Office of Government Ethics
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Letter to an Employee dated October 21, 1980

You have written us on April 23, and April 28, 1980, and have had subsequent conversations with this Office and representatives of the Office of General Counsel, [of your agency], regarding your desire for this Office to reconsider the conclusions reached in our memorandum of February 4, 1980, to the Ethics Counsel, [of your agency], on the subject of certain proposed post-employment activities on your part.

As you are aware, our February 4th memorandum was premised solely upon the facts which accompanied your initial letter of October 29, 1979, to [the ethics counsel of your agency].**1**

We have undertaken a review of this matter in light of the additional information which you have provided for our consideration, as well as additional facts developed by the Office of General Counsel, [of your agency].

Facts

You are an attorney currently on a leave of absence from your grade GS-15 position, [as counsel for Program X], Office of General Counsel, [of your agency]. Your duties and responsibilities include advising the Director [of one of the offices within the agency] on legal matters involving [a particular program including Program X (statutory citation to program omitted)] and performing an annual review of all contracts [for particular services]. [The types of services] and rates are amended annually and, from time to time, specific clauses are amended or new clauses added. [Counsel for Program X] participates both in the drafting and negotiating leading to new or amended clauses. Although the specific disputes or changes in circumstances involve specific [contractors], normally the resulting new or amended clauses are incorporated into all other contracts.

Most of the contracts in question were initially executed in 1960. [The agency] advises that there are currently approximately one hundred (100) [of the contracts in question]. These [contracts] fall into three major categories. While the role of the [Counsel to Program X] may vary somewhat from [contract to contract], the

overall level of involvement is similar. Each [contract] is reviewed by the [Counsel to Program X] as to form and legality prior to execution by the [agency's] contracting officer. The [Counsel to Program X] also engages in negotiations with carriers during the term of a contract if it becomes necessary to amend the contract due to changes in law, regulation or other events.

On October 29, 1979, you inquired of the Office of General Counsel, [of your agency], as to what, if any, problems you might encounter if you elected to reenter the private practice of law and to have as clients some of the [contractors] that presently participate in the [particular program]. By letter dated January 7, 1980, the Ethics Counsel, [of your agency], advised that you would be barred by 18 U.S.C. § 207(a) from representing anyone other than the Government on matters involving legal opinions which you rendered and the amendments and new clauses added annually to the contract because it appears that you would have been involved "personally and substantially" in those matters while an employee. You were further advised that you would not be barred from representation in matters involving the contracts generally because your review of them was confined to the amendments and new clauses.

That opinion was submitted to this Office for review. On February 4, 1980, by memorandum, we advised [your agency's] ethics counsel that, as to those contracts you reviewed for the purpose of amendment or to render legal advice concerning the administration thereof, you would be barred from subsequent representation of the carriers as to the contract, in toto, and not just as to those amendatory clauses in which you had participated either in the drafting or approval.

On March 26, 1980, the Office of Legal Counsel, Department of Justice advised you that our legal opinion was correct in its conclusion that specific contracts cannot be divided into clauses in order to mitigate the impact of the post-employment restrictions of 18 U.S.C. § 207.

On April 23, 1980, you wrote to this Office seeking reconsideration of the earlier opinion. You based your request upon the premises that (1) your review of the contracts for legal sufficiency was pro forma and did not deal with substantive issues, and (2) your involvement with specific contract clauses was peripheral and thus could not support a conclusion that your involvement was "personal and substantial". Further, you contended that contracts amended subsequent to your employment fall outside of

the bar of section 207(a) because each year the contracts are significantly different.

Issues

1. Whether your involvement in drafting or amending specific clauses or review of the contracts for legal sufficiency, or rendering advice after execution of the contracts constituted substantial participation so as to bar you under 18 U.S.C. § 207(a)?

2. Whether such bar would apply to all contracts in which generic clauses prepared by you were used, even though many such contracts were actually executed after your responsibility for drafting such clauses ceased?

Discussion

As to the first issue, our February 4, 1980 memorandum concluded, as to those contracts which you reviewed for purposes of amending as well as those which you reviewed for legal sufficiency, the provisions of 18 U.S.C. § 207(a), as amended, prevent you from representing certain carriers who participate in the [particular program in question]. We reaffirm that opinion here.

The contract itself constitutes the particular matter involving specific parties to which the prohibited subsequent representation applies. This Office has previously held that the rendering of advice concerning the validity or meaning of a standard term or clause embodied in a specific contract is an aspect of the particular matter and not merely an ancillary matter under 5 C.F.R. § 737.5(d)(2). Moreover, passing upon the legality of a particular contract by an attorney does not constitute involvement with an ancillary aspect of the matter, but rather is involvement which cannot reasonably be separated from the substantive merits of the particular matter. As noted in 5 C.F.R. § 737.5(d)(3), if an employee reviews a matter and passes on it, his or her participation may be regarded as "substantial" even if he or she claims merely to have engaged in inaction. Further, we must emphasize that to fractionalize a specific contract and to say that a former employee is barred as to representation on a particular clause or amendment but not as to other clauses or provisions contained therein is not consistent with the law or common sense.

As to the second issue, we are of the opinion that contracts

which were amended or reviewed for legal sufficiency subsequent to the termination of your responsibilities fall outside of the bar of section 207(a) even though these contracts contain certain generic clauses, the initial drafts of which you prepared.

Some question has arisen as to whether the contracts [in question] are indefinitely continuing contracts or are a series of contracts each for a specific term. [The agency] has informed us, and we have no reason to disagree, that generally the contracts with which you were involved are for a definite term and must be renewed annually. The very heart of all such contracts are the [services] rendered and the cost of providing such [services]. Under the current [contracts], the [monies] paid to the contractor are usually adjusted each year and often the [offered services] also change. [Citation to law omitted]. To the extent that the contracts change each year relative to rates and employee benefits, we interpret the effect of such changes as constituting or creating a new "particular matter" or contract.

The Department of Justice letter of March 26, 1980 referred to above suggested that you again contact this Office to further amplify and explain your role in preparing generic contract clauses, as opposed to preparing specific clauses contained in specific contracts. We have reviewed the issue in light of your further explanation.

In your explanation you argued that the applicability of the Federal Procurement Regulations to the [these contracts] was an issue initially involving only [one company's] contracts. Ultimately, however, the clause reflecting such applicability was inserted into every contract.

To the extent that such a clause is inserted into a contract which did not come within your "administrative review," we feel the matter is analogous to Example 5 following the discussion of what constitutes a "particular matter involving a specific party or parties" in 5 C.F.R. § 737.5(c)(1), and hold that such a contract would not constitute the same "particular matter involving a specific party or parties" for the purpose of triggering the bar of 18 U.S.C. § 207(a).

In summary, it is our opinion that any contracts, regardless of their effective dates, which you reviewed prior to termination of your employment would be subject to the restrictions imposed by 18 U.S.C § 207(a). However, any contracts which were modified as to

rate structure or benefits provided, subsequent to the date of your termination as contract counsel, would not be subject to the restrictions of section 207(a) even though they contain certain generic clauses with which you may have been substantially involved as draftsman or otherwise while serving in the capacity as [the agency's Counsel for Program X].

This response constitutes an advisory opinion concerning the application of a general rule of law stated in 18 U.S.C. § 207 to the specific factual situation set forth in your letter request.

Sincerely,
J. Jackson Walter
Director

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1 Our February 4th memorandum specifically pointed out that the exact extent of your involvement in any particular contract was not clear from the documantation provided.