

Office of Government Ethics

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Memo to an Agency Ethics Official dated August 23, 1985

You have asked us to advise you regarding the application of 18 U.S.C. § 209(a) to a severance arrangement involving a prospective nominee to a Senate confirmed position.

From available information, it appears that the prospective nominee will resign his position as Chairman of the Board of a closely held corporation in which he is a major shareholder. He will retain his membership on the board on an uncompensated basis during his term of Federal appointment. He intends to return to his position as chairman of the corporation after he leaves Government service. He will retain his present vested interests in the corporation's ongoing profit sharing plan, pension plan and Supplemental Employees' Retirement Plan. He expects to continue his participation, on a reimbursement basis, in the corporation's group health and group life insurance plans.

In addition to the benefits described above, [the company] is considering the adoption of a severance benefits plan to provide payment to certain officers of the corporation, as designated by the discretion of the board of directors, who are leaving the company to perform public service, which would include service to local, state and Federal governments, educational institutions, and charitable foundations. The proposed plan would pay the departing officer for past services an amount determined by the board of directors of up to 150% of the annual salary being received by the executive at the time of termination of employment, with the percentage of salary for a particular executive determined by (1) various factors, including years of service to the company, degree of responsibility for company affairs, and overall contribution to the success of the company over the period of employment, and (2) the costs of professional services incurred by the executive in connection with obtaining such position.

In applying this severance benefits policy to [this individual], it is anticipated that the board will approve a payment of 150% of his present salary of [x] for a total of [y], based on his [35+] years of service to the corporation and the large part he has played in developing the company to its present healthy financial condition and highly recognized stature in the

publishing field. This benefit would be paid one half on January 1, 1986 and one half on January 1, 1987.

Although the issue is not without some doubt, for the reasons discussed below, we are of the opinion that 18 U.S.C. § 209(a) would preclude implementation of the proposed severance arrangement in [this individual's] case.

18 U.S.C. § 209(a) has four elements. It prohibits: (1) an officer of the executive branch or an independent agency of the United States Government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States.

In most cases, the first three elements are relatively straightforward, and the focus of the section is whether a payment is "compensation for services as an employee of the United States." Violations in matters involving severance payments depend to a large extent on the subjective intent of the parties. Consequently, our decision is based upon the inferences which can reasonably be drawn from all the circumstances surrounding the proposed arrangement.

In our review of the proposed arrangement we have taken into consideration such factors as the majority shareholder status of the proposed recipient, his intent to return to this former position as chairman of the board of the company upon termination of Federal service, his continued presence on the board as an uncompensated director, and finally, the lack of a pre-existing established corporate plan or policy involving severance payments.

In the past, we have given advisory approval to severance payments made under a prospective plan that conditioned eligibility on a broad range of activities, including Federal service. However, we have never granted approval to a prospective plan where the recipient indicated his intention of returning to the company upon termination of Federal service. In spite of the proposed language of the arrangement, the inference can be drawn that availing oneself to the several available benefit plans of the company coupled with an intent to return creates, in effect, a leave of absence situation where the severance arrangement is used simply to supplement Federal salary. A true severance payment would occur at the end of [the

individual's] service to the corporation. Since he will continue to serve in a limited capacity while he is in the Government and intends to return to full time status after Government service, that time has not yet occurred.

Additionally, the approval of such an arrangement could conceivably affect adversely the confidence of the public in the integrity of the Government's decision-making process by creating the appearance of official governmental acquiescence in an arrangement created specifically to circumvent the limitations placed on Federal salary. Violations of section 209(a) do not depend on the existence of a conflict of interest in the sense that there must be an identifiable corrupting potential inhering in the payment. It is sufficient that the parties intend the payment as a supplementation of Federal salary, whatever the underlying motivation may be. In describing the rationale for the broad reach of section 209(a), the Association of the Bar of the City of New York in their book, *Conflict of Interest and Federal Service* at page 211-12 (1960), stated:

The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government. In part the fear is that the government employee will not keep his nose to the grindstone; in part the fear is close to the fear of bribery; in part the fear is that outside forces will subvert the operation of regular policy-making procedures in the government; and in part the rule is grounded in consideration of personnel administration.

For the reasons given, we must advise you to reject the proposed severance arrangement.