
Office of Government Ethics

97 x 9

Letter to a Former City Council Member dated May 21, 1997

This is in reply to your letter of April 29, 1997, in which you requested guidance concerning the interpretation of the post-employment restrictions of 18 U.S.C. § 207. You served as a member of the City Council of the District of Columbia government until your last term ended. Now a partner in [a] law firm you expect that the nature of your law practice will require contacts with State and local governments in this area, as well as with the government of the District of Columbia. You have posed six questions concerning the potential applicability of section 207 in your situation.

According to section 1814.3 of the District Personnel Manual, a copy of which was enclosed with your letter, “[q]uestions regarding the application of 18 U.S.C. § 207, 5 C.F.R. Part 737, or these [District of Columbia] regulations to specific factual circumstances may be addressed to the ethics counselor of the agency where the government employee is or was employed, or to the D.C. Ethics Counselor.” You note that you are, consistent with this provision, currently seeking guidance from the District of Columbia Office of Campaign Finance. As you appreciate, the U.S. Office of Government Ethics (OGE) is charged with providing “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency” 5 U.S.C. app., § 402(a). We do not provide advice to, or concerning, current or former employees of the legislative or judicial branches of the Federal Government or current or former employees of the government of the District of Columbia, absent unusual circumstances. While we do not believe your situation

presents such circumstances, we have, nevertheless, reviewed your correspondence and we offer a few comments which may prove useful.

You correctly observe in your letter that the summary of the post-employment restrictions of 18 U.S.C. § 207 published in sections 1814 and 1815 of the District Personnel Manual is out-of-date. These sections do not reflect the substantial revision of the statute by the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716, or the several other amendments to the statute enacted thereafter. In addition, the citation to 5 C.F.R. part 737 is incorrect in that part 737 was transferred and redesignated as 5 C.F.R. part 2637 when OGE became a separate executive branch agency on October 1, 1989. More significantly, however, it is important to note that the regulatory guidance now published at part 2637 relates to 18 U.S.C. § 207 as it was in effect prior to January 1, 1991, and continues to apply to individuals terminating Government service before that date. Until OGE completes the new regulation at 5 C.F.R. part 2641 that will eventually reflect all amendments to section 207 enacted by the Ethics Reform Act of 1989 and thereafter, we have advised that “[e]xcept where the underlying statutory provision has changed, Part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207.” OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992) (“November 1992 summary”).¹

As a preliminary matter, we can confirm your understanding that sections 207(a)(1) and 207(a)(2) are the only substantive provisions of the current version of the statute which apply to former employees of the District of Columbia government. In

¹ This memorandum forwarded the November 4, 1992 summary of 18 U.S.C. § 207 to which you referred in your letter.

1991, we were asked by a District of Columbia ethics counselor for our views concerning the applicability of section 207(c), as amended by the Ethics Reform Act of 1989 and related technical amendments, to individuals who terminate employment with the government of the District of Columbia on or after January 1, 1991. We concluded, after consulting with the Department of Justice, that Congress did not intend the “new” section 207(c) to apply to former employees of the District of Columbia government.

We noted in our response to the ethics counselor that the Ethics Reform Act of 1989 and the related technical amendments enacted in 1990 by Pub. L. 101-280 made both structural and substantive changes to the statute. We reasoned that --

. . . section 207(c) was revised by the technical amendments to clarify its applicability to special government [sic] employees and to add the phrase ‘of the United States’ after ‘executive branch.’ These changes had the effect of adding language to section 207(c) that had been included in sections 207(a)(1) and (a)(2) as originally enacted by the Ethics Reform Act. Significantly, the technical amendments did not add the phrase ‘or the District of Columbia’ to section 207(c). Unlike sections 207(a)(1) and (a)(2), therefore, the language of the current version of section 207(c) makes no reference to employees of the District of Columbia.

