

Office of Government Ethics

82 x 5 -- 04/08/82

Letter to a Private Attorney dated April 8, 1982

This responds to your letter of March 24, 1982 requesting our opinion on a matter calling for an interpretation as to whether the Ethics in Government Act of 1978 ("the Act") would bar a former employee of [an agency] from participating in an adjudicatory proceeding at the [agency] as an expert witness.

The relevant facts, as we understand them, are as follows:

The former Government employee was employed by the [agency] as the section chief of an office that analyzed certain aspects of proposed rate increases in adjudicatory proceedings to contest such increases.¹

Your client filed a proposed rate increase applicable to the movements of a particular commodity between a large number of specified origin and destination points. The increase was challenged and became the subject of a proceeding.

You indicate that the former employee participated in the proceeding, that he analyzed certain testimony and studies filed by your client, and that he represented the [agency] in a meeting with an important witness of your client to discuss certain technical aspects of the [agency's] requirements for one of these studies. Additionally, he prepared a draft of a portion of the [agency's] decision dealing with the areas within his expertise and consulted with and advised members of the [agency] and other staff members concerning the areas of the decision for which he was responsible. Throughout the proceeding, the former employee had access to confidential information of your client that was the subject of a protective order prohibiting its use outside the proceeding.²

One of the parties, which protested the proposed rate increase and participated in the first proceeding, thereafter filed a complaint pursuant to [a statute, citation deleted] challenging the rates applicable to its movements of the same commodity at issue in the first proceeding. This party has asked the former Government employee, who is now employed as a private consultant, to prepare an analysis of the issues he analyzed in the first

proceeding and to testify concerning the results of this analysis in the second proceeding.

You suggest that the first proceeding involved a large number of movements of one commodity and that the former Government employee has been asked to analyze the same movements of the same commodity that were at issue in the first proceeding. Further, the [agency's] decision in the first proceeding was served approximately two years ago, and that the rates covered by the new complaint (second proceeding) are the same rates (adjusted to reflect general increase) that were attacked in the first proceeding. The first proceeding is still pending before the [agency] on reopening and the second proceeding is about to go to hearing.

On the facts as you present them, it would appear that the former employee participated personally and substantially in the first proceeding and that such participation would subject him to the permanent bars of 18 U.S.C. § 207(a). His drafting of portions of the [agency's] decision in the first proceeding is clearly a direct involvement in a particular matter involving specific parties (5 C.F.R. Part 737.5). Further, the restraints of section 207(a) are intended to include expert witness testimony. Such testimony would not fall within the exception carved out by 18 U.S.C. § 207(h); your basic citations to the legislative history surrounding the Act are correct on these points. However, since we are not fully aware of the nature of the former Government employee's expertise, we cannot speak to whether he may avail himself of the exceptions set forth in 5 C.F.R. Part 737.19(b).

Your letter has framed the main issue of inquiry as whether the second proceeding is the "same particular matter involving a specific party" as the first proceeding. You go on to say that you believe that the "same particular matter" test involves a broader concept than whether there is merely one or two proceedings. We, of course, agree. As you have pointed out, 5 C.F.R. Part 737.5(c)(4) makes it clear that same particular matter may continue in another form or in part.

Because the information you presented in your letter was not specific with regard to the actual identity of the proceedings and the parties and because we did not discuss this question with [the agency], we are not in a position to determine conclusively whether the second proceeding involves the same particular matter

as the first. Your letter does, however, raise a distinct possibility that this is the case. We would suggest that in the event the former employee does testify in the second proceeding, this issue be brought to the attention of the [agency]. In the alternative, if you wish to identify the parties and the proceeding involved, we could seek information from the [agency] as to its position on the nature of the second proceeding and the effect the former employee's testimony may have upon that proceeding and then could prepare a more definitive opinion.

Sincerely,

J. Jackson Walter
Director

1 You have suggested that because you do not wish to embarrass unnecessarily the individual involved, you have not included identifying details in your request. Consequently, we have not discussed the case with the [agency]

2 Your letter indicates that the former Government employee was not an employee at a level referred to in 18 U.S.C. § 207(d)(1), and that he ceased being a [an agency] employee about two years ago.