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Letter to a Former Employee
dated December 13, 2007

This is in response to your letter dated December 4, 2007. You indicate that you are a newly-retired Administrative Law Judge for [an agency]. You have requested that the Office of Government Ethics (OGE) clarify whether the term "rate of basic pay" includes locality-based pay adjustments when determining whether an employee is a senior employee under the criminal post-employment statute's coverage at 18 U.S.C. § 207(c).

At the outset, it should be noted that agencies have the primary responsibility for providing advice to employees about post-Government employment restrictions. As this advice is very fact specific, the agency is in the best position to ascertain the facts. Because you have asked OGE to provide advice on the very narrow question of whether or not the term "rate of basic pay" for purposes of applying 18 U.S.C. § 207(c) includes locality adjustments, we offer the following response.

The post-employment provision at 18 U.S.C. § 207(c) applies special restrictions to former senior employees, who are defined, *inter alia*, at section 207(c)(2)(A)(ii) as persons employed in a position "for which the rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay payable for Level II of the Executive Schedule", which is \$145,320 for calendar year 2007. Your inquiry seeks clarification of whether "rate of basic pay" includes locality pay.

The law that established locality pay in the Federal Government provides that locality pay is deemed to be part of basic pay only for specifically enumerated purposes (unrelated to 18 U.S.C. § 207), and for other purposes expressly provided by law or as determined by the Office of Personnel Management by regulation. 5 U.S.C. § 5304(c)(2)(A). Nothing in any other law or the Office of Personnel Management regulation expressly provides that locality pay is considered part of basic pay for purposes of 18 U.S.C. § 207(c). Therefore, we have concluded that

locality pay is excluded from an employee's rate of pay for purposes of determining coverage by 18 U.S.C. § 207(c).

Although you have provided information about your salary and the basic rate of pay for your position, OGE cannot confirm the specific salary information provided and, therefore, cannot provide you with a specific determination as to whether you are subject to the post-employment restrictions triggered by the application of 18 U.S.C. § 207(c). In addition, other provisions of section 207, such as section 207(a), could affect your plans to represent others before the [agency]. We strongly encourage you to seek specific post-employment advice from your designated agency ethics official at the [agency], who is in a better position to apply the specific facts related to your prior employment to the conflict of interest laws.

In closing, we caution you that the criminal post-employment statute is complex and very fact specific. Therefore, we strongly suggest that you contact and work closely with your agency ethics counselor to ensure your compliance with all applicable post-employment restrictions. I hope you have found this information to be of assistance.

Sincerely,

Robert I. Cusick
Director