

Office of Government Ethics

81 x 24 -- 07/23/81

Letter to a Government Officer dated July 23, 1981

You have asked this Office for an opinion on the impact of the Federal conflict of interest statutes upon a prospective course of action which you are interested in pursuing outside your Government employment. We have undertaken a review of this matter in light of the information which you have provided for our consideration, as well as additional information developed in conversations with representatives of the Office of General Counsel [of your agency].

You have provided the following information:

- (1) You are currently serving a three year term as a member of [a Federal Board which governs an agency].
- (2) You are a principal in a small consulting firm which handles matters totally unrelated to your responsibilities at [your agency].
- (3) You desire personally to contact and represent your firm in negotiations on a contract matter before [a] Department [not related in any way to your agency] (hereinafter "the Department").

We will first review the three conflict statutes which bear on your situation. Chapter 11 of Title 18 of the United States Code contains criminal restraints which you as a Federal official must be aware of in your private business dealing in matters in which the United States Government has a direct and substantial interest. More specifically, 18 U.S.C. § 203 is essentially a prohibition against an officer or employee of the executive branch receiving compensation from a private source for working on a particular matter in which the Government has an interest and which is pending before any Department or agency.¹

18 U.S.C. § 205 is similar to section 203 and overlaps it in some respects. Section 205 prohibits an officer or employee of the executive branch from acting as agent or attorney for anyone with or without compensation before any Department or agency in any particular matter in which the United States is a party or

has a direct and substantial interest.² Included in "particular matters" are applications and contracts. Clearly, this part of the statute standing alone would constitute a bar to your personal involvement in any negotiations on behalf of a private firm before the Department. However, both sections 203 and 205 provide an exemption of limited application to the above mentioned restrictions in the case of special Government employees, an employment status which is defined in 18 U.S.C. § 202. In short, this exception precludes a special Government employee from representing private firms as an agent or attorney only in a matter involving a specific party or parties (i) in which he has participated personally and substantially in his Government capacity, or (ii) which is before his Department or agency if he has served therein more than 60 days in the past year.³

From the above, we determine that the critical issue in your case is whether or not you and the other members of [your] Board are to be considered special Government employees under 18 U.S.C. § 202.

In two separate internal memoranda, the Office of General Counsel of [your agency] has concluded that it is "doubtful" whether or not the [members of this Board] are special Government employees. These memoranda seem to rely on the following factors as being dispositive of the issue:

- (A) the definitional language of 18 U.S.C. § 202 does not exactly describe a member of [this] Board; and
- (B) the payment of an annual salary to the [members of this] Board.⁴

For the reasons set forth below, we are of the opinion that the [members of this] Board are special Government employees and therefore do fall within the exceptions enumerated under sections 203 and 205 of Title 18.⁵

18 U.S.C. § 202 defines a special Government employee as:

an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to

exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. . . .

Guidelines for obtaining and utilizing the services of special Government employees are found in the Federal Personnel Manual at Chapter 735, Appendix C.⁶

The following rules are set forth to assist each agency in making the necessary determinations:

- (a) At the time of the original appointment, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate.
- (b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.
- (c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee.

The members of [this] Board are appointed by the President by and with the advice and consent of the Senate.⁷

The enabling legislation, establishing the Board, is silent as to the actual status of the [members] and there is little in the legislative history surrounding the establishment of the [agency] which suggests that Congress focused on the status of the [members] in any determinative way.⁸ However, there is some

insight to be gained from looking at the effect that 18 U.S.C. § 202 has upon the Government officers or employees whose services are intermittent. The major purpose of this 1963 legislation was to remedy the failure of the existing conflict of interest statutes to deal with the special problems of intermittent officers and employees of the Government.⁹ The formal act by which one is "retained, designated, appointed, or employed" is of crucial importance under section 202. The officer or employee's status as a regular or a special Government employee is determined by the terms of his appointment or retention. That is to say, section 202 defines special Government employee on the basis of whether the employee (officer) was appointed to serve no more than one hundred and thirty days out of any consecutive three hundred and sixty-five days. For purposes of this classification it is immaterial whether he is paid or not paid for his governmental work. The facts and form of the appointment are the critical elements.¹⁰

Under [the applicable provisions of the United States Code] the members of the Board are appointed by the President. The agency has advised us that the Board normally meets once a month on call of the Chairman. These meetings usually consist of an afternoon session on one day and a morning session on another day. Special meetings are held occasionally as policy matters dictate and separate committees of the Board meet on an intermittent basis. Since establishment of the Board, experience has shown that none of the [members] has served more than 130 days within a 365 calendar day period. More particularly, you have not served more than 130 days within the prior 365 day period, nor is it contemplated that you will serve more than 130 days during the current 365 day period.

