

Office of Government Ethics

81 x 33 -- 11/06/81

Letter to a Private Attorney dated November 6, 1981

This is in response to your October 14, 1981 request for an opinion on the impact of the post employment restrictions of 18 U.S.C. § 207, as amended by the Ethics in Government Act of 1978, upon the proposed appearance of [a former Senior Employee]¹ as an expert witness in a proceeding currently pending before the Federal Energy Regulatory Commission (FERC). The purpose of this proceeding is to establish an appropriate tariff for the Trans-Alaska Pipe Line System (TAPS).

Your request states that the protestants in this proceeding, which include the State of Alaska and the U.S. Department of Justice's Anti-Trust Division, have opposed tariffs filed in 1977 by the oil companies who constructed the line. These oil companies, the respondents in the proceeding, are Amerada, Hess, BP, ARCO, Sohio, Exxon, Mobil, Union and Phillips.

You relate that one of the protestants' assertions is that the final cost of construction was excessive due to mismanagement and imprudence in the construction of the TAPS line. The State of Alaska has retained a number of consultants who have investigated and identified specific sums that you argue should be deducted from the tariff's rate base. The State of Alaska would like to retain [this former employee] to testify as an expert witness regarding the validity of the investigations and methodologies employed by the other consultants which the State has retained.

You suggest that in 1978, [the former employee's agency (not FERC)] issued a report [about TAPS]. The State of Alaska's witnesses in a few instances may cite [this] report in their written testimony to challenge materials cited which are internal documents of the respondent companies.

You state that [the former employee] will be asked to analyze on the witness stand the methodologies of the consultants used by the State of Alaska totally independent of [his former agency's] report or any work performed by [the agency] in connection with it. [The former employee's] specific testimony will depend entirely on his overall expertise in administering complex investigations and will not be related to [his former agency's]

own inquiry into the TAPS project.

For the reasons set forth below, we conclude that [the individual], as a former Senior Employee of the executive branch, would not be precluded from appearing and testifying as an expert witness in the FERC proceeding.

It is clear from the legislative history surrounding the enactment of the provisions of 18 U.S.C. § 207(h) that the testimony under oath exception to the bars created by 18 U.S.C. § 207(a), (b), and (c), prohibiting certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliation, does not apply to testimony given for which expert opinion compensation is received.² Office of Government Ethics regulations implementing 18 U.S.C. § 207(h) state in part that: ". . . This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. § 207(a), (b), or (c) to testify on behalf of another as an expert witness" ³

We are of the opinion that [the former employee's] contemplated testimony as you outline it in your letter would not be otherwise barred by the provisions of 18 U.S.C. § 207(a), (b), or (c). You have described [the former employee's] role as being limited to giving testimony that analyzes investigative methodologies totally independent of a particular investigation or report [of his former agency]. As such, his testimony would not fall within the proscriptions of 18 U.S.C. § 207(a) or (b) which are based on the former Government employee's prior participation in a "particular matter" involving "specific parties."⁴ Nor would his testimony be barred by the provisions of 18 U.S.C. § 207(c) because of his Senior Employee status. The one-year restriction on a former Senior Employee's transaction in a particular matter, regardless of prior involvement, is limited to appearances, communications or representations with one's former agency.⁵ The Federal Energy Regulatory Commission is not part of [this individual's] former agency.

Our opinion in this matter is based solely on the facts as represented to us in your October 14, 1981 letter. Without being able to foresee precisely how the issue will be raised, we would caution that if [the former employee] were personally and substantially involved in the development of [his former agency's] Report [on TAPS] or activities involving the Report

fell within his "official responsibility" within one year of his retirement, the bans imposed by 18 U.S.C. § 207(a), § 207(b)(i) and § 207(b)(ii) would prohibit him from giving direct testimony on behalf of the State of Alaska on the Report. Such testimony would violate the provisions of 5 C.F.R. § 737.19 unless it were established that his testimony fell within the exception established by 5 C.F.R. § 737.19(b)(2). Under this exception, it would have to be established that another expert in the field cannot practically be obtained, that it is impracticable for the facts or opinions on the same subject to be obtained by other means, and that [the former employee's] testimony is required in the interest of justice. [The former employee] could, however, give direct testimony on the Report if called as a witness by representatives of the Antitrust Division, Department of Justice, because he would be testifying on behalf of the United States.

This opinion is for your guidance as you prepare for the FERC proceeding, but your request does not meet the criteria of 5 C.F.R. § 738.301, and therefore is not a formal advisory opinion.

Sincerely,

J. Jackson Walter
Director

1 Pursuant to 18 U.S.C. § 207(d)(1)(A) [the individual] is a former Senior Employee subject to the one year "cooling off" provisions of 5 C.F.R. § 737.11.

2 S. Doc. No. 127, 95th Cong., 2d Sess. 76(1978) -- Conference adopted the House provision excepting from 18 U.S.C. § 207(a), (b), and (c) testimony under oath and as modified the exception in the House amendment for statements, based on the former official's special knowledge, for which no compensation is received

3 See 5 C.F.R. § 737.19(b)

4 See 5 C.F.R. § 737.5(a)

5 See 5 C.F.R. § 737.11