursuant to the IPA, we are unwilling to say that section 207 does not apply to the individual who was on detail to the [agency] merely because a portion of the [agency's] expenditure is properly characterized as a "reimbursement" rather than as "pay." The individual performed duties which the [agency] apparently determined warranted compensation in excess of the

rate of basic pay payable for EL-V. And, in fact, the individual received total compensation in excess of that amount. We conclude, therefore, that 18 U.S.C. § 207 remains applicable for the remainder of the one-year period.

Permissibility of Proposed Activities

If we determined 18 U.S.C. § 207 to be applicable, you asked that we consider whether the restriction bars certain activities proposed to be undertaken by the former [agency] detailee. As noted above, your letter indicates that the individual has, since leaving the [agency], resumed the consulting work from which he derives income from sources other than the university "to produce various scholarly articles, studies, and reports within his area of academic expertise." His clients include companies and associations involved in [a certain] industry.

Your letter advises that some of the individual's clients might "append studies or reports that he has completed for them to comments that they will be submitting on proceedings pending before the [agency]. . . ." In some cases, both he and the client may know at the time he prepares or submits his report to the client that his report will be appended to the comment. In any event, you indicate that the client will always wish to identify the individual as the author of the report. We are assuming, therefore, that the former detailee will not have signed his report and that his name will not otherwise appear on any materials to be enclosed with the client's submission to the [agency].

An individual subject to 18 U.S.C. § 207 will violate the restriction if he --

Knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency

The first situation posed in your letter assumes that the former detailee might submit (or have already submitted) a report to his client with no knowledge that the report would be submitted by the client to the [agency]. At some future time, however, the client does in fact submit the report to the [agency] as an enclosure to its comment, and identifies the former detailee as the author. In these circumstances, we do not believe the individual would violate 18 U.S.C. § 207(c). The submission of the report to the Government would not have been made knowingly as required by

the statute.

Another situation described in your letter allows for the possibility of at least two different sets of facts. In the case of both fact patterns, the former detailee would know at the time he submits the report to the client that the client intends to submit the report to the [agency], and the client does in fact submit it to the agency. In the first scenario, however, the former detailee would not know at the time he submits the report to the client that the client will identify him in its comment as the author of the report. In the second scenario, the individual would know that the client will identify him as the author.

Section 207 has long been interpreted to permit so-called "behind-the-scenes" assistance. In regulatory guidance interpreting a prior version of 18 U.S.C. § 207, for example, 5 C.F.R. § 2637.201(b)(6) makes clear that a former employee does not "represent" another person when he provides "in-house" assistance to that person. The related example indicates that a former employee may prepare a paper for her new private sector employer describing the persons at her former agency who should be contacted and what would be said to them concerning a certain matter. 5 Several OGE advisory letters and memoranda have made the same point concerning the representational bars of both the prior and current versions of 18 U.S.C. § 207. 6

Example 4 at section 2637.204(f) indicates that section 207 is not violated unless the former senior employee makes a communication or appearance to his former agency:

Example 4: In connection with a new matter, a former senior employee of the Federal Food and Drug Administration, since retired to private law practice, is asked to consult and assist in the preparation of briefs to be filed with the Administration on a new particular matter. He may do so, but he should not sign briefs or other communications or take any other action that might constitute an appearance.

The example emphasizes that an individual subject to section 207 may assist an employer or client in various ways as long as he does not make a communication to or appearance before his former agency.

The lawyer in the example quoted above can prepare and submit an unsigned legal brief to his firm (or client) without violating section 207(c), even though he knows at the time that it will be forwarded to his former agency. Similarly, we believe that the former [agency] detailee can submit an unsigned report to his client even though he knows that it will

eventually be forwarded to the [agency] as an enclosure to his client's comment -- at least where the former detailee does not know that the client will identify him to the [agency] as the author of the report. We are unable to say, however, whether the individual would violate section 207 in these circumstances if he knows at the time he submits the report to his client that he would be identified to the [agency] as the report's author. We believe that analysis of this latter combination of facts would require that we coordinate with the Department of Justice.

We would also need to consult with the Department of Justice concerning the additional fact patterns that you posed in a facsimile forwarded to this Office by a member of your staff on June 13, 1996. As a follow-up to your original letter, you asked in your facsimile if the individual could avoid a violation of 18 U.S.C. § 207 "if he prepared the paper under a company name (e.g. , the ABC Group)" -- perhaps even if the paper was written "explicitly to influence [agency] decision making" and "it was common knowledge that [he] was one of the few, or perhaps, the sole, member of the ABC Group."

We recognize that we have not addressed all fact patterns potentially arising from the former detailee's consulting arrangements. Of course, if you wish, we would be happy to consult with the Department of Justice concerning those issues discussed above which have not been resolved. Please contact my staff if you would like us to coordinate with the Department of Justice concerning these matters.

Sincerely,

Stephen D. Potts
Director

1 When the direct payment from the [agency] is added to the sum of the salary and benefits paid by the university, it appears that the individual received compensation totaling \$135,482 per year during the period of his detail.

2 Compare 5 C.F.R. § 534.401(b)(1), which provides that "an appointing authority may set the rate of pay of an individual at any ES rate upon initial appointment to the SES"

3 We agree that 18 U.S.C. § 207(c)(2)(A)(ii) specifically provides that

locality-based pay adjustments are not considered when determining whether a rate of pay exceeds the EL-V threshold.

4 The IPA, including section 3374(c)(2), was originally enacted in 1971. Pub. L. 91-648, Jan 5, 1971, 84 Stat. 1921. Section 207 was added to 18 U.S.C. § 207 by the Ethics in Government Act of 1978. Pub. L. 95-521, Oct. 26, 1978, 92 Stat. 1864.

5 While 5 C.F.R. § 2637.201 technically relates to 18 U.S.C. § 207(a) -- the predecessor to current section 207(a)(1) -- its guidance concerning "in-house" assistance is equally applicable to 18 U.S.C. § 207(c). Prior to the effective date of the amendments enacted by the Ethics Reform Act of 1989, both 18 U.S.C. § 207(a) and contained identical language describing the nature of the representational activity prohibited.

6 See , e.g. , OGE Informal Advisory Letter 79 x 5 (Sept. 28, 1979) and OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992). The latter specifically provides that section 207 "prohibits communications to and appearances before the Government and does not prohibit 'behind-the-scenes' assistance."