

Office of Government Ethics

89 x 3 -- 04/13/89

Letter to an Ethics Official dated April 13, 1989

Your letter of December 5, 1988, to [an attorney] of this Office requested our opinion on legal issues relating to potential violations of 18 U.S.C. § 207 by former [agency] employees. Specifically, you asked for guidance on the issue or whether affidavits which these employees submitted to [the agency] could be viewed as representations on behalf of "any other person," as proscribed by section 207, or whether they fit the exception for representations made on behalf of the United States. Based solely on the information which you have provided, it appears that the representations or communications did not violate section 207, as they were made on behalf of the United States. Accordingly, we do not reach the other issue which you raised concerning when the "particular matter involving specific parties" may first have existed.

Your letter and enclosures indicate that three former [agency] employees were involved in a quality assurance review at [a licensee] in 1986; that an issue arose as to the truth of certain statements made in a letter to [the agency] by [an individual], [who was at that time the] manager of [the licensee], regarding quality assurance at [the licensee]; that the three former [agency] employees executed affidavits concerning this issue in November 1987, after leaving [the agency] and going to work for [the licensee's] contractors; and that these affidavits were submitted by [the licensee] to [the agency] in connection with an investigation into the truthfulness of assertions in [the manager's] letter.

Your letter acknowledges that these affidavits were submitted on behalf of [the licensee], an entity of the Federal Government, but you asked whether they might still be considered representations on behalf of [the licensee's] contractors for which the former [agency] employees worked, or on behalf of "any other person." From the material which you have given to us, we understand that the three affidavits were executed virtually contemporaneously and provided to [the licensee], which then submitted them together to [the agency] and to the Department of Justice. The affidavits are in the nature of statements of witnesses called by [the licensee] offering both factual

information and personal opinions arising out of the former [agency] employees' involvement in the matters at issue. Based solely on these circumstances, and absent additional facts which your further investigation might reveal, it appears that the affidavits were not representations or communications on behalf of [the licensee's] contractors or "any other person," but instead on behalf of [the licensee], an agency of the United States, and therefore not proscribed by section 207 of Title 18, U.S. Code.

Your letter also asked how a determination that the affidavits were submitted on behalf of [the licensee] could be reconciled with OGE's informal advisory letter 86 x 1 of January 22, 1986. In that letter, this Office found that [the licensee] is a Government agency, and that, therefore, representations by [the licensee's] employee within the scope of his official duties and in [the licensee's] behalf constituted representations on behalf of the United States. The opinion did distinguish between employees of [the licensee] and of [the licensee's] contractors, but only for the purpose of isolating the issue, which was whether [the licensee] is a Government agency. While we noted that a former employee in the private sector would be subject to section 207 restrictions, we did not have occasion in the opinion to determine under what circumstances a nonemployee of [the licensee] might still make representations on behalf of [the licensee] and the United States, within the meaning of the section 207 exception. We did not hold that representations by employees of [the licensee's] contractors could never be made on behalf of [the licensee]. Indeed, the implementing regulations for section 207 specifically exempt actions on behalf of a Government corporation such as [the licensee], without regard to whether those actions are undertaken by employees of that corporation (5 C.F.R. § 737.23(b)).

Sincerely,

Frank Q. Nebeker
Director