We found further support for our conclusion in the legislative history surrounding enactment of the technical amendments. Accordingly, we observed in our response that, in connection with his remarks in support of the House Joint Resolution that made the technical corrections to the Ethics Reform Act, Representative Fazio placed in the record a “detailed

explanation” of the resolution. That summary explained that the resolution would make “several technical corrections to the Ethics Reform Act of 1989 . . . to restore the references to District of Columbia employees that had been omitted.” H.J. Res. 553, 101st Cong., 2d Sess., 136 Cong. Rec. H1641, H1646 (daily ed. Apr. 24, 1990). It was our opinion that these comments supported the conclusion that Congress specifically reviewed the Ethics Reform Act with a view toward clarifying the applicability of section 207 to various groups of employees. While the phrase “or the District of Columbia” was added to 18 U.S.C. § 207 in several places, it was not added to the language in section 207(c) that specifies the individuals subject to that restriction.

Consistent with this analysis concerning the inapplicability of section 207(c), it is also our view that the remaining substantive restrictions of section 207 do not apply to former employees of the District of Columbia government. Section 207(d) applies only to former high-level officials in the Federal executive branch as specified in section 207(d)(1), including the Vice President of the United States and members of the Cabinet. And, while we do not purport to interpret section 207(e) which applies to former Members of Congress and legislative staff, it is apparent that mention of District of Columbia employees is also omitted from that provision. Finally, section 207(f) does not apply to former employees of the District of Columbia since that restriction applies to “[a]ny person who is subject to the restrictions contained in subsection (c), (d), or (e)” of section 207.

Although not asking for our views on the point, you also suggest in your letter that it could be argued that Congress did not intend for sections 207(a)(1) and 207(a)(2) to apply to the City Council. Thus, you noted that “Congress has amended the original Act on several occasions since the City Council was established, including amendments in 1990 which dealt with

other District of Columbia issues, and never chose to insert language applying the law to the District's legislature."

In OGE Informal Advisory Letter 86 x 18, we responded to a District of Columbia government employee who wrote to OGE after enactment of the District of Columbia Self-Government and Governmental Reorganization Act "questioning whether 18 U.S.C. § 207 applies to employees of the Council of the District of Columbia, in view of the passage of the Act vesting legislative power in the Council." We concluded, after consulting with the Department of Justice, that it did. We explained that --

[b]y its terms, section 207 applies to any individual who has been 'an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia' Thus, under the plain statutory language, section 207 applies to *all* officers and employees of the District of Columbia and not merely to those in executive agencies.

Under the current statutory language as amended by the Ethics Reform Act of 1989, sections 207(a)(1) and 207(a)(2) now apply to "[a]ny person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia" Since, like the prior versions of the permanent and two-year restrictions, these sections apply to "an officer or employee . . . of the District of Columbia," the analysis in OGE 86 x 18 remains apposite.

The first of your six questions concerns the meaning of the term "District of Columbia" for purposes of determining the scope of sections 207(a)(1) and 207(a)(2). Thus, if one of these restrictions is otherwise applicable, you ask if the

representational bar extends to contacts with the City Council or courts, as well as to contacts with the “Executive Branch agencies of the District.” You note that, as applied to former employees of the Federal executive branch, section 207(a)(1) has been interpreted by OGE not to extend to communications or appearances before the Congress. You suggest that --

it could be argued that if former Executive Branch employees may make representations before the Legislative Branch though prohibited from doing so before the Executive Branch, then, conversely, former Legislative Branch employees may make representations before the Executive Branch though prohibited from doing so before the Legislative Branch.

Thus, assuming that the City Council is the District of Columbia’s legislative branch, you would conclude that you are not barred by section 207(a)(1) (or by section 207(a)(2)) from representing others before [District of Columbia executive agencies] on any matter. You find further support for your conclusion from the fact that section 207(c) “allows former senior federal employees to lobby other federal agencies where they did not work.”

