Office of Government Ethics

99 X 11

Letter to a Designated Agency Ethics Official dated April 29, 1999

We are writing to bring your attention to a recent ethics opinion issued by the Chief Counsel's Office of [a Division within your agency]. That opinion concerns the application of the post-employment restrictions of 18 U.S.C. § 207 to [an agency] manager who has duties that are related to [a] Contract. The opinion employs a dollar-based test to determine whether an employee was "substantially" involved in a particular matter involving specific parties for purposes of the lifetime bar of 18 U.S.C. § 207(a)(1). Such an analysis is not consistent with positions taken by the Office of Government Ethics (OGE) and, if perpetuated, would lead to incorrect conclusions concerning the application of both 18 U.S.C. § 207 and 18 U.S.C. § 208. The opinion also seems to import, incorrectly, "substantiality" as an additional element for the two-year post-employment restriction of 18 U.S.C. § 207(a)(2). We are calling your attention to this opinion so that you can take appropriate steps to bring the [Division's] ethics advice into accord with OGE guidance.[1]

We note at the outset that, as a general matter, agencies have the responsibility to provide assistance to former Government employees who seek post-employment advice on specific problems. 5 C.F.R. § 2637.101(c)(8).[2] Indeed, in most cases, the former employee's agency is likely to be in the best position to make a

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[1] Last year we received copies of post-employment opinions from [a second division within your agency] that used a similar dollar-based analysis. [Our staff] contacted [an ethics official] at [your agency] on April 13, 1998. [The ethics official] indicated that [the agency] would correct those opinions. Because the [Division] opinion is similar to the 1998 opinions [of the second division], we now believe that a written communication expressing our concern is appropriate.

[2] Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, part 2637 still provides useful guidance concerning the elements of section 207 that remained essentially unchanged from the prior version of the statute.

determination as to certain issues, such as the identity or existence of a particular matter. 5 C.F.R. § 2637.201(e). However, agency determinations must be made within the appropriate analytical framework.

"SUBSTANTIALITY" AND 18 U.S.C. § 207(A)(1)

As you know, 18 U.S.C. § 207(a)(1) bars a former executive branch employee from communicating to or appearing before any court or agency of the United States with the intent to influence in connection with any particular matter involving specific parties in which the former employee participated "personally" and "substantially" as a Government employee. The term "substantially" is defined in 5 C.F.R. § 2637.201(d) as follows:

> `Substantially' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

In reaching the conclusion that the manager in question had not participated "substantially" in the [Contract], the [Division] based its conclusion primarily on the dollar value of the tasks in which the manager participated as a portion of the entire contract. The opinion thus focused on the fact that the manager's duties involved [Contract] tasks with a budget figure of $27.5 million out of a total [Contract] budget of $1.3 billion for FY 1998 (just over 2.1% of the total), and the fact that the manager's technical evaluations impacted 135 of approximately 8,600 [Contract] contractor employees (approximately 1.6% of the [Contract] contractor workforce). Based on these considerations, the opinion concluded that "your [duties] are personal, but they are not considered to be `substantial' under 18 U.S.C. § 207 when you consider the large scope of [the Contract]."

Nowhere in 18 U.S.C. § 207(a)(1) or in the regulations at 5 C.F.R. part 2637 is this type of dollar-based analysis employed, nor has it been used in any OGE opinion. Instead, the correct focus for making a determination of substantial involvement should be on the nature of the employee's involvement in the underlying matter. Although the regulatory language at 5 C.F.R. § 2637.201(d) states that "the single act of approving or participating in a critical step may be substantial," there is no basis for concluding that only the act of "approving" or some other similar critical

step should be considered substantial. If an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. If an employee's actions as a Government official go to a substantive aspect of the matter in question, then his participation in the matter may be considered to be substantial.

This analytical framework for determining whether an employee's participation in a matter is substantial is consistent with the policy behind 18 U.S.C. § 207. Section 207 seeks to bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations. *See* OGE Informal Advisory Letter 87 x 4. Reliance upon the dollar-based analysis employed by the [Division] in the opinion would create a situation where large numbers of senior agency employees who are involved in key aspects of a large procurement contract would be informed incorrectly that they are not subject to the post-employment restrictions of 18 U.S.C. § 207 in connection with the contract. This result would occur whenever agency employees work on aspects of the contract that, while not large in dollar terms in relation to the contract as a whole, are vital to the success or failure of that contract. The erroneous conclusion that such officials do not participate substantially in the contract could occur notwithstanding the fact that some of these officials may devote large portions of their time as Government employees to making important determinations and decisions regarding substantive elements of the contract, are privy to inside information as to the Government's decisionmaking processes, and frequently interact with contractor officials in monitoring contract performance.

