Office of Government Ethics
89 x 8 -- 06/30/89

Letter to an Assistant Chief Counsel dated June 30, 1989

You have asked to be advised regarding the application of 18 U.S.C. § 209(a) to a provision contained in a proposed agreement between [an agency employee] and her former employer.

The proposed agreement relates to [the employee's] two-year leave of absence from [a company] to serve [in a visiting position] with [the agency]. You have indicated that during her leave of absence, [the employee] will receive the standard benefits provided by [the company] for employees on leave of absence. In addition, [the company] has offered an incentive in the form of payments totaling $80,000 for [the employee] to return to [the company] upon the expiration of her temporary assignment with the [agency]. The first $30,000 will be paid upon her completion of 6 months of service after returning to active employment with [the company]; a payment of $25,000 will be made upon completion of 12 months of service; and a final payment of $25,000 will be made upon completion of 18 months of service. You raise no question concerning the continuation of benefits to [the employee] during the period of her leave of absence but ask whether the payments proposed to be made upon her return to [the company] would violate 18 U.S.C. § 209.

By way of background you explain that [the company] originally had proposed payments totaling $80,000 that would be made in three installments: one at the beginning of [the employee's] leave of absence; another at the end of the leave of absence; and the last upon completion of one year of service with [the company] after return from the temporary assignment. As originally proposed, the agreement provided that all such payments would be contingent upon [the employee's] continued employment with [the company] for one year after return from the [agency] assignment. The parties sought advice concerning the propriety of this proposed arrangement and, upon being informed that it was inconsistent with section 209, revised the agreement to provide for all three payments to be made in six month intervals after her return to active service with [the company]. You have indicated that this provision is to be effective only upon approval by the [agency].

Section 209 has four elements. It "prohibits (1) an officer

or employee of the executive branch 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." United States v. Raborn, 575 F.2d 688, 691-92 (9th Cir. 1978). As is the case here, the first three elements are relatively straightforward and the focus of a section 209 inquiry usually is on the fourth element, whether the compensation in question is "for services as an employee of the United States." In many cases the answer depends largely upon the subjective intent of the parties and, in turn, upon the inferences that can reasonably be drawn from all the circumstances surrounding a proposed arrangement.

In [the employee's] case, we have obtained additional information from [the company] concerning its personnel practices. In particular, we have been advised that [the company], on a case-by-case basis, pays "hiring bonuses" in the range of $10,000 to $20,000 to recruit experienced actuaries, but has never offered any such payment as an incentive to one of its employees to rejoin [the company] following a leave of absence. A [company] official described [the employee's] circumstances as unique in that [the company] has never had a "principal" with the firm take a leave of absence to work for [the agency]. Her experience with [the agency] is expected to be of value to the firm upon her return.

Given the facts we have reviewed for purposes of determining the intent element, we are unable and unwilling to advise that [the employee's] acceptance of the payments proposed under even the revised agreement would not violate section 209. The incentive payments proposed are unprecedented in terms of [the company's] personnel policies. The structure of the payments originally proposed, with the initial payment timed to coincide with the beginning of her services as a visiting [job title] and the second upon return to but before actual service with [the company], suggests an intent to supplement her Government salary. Regardless of when the payments are made, they would in the aggregate replace approximately 80% of the salary reduction she will suffer over the two years she intends to be employed [in] a visiting [position]. Restructuring the payments to begin following separation from service with [the agency] does not necessarily cure the problem. U.S. v. Boeing Co., 845 F.2d 476 (4th Cir. 1988), cert. granted April 3, 1989. In the face of a company policy of paying hiring bonuses of no more than $20,000 to recruit [members of the employee's specific profession] with

[employee's] experience, payments aggregating four times that amount to assure the return of [a member of the employee's profession] already on board appears suspect.

We recognize that the revised agreement provides for payments to be made following six-month periods of actual service upon return to [the company]. In cases of individuals returning to private employment following a leave of absence for Government employment, the Office of Legal Counsel has recognized that a company may pay an employee a larger salary upon his return. In a May 21, 1979, letter to the Counsel to the President, Deputy Assistant Attorney General Hammond opined that an increase that takes into account the individual's federal experience in a manner similar to that in which experience in the company is taken into account in awarding merit increases would not run afoul of section 209. Although we do not have information concerning [the company's] pay policies, the proposed payments cannot be justified by analogy to a salary increase. The fact that the payments would terminate after 18 months contradicts the suggestion that they are justified on the basis of her increased worth to the firm. That, together with the substantial amount of the payments, tends to support the inference that they are intended to replace the salary she forfeited while employed by [the agency].

Under the circumstances, we cannot advise [the employee's] acceptance of the proposed payments would be acceptable under the terms of section 209.

Sincerely,

Frank Q. Nebeker
Director