

Office of Government Ethics

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Letter to a Private Attorney dated January 6, 1988

This is in response to your letter of December 21, 1987, requesting this Office's opinion on the applicability of 18 U.S.C. § 207 to [your client's] proposed contacts with representatives of various executive branch agencies on matters involving [a specific type of] testing. After reviewing the facts you have presented, we have concluded that [your client's] proposed activities fall outside the scope of the four post-employment restrictions of 18 U.S.C. § 207. Our analysis of [your client's] proposed activities under the statutory post-employment restrictions follows.

According to your letter, [your client] is the Chief Executive Officer of [Company A], which, through its subsidiary, [Company B], provides [a specific type of] testing services to hospitals, corporations and other organizations. You indicate that approximately 15% of [Company B's] business involves [such] testing in the workplace. To further develop this market, [Company B] intends to target as potential sources of business Fortune 500 corporations and Government agencies that are adopting [such] testing programs.

Before joining [Company A], [your client] served from July 1981 to January 2, 1987 as [an advisor to an agency head for a specific policy area], a Senior Employee position under 18 U.S.C. § 207(d)(1). In that capacity, he was a member of the [staff of a particular office] within the [agency].

As outlined in section 2 of Executive Order [citation deleted], the responsibilities of the Director of the [Office] include "assisting the [agency head] in formulating policy for, and in coordinating and overseeing, international as well as domestic [reference to specific function deleted] functions by all Executive agencies." While serving in that position, [your client] also chaired a multi-agency committee which was instrumental in the issuance of Executive Order [citation deleted], which requires [certain categories of Government employees] to submit to [these] tests. Under [the Executive Order], the responsibility for establishing a testing program, including a determination as to the criteria for such testing,

lies with the head of each agency. Section 4 of the Order authorizes the [head of a specific executive branch Department] to promulgate scientific and technical guidelines for [these] testing programs, which agencies shall then follow in conducting their testing programs.

Although [your client] participated in general policy issues involving [the testing program], you explain that neither [your client] nor the committee played an operational role with respect to [the] testing. Consequently, [your client] was not involved in establishing criteria for selecting [organizations to evaluate the tests] or on any contracts with private companies for [the] testing services. The Executive Order places such responsibilities in the hands of the agencies.

Since [your client] is a former Senior Employee under 18 U.S.C. § 207, we must evaluate his proposed activities under the statutory post-employment restrictions applicable to all former executive branch employees and the two additional restrictions that apply only to Senior Employees. The following is a summary of those provisions.

The first post-employment restriction is the lifetime bar of 18 U.S.C. § 207(a), which prohibits a former employee of the executive branch of the United States Government, of any independent agency of the United States or of the District of Columbia from engaging in representational activities on certain matters in which he or she had participated personally and substantially as a Government employee. For purposes of these post-employment provisions, the restricted representational activities include representing anyone other than the United States or making any oral or written communication on behalf of anyone other than the United States to a Department, agency, court, or employee of the Federal or District of Columbia governments. For this restriction to apply, the former employee must have worked on "a particular matter involving a specific party" while with the Government, and after the conclusion of his or her Government employment, be working on the same matter for someone else.

Under 18 U.S.C. § 207(b)(i), the former employee is also prohibited from engaging in representational activities before any of the entities listed above, but with regard to different matters than those covered by the lifetime bar. Whereas subsection 207(a) restricts activities related to matters in

which the former employee had personally worked, subsection 207(b)(i) applies to any particular matter involving a specific party which was under the individual's official responsibility within the period of one year prior to the termination of such responsibility. This prohibition lasts for two years after the individual's departure from the position.

As a former Senior Employee under 18 U.S.C. § 207(d)(1), [your client] is subject to two additional post-employment restrictions. With regard to particular matters involving specific parties of the type covered by subsections 207(a) and (b)(i), a former Senior Employee is subject to the two-year restriction of 18 U.S.C. § 207(b)(ii). That provision prohibits a former Senior Employee from representing or assisting in representing anyone other than the United States, by personal presence at an appearance before the Government, on matters in which the former employee had personally and substantially participated as a Government employee.

The second provision that applies to Senior Employees only is 18 U.S.C. § 207(c). It imposes a one-year restriction on the former Senior Employee's representations on behalf of anyone to his or her former Department or agency in connection with any particular Government matter which is pending before the individual's former Department or agency or in which that Department or agency has a direct and substantial interest. Unlike the other post-employment provisions, this restriction applies whether or not the individual had any prior involvement in the matter and whether or not the matter is one involving a specific party.

The statute and the interpretative regulations at 5 C.F.R. Part 737 contain guidance on the meaning of the phrase "particular matter involving a specific party or parties." The statute itself contains a list of matters that fall within its scope, including a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest." As further explained at 5 C.F.R. § 737.5(c), the phrase "particular matter involving a specific party or parties" does not include general policy matters:

Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an [isolatable] transaction or related set of transactions

between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

Based on the information you have provided us regarding [your client's] prior involvement in [these] testing matters, it appears that his involvement was on matters of general policy. Such matters of general policy are not considered "particular matters involving specific parties" under the statute, and are not within the scope of 18 U.S.C. § 207(a), § 207(b)(i), or § 207(b)(ii). [Your client's] proposed activities on behalf of [Company A] in obtaining contracts with the Government to provide [these] testing services were subject, however, to 18 U.S.C. § 207(c), which prescribes a one-year cooling off period for matters which are pending before the individual's former Department or agency or in which that Department or agency has a direct and substantial interest. Consequently, [your client] was prohibited from acting as [Company A's] agent or otherwise representing them before his former agency, or making any written or oral communication on their behalf to his former agency, for one year after his departure from [the Senior Employee position]. You have indicated that [your client] observed this restriction, which expired on January 2, 1988.

The information you provided indicates that [your client's] role with the Government, at least in the [specific] testing area, was on policy matters rather than on particular matters involving specific parties, such as contracts or grant applications. If, however, [he] was involved in any particular matter involving a specific party, such as a project grant or contract, and wishes to represent [Company A] or someone else before the Government on such a matter, he would be subject to the other post-employment restrictions discussed above.

Sincerely,

Frank Q. Nebeker
Director