Although we have reviewed your suggested analysis with interest, we believe that this question should be addressed, at least initially, by the District of Columbia government. We suspect that District of Columbia ethics counselors may have resolved this issue in the past, especially in view of the apparently plain language of section 207(a)(3)(B). As you noted in your letter, section 207(a)(3)(B) states that, as applied to former employees of the District of Columbia, sections 207(a)(1) and 207(a)(2) apply to communications or appearances “before any officer or employee of any department, agency, or court of the District of Columbia.”

Your second question concerns the effect of recusal from a matter. Your letter cites guidance at 5 C.F.R. §§ 2637.201 and 2637.202. We agree, generally, with your conclusions that self-disqualification from a matter does not remove the matter from an employee's official responsibility for purposes of section 207(a)(2) and that self-disqualification ordinarily ensures the absence of personal and substantial participation for purposes of section 207(a)(1).

Your third question concerns the distinction between "legislation of general applicability" and "legislation involving a specific party" for purposes of sections 207(a)(1) and 207(a)(2). We agree that both restrictions require that the representation be made in connection with a particular matter involving a "specific party or specific parties." While we will not address your specific example concerning legislation affecting the health care professions and insurance, we briefly discussed this distinction in OGE 86x18. In that advisory letter, we observed that --

[a]s a practical matter, of course, the impact of the prohibitions of sections 207(a) and (b)(i) on former District of Columbia legislative branch employees, including former Council employees, varies according to the type of legislative activity engaged in while with the Government, and in many instances the impact may be limited because of the requirement of particular matters involving specific parties.² Although special legislation affecting a selected class rather than the public generally might amount to a particular matter involving specific parties, most legislation would not so qualify.

² The prior versions of sections 207(a)(1) and 207(a)(2) were, in 1986, designated as sections 207(a) and 207(b)(i).

Your fourth question concerns the significance of compensation in relation to the applicability of section 207. You cited guidance in our November 1992 summary stating that section 207 prohibits individuals from engaging in certain activities on behalf of persons or entities other than the United States “whether or not done for compensation,” but does not bar “self-representation.” This excerpt correctly indicates that the receipt of compensation is not an element of any of the section 207 restrictions. You query, however, whether *pro bono* representation of an organization can be considered self-representation if the representation is undertaken as a member or official of the organization and not as the organization’s attorney.

Sections 207(a)(1) and 207(a)(2) can affect any former employee to whom they are applicable, including former employees who do not act as attorneys. A former employee makes a communication on behalf of another person if, judging by all the circumstances, he is engaging in the activity as a formal or informal representative or advocate for the other person. All relevant factors must be considered, such as the relationship between the communication or appearance and any related interest of the former employee’s new employer or other organization with which he is affiliated. A former employee can act on behalf of another even in the absence of a formal employment relationship or other arrangement concerning compensation. A former employee does not act on behalf of another, however, merely because that other person may derive a benefit as a consequence of the employee’s post-employment activity.

Your fifth question concerns the permissibility of behind-the-scenes advice to an employer, associate, or client regarding their contacts with the District of Columbia government. You cite an example at 5 C.F.R. § 2637.201(b)(6) stating that a former

employee is not prohibited from preparing a paper for a private sector employer describing the persons at her former agency who should be contacted and suggesting what should be said to them concerning a matter in dispute. While this example technically relates to the pre-Ethics Reform Act version of the permanent bar, its guidance concerning permissible in-house assistance is equally relevant to the interpretation of the terms “communication” and “appearance” in current sections 207(a)(1) and 207(a)(2). *See, e.g.*, OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992). And, although interpreting the prior version of section 207(c), example 4 at section 2637.204(f) is also germane:

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.

Your sixth question, in which you ask whether the District of Columbia Financial Responsibility and Management Assistance Authority is an “agency” of the District of Columbia for purposes of section 207, is outside our purview.

We trust these comments will prove helpful. Should you require additional assistance from OGE, please call [our Office].

Sincerely,

Stephen D. Potts
Director