Office of Government Ethics
82 x 19 -- 12/09/82

Letter to an Agency Official dated December 9, 1982

By letter dated January 28, 1982, you informed this Office of an ongoing investigation being conducted by your office into a matter involving an attorney in [your agency] who is acting as attorney of record for two former [agency] employees in civil actions filed in [a certain] United States District Court. You indicated that the attorney has asserted that he is acting as "Council Attorney" for [a] Local Chapter of [a specific employee union] and is authorized to represent members of the bargaining unit, including discharged employees seeking reinstatement. You requested an opinion from our Office regarding the applicability of 18 U.S.C. § 205 in these circumstances.

Through subsequent communications with your office, we have determined that two Petitions for Review have in fact been filed in the Federal District Court by the attorney in question. One petition deals with the case of a GS-9, who was separated from [your agency] for "inefficiency" and the other is a case of a GS-5, who was separated for "absence without leave." In each instance, the pleadings filed with the Court allege that the petitioner has exhausted all administrative remedies including appeals to the Merit Systems Protection Board (MSPB).

As a general policy, this Office will not answer questions on particular situations which are the subject matter of pending litigation. Nevertheless, in light of the special circumstances and unsettled questions you have presented, we have decided to discuss the two issues raised in your letter. The first involves the interpretation of 18 U.S.C. § 205(2) and the exceptions thereunder; and the second, the applicability of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 701 et seq.

In regard to the first issue, 18 U.S.C. § 205 states in relevant part:

> Whoever, being an officer or employee of the United States in the executive . . . branch of the Government . . . (2) acts as agent or attorney for anyone before any . . . court . . . 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 a direct and substantial interest --
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> . . . .
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> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

The statute goes on to recite by way of exemption:

> Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

The phrase "disciplinary, loyalty or other personnel administration proceedings" received only perfunctory attention in the course of the legislative history of section 205. See H.R. Rep. No. 748, 97th Congress, 1st. Sess. 10, 22 (1961); Sen. Rep. No. 2213, 97th Cong., 2d Sess., 11 (1962). More particularly, there is nothing in that history to indicate whether or not proceedings in court are embraced by the words "personnel administration proceedings." However, in Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977), the Court read those words to mean personnel administrative proceedings and thus to exclude matters before a court. The Court gave no consideration to the possibility that personnel administration may be properly read to describe the subject matter of certain proceedings wherever litigated rather than simply proceedings litigated before executive adjudicators.

The Court in Bachman explicitly disagreed with a November 20, 1975, memorandum of the Attorney General to the Heads of the Departments and Agencies of the executive branch expressing the view that the section 205 exemption permitted a Federal attorney's representation of a Government employee in an equal employment opportunity proceeding even after it reached the judicial level. It should be noted, incidentally, that a Federal attorney does not have the power to decide for himself whether he

may represent another person in a personnel administration matter. His superior or superiors must decide that such representation is "not inconsistent with the faithful performance of his duties" in the agency he serves. See 18 U.S.C. § 205.

There has been no judicial decision since Bachman that dealt with the instant question. However, the Federal Legal Council, which was created by Executive Order 12146 of July 18, 1979 (44 Fed. Reg. 42657, July 20, 1979) has considered it. In a report of September 30, 1980, the Council found that the decision reached a result inimical to the continued vigorous participation by Federal attorneys in pro bono activities and that the holding was not necessary to decide the issues before the Bachman Court. By memorandum dated January 5, 1981, then Attorney General Benjamin R. Civiletti advised all executive branch General Counsels that on the basis of those findings the Federal Legal Council had adopted the following resolutions:

1. Federal agencies are urged to adopt policies affirmatively endorsing and encouraging pro bono activities on the part of their attorneys.

2. The Council believes that the holding of the District Court in Bachman v. Pertschuk should be narrowly interpreted so as to limit the holding to its facts.

We believe the positions taken by the Attorney General in 1975 and the Attorney General on behalf of the Federal Legal Council in 1981 are reasonable and comport with the thrust of the statute.

In turning to the second issue, that of the impact of the Federal Service Labor-Management Relations Statute ("the Statute") upon the representational activities of the [agency] attorney, we are of the opinion that the Statute does not confer special authority upon the [agency] attorney to engage in what would otherwise be a prohibited activity.

5 U.S.C. § 7102 includes, within protected union activities under the Civil Service Reform Act, the right:

> to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of

> the Government, the Congress, or appropriate authorities.

The right, however, is tempered by the provisions of 5 U.S.C. § 7102(e) which states in relevant part that:

> this chapter does not authorize . . . acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

We have found nothing in the legislative history of the Civil Service Reform Act to change our belief that if an activity of a current Federal employee is prohibited by one of the provisions of Chapter 11 of title 18 of the United States Code, nothing within the provisions of the Labor-Management Relations statute will ameliorate the effects of the prohibition.

In arriving at our decision in this matter, we, of course, should point out that 18 U.S.C. § 205 is not the only consideration. We have not addressed the impact which the provisions of the American Bar Association Code of Professional Responsibility may have on this situation. Nor have we considered the agency standards of conduct regulations which must be followed to ensure that such acts on the part of the employee are consistent with the faithful performance of his duties.

We deferred this response pending coordination with the Department of Justice. In arriving at our conclusion on the 18 U.S.C. § 205 issue we have taken into consideration the arguments made by the Office of Chief Counsel [of your agency] in their letter to us of October 18, 1982. The Office of Legal Counsel, Department of Justice concurs in this opinion.

Sincerely,

David R. Scott
Acting Director