For all of the foregoing reasons, we conclude that for purposes of the conflict statutes Board members are special Government employees.

Having concluded that you should be classified as a special Government employee, we are of the further opinion that you may enter into negotiations with the Department as a principal on behalf of your private consulting firm. You should be aware, however, that under [specific] provisions of [the regulations of this Department], the Department must make a further determination relative to contracting with a business concern which is substantially owned or controlled by a Government employee. We have no jurisdiction over that procurement issue.

A copy of this advisory opinion will be made available both to [your agency] and the Department.

Sincerely,

J. Jackson Walter
Director

1 18 U.S.C. § 203 states:

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another...in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission...shall be fined not more than \$10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

2 18 U.S.C. 205 states in part:

Whoever, being an officer or employee of the United States in the executive...branch of the Government or in any agency of the United States...otherwise than in the proper discharge of his official duties--

....

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil,

military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has direct and substantial interest--

Shall be fined not more than \$10,000 or imprisoned for not more than two years or both.

3 18 U.S.C. 205 states in part:

A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

4 See, e.g., the Office of General Counsel's ([of your agency]) memorandum to file September 14, 1970:

It might be argued from the \$300-a-day salary authorized to each [Board member] (not to exceed 30 or 60 days)([citation omitted]), that a [Board member's] employment does not exceed "one hundred and thirty days" during the year. On the other hand, however, a [board member] is also authorized a salary of \$10,000 a year (emphasis added). [citation omitted]. This suggests an annual salary, presumable pro-rated as such, notwithstanding the additional \$300 per diem. In addition, the per diem allowance is not to be "contrued to limit the number of days of meetings each year to 30 days." Id.

Thus, the [Board members] are not precluded from meeting more than 130 days a year-- only their per diem allowance may not be paid for more than 30 or 60 days.

See also the memorandum of June 24, 1974 from Assistant General Counsel, Legal Affairs Office to General Counsel:

A [Board member] simply does not fit within the language of 18 U.S.C 202 as "an officer...of the executive branch...who is...appointed...to perform...temporary duties..." nor within the sense of the statute in creating that category.

5 By letters dated September 24, 1980 and January 28, 1981, this Office advised the General Counsel of [your agency] that officials such as the [members of this] Board who serve sixty days or less were not subject to the public financial reporting requirements or Title II of the Ethics in Government Act of 1978 (Pub. L. No. 95-521) but are instead subject to the confidential financial reporting requirements of Executive Order 11222.

6 As Attorney General's Opinion of January 31, 1962 to the President set forth some mechanical rules for executive agencies to follow on the application of the conflict of interest laws to intermittent and part-time consultants and advisers, 42 Op. Att'y Gen. 6. After Public Law No. 87-849, 76 stat. 1119, came into force in January 1963, the President rescinded his memorandum of February 9, 1962 and replaced it with a similar memorandum of May 2, 1963 entitled "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 Fed. Reg. 4539.

This second Presidential Memorandum was rescinded by Executive Order 11222, of May 8, 1965, 28 Fed. Reg. 6469, but its provisions were preserved as follows: Those derived from ethical consideration were, in condensed form, included in Executive Order 11222 as Part II. The remaining portion was mandated by the Civil Service commission (OPM) for continuing agency compliance government-wide by inclusion in the Federal Personnel Manual at Chapter 735, Appendix C.

7 The Board was established under the provisions of [citation omitted]. Each [member] receives a salary of \$10,000 a year plus \$300 a day for not more than 30 days of meeting each year and reimbursed for travel and reasonable expenses incurred in attending meetings of the Board. There is no limit on the number of days on which meetings of the Board may

by held.

8 In floor debates, Congressman Udall did express the opinion that the [members of the Board] would be "special Government employees" who were

"expressly permitted to engage in outside employment." [Citation omitted.]

9 H.R. Rep. No. 748, 87th Cong., 1st Sess. 4, 13-1 (1961). S. Rep. No. 2213, 87th Cong., 2d Sess. 6-7 (1962).

10 See Bayless Manning, Federal Conflict of Interest Law § 1A-3.2.b (1964).