It should be noted that the [Division's] focus on the dollar value of an employee's participation in a matter rather than the nature of that participation can also result in an incorrect conclusion that an employee participated substantially in a matter even when his participation was purely administrative. For example, even if an employee were responsible for processing all $1.3 billion in FY 1998 payments for the contract, his action might not constitute substantial participation. *See* OGE Informal Advisory Letter 86 x 15.

IMPLICATION FOR 18 U.S.C. § 208

The use of a dollar-based method of determining whether an employee is "substantially" involved in a particular matter also may impact [the agency's] interpretation of the criminal statute concerning acts affecting a personal financial interest, 18 U.S.C. § 208. Section 208 bars an employee from participating personally and substantially in a particular matter in which the employee knows that he or she has a financial interest. 18 U.S.C. § 208(a).

For purposes of 18 U.S.C. § 208, financial interests of persons with whom the employee is negotiating for employment are attributed to the employee. *Id.*

The [Division's] interpretation of the term "substantial" for purposes of section 207 is relevant to its interpretation of section 208 because the term has essentially the same meaning in both statutes. *See, e.g.*, 5 C.F.R. §§ 2637.201(d) and 2640.103(a)(2). If the [Division] determines that an employee's participation in connection with a particular matter involving specific parties is not substantial for purposes of 18 U.S.C. § 207, it is difficult to see how the same participation could be interpreted to be substantial for the purposes of 18 U.S.C. § 208. The logical result of the dollar-based method of analysis employed in the opinion is that the [agency] manager in question, whose primary job responsibilities concern the fulfillment of an aspect of the [Contract] and regularly require the manager to deal with contractor employees, would be free to negotiate for employment with one of the contractors without recusing himself from oversight of that contractor's performance under the [Contract]. Similarly, if the dollar-based method of analysis were followed, the [agency] manager also would be able to continue to work on the [Contract] without violating section 208 even if he owned contractor stock, worked as an employee of the contractor, or served as an officer or director of the contractor.

The opinion appears to stop short of this result, recommending that the manager recuse himself while negotiating with the contractor "to avoid possible violations of 18 U.S.C. § 208." This recommendation that the employee recuse himself, which we believe to be correct, is inconsistent with the opinion's earlier finding that the employee's involvement in the [Contract] matter is not substantial. It serves, however, to underscore the deficiencies of the line of reasoning employed in the opinion's section 207 analysis.

INTERPRETATION OF 18 U.S.C. § 207(A)(2)

As noted earlier, another troubling aspect of [the opinion] is its analysis of the "official responsibility" bar that is described in 18 U.S.C. § 207(a)(2). The opinion concludes that the manager did not have official responsibility for the [Contract] because "none of the [employees under his supervision] have substantial [Contract] duties." The term "substantial" does not appear in 18 U.S.C. § 207(a)(2). That restriction bars any former officer or employee from knowingly making, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, or court of the United States on behalf of any other person in connection with a particular matter in which the United States is a party or has a direct and substantial interest which the former employee knows or reasonably should know was actually pending under his or her official responsibility

during his or her last year of Government service, and which involved a specific party or parties at the time it was so pending. Adding such a substantiality requirement creates the risk of understating the scope of 18 U.S.C. § 207(a)(2) and thereby placing former employees at risk.

To avoid this result, you should instruct the [Division] that, when rendering advice concerning section 207(a)(2), current and former employees should be advised that, for the restriction to apply, a particular matter involving specific parties need only have been "actually pending" under the employee's official responsibility during the indicated time period. This would require that the matter in fact have been referred to or under consideration by persons within the employee's area of responsibility. 5 C.F.R. § 2637.202(c). Once the matter is "actually pending," it remains so until a specific action or event terminates this status. OGE Informal Advisory Letter 94 x 13. Even if no action at all is taken by the subordinates during the final year of the supervisor's service, the matter remains pending. OGE Informal Advisory Letter 85 x 6.

We trust that you will take appropriate steps to ensure that the [Division's] future post-employment opinions are consistent with OGE guidance, and to remedy any misconceptions that previously issued opinions may have created. It is extremely important that employees receive accurate advice about matters as significant as the provisions in title 18 of the U.S. Code. Should you have any questions concerning the issues discussed in this letter, please contact my Office.

Sincerely,

Stephen D. Potts
Director