

Office of Government Ethics

91 x 24 -- 07/17/91

Letter to a Former Employee dated July 17, 1991

This responds to your request for a formal advisory opinion under 5 C.F.R. § 2638.301 concerning your activities as a former employee of [an agency]. You have asked whether your representation of [a company] before the [agency] violates the post-employment restrictions applicable to former Federal employees set forth at 18 U.S.C. § 207.

Formal advisory opinions concerning a matter under the jurisdiction of this Office may be issued if the person making the request meets the requirements of 5 C.F.R. § 2638.302 and if the subject matter of the request meets the criteria of 5 C.F.R. § 2638.308. In determining whether the subject matter is an appropriate one for a formal advisory opinion, this Office may consider the precedential value of the question, the potential number of employees throughout the Government who may be affected, the frequency with which the question arises, and the likelihood of inconsistent interpretations among agencies. Based upon these factors, I cannot conclude that the issue you have raised is an appropriate question for a formal advisory opinion. The facts as you have described them raise questions which particularly involve the contracting procedures of the [agency]. Nothing in your request leads me to conclude that the issues you raise would clearly have Government-wide affect. Although this Office will not render a formal advisory opinion on this matter, we will respond in the form of an informal advisory letter.

As described in your letter of June 25, 1991, you signed a [specific] contract in 1983 in your capacity as a purchasing agent for the [agency,] with [Company A] for the delivery of [a product] to the [agency plant]. This contract was later assigned to [Company B] and a number of amendments were made concerning price, quantity, destination of deliveries, and origin of shipments. Although at the time of the assignment you were a consultant to [Company B,] you state that you did not represent [Company B] before the [agency] concerning the assignment or any of the contract amendments. You further state that, until 1991, you did not represent [Company B] before the [agency] on any matter involving this contract. Since 1989, however, you have represented [Company B] on another contract involving the

delivery of [the product] to the [agency].

Sometime in 1990, a dispute developed between [Company B] and the [agency] concerning adjustments in the amount owed [Company B] for the [product] it delivered. This dispute involved [product] quality testing procedures performed under the two contracts described above. Because the quality testing issue arising under the two contracts was essentially the same, [Company B's] dispute with the [agency] was handled as a single matter. In your capacity as Vice President for Sales for [Company B,] you signed and hand-delivered a letter to the [agency] on February 15, 1991 stating that if the dispute between [the agency] and [Company B] could not be settled, [Company B] intended to pursue its rights under the Contract Disputes Act. The letter specifically made reference to the contract which you had signed as [an agency] employee in 1983. In March 1991, you were informed by [an official] for the [agency], that your actions in connection with this matter violated 18 U.S.C. § 207. In particular, [the official] found that you participated personally and substantially as [an agency] employee in the award of [the contract] and that representation in connection with that contract was inconsistent with 18 U.S.C. § 207(a).

As a result of his findings, [the official] advised you to refrain from making any further representational communications to the [agency] concerning [the contract]. He also referred the matter to [the agency's] Inspector General for investigation and suggested that you contact this Office or provide him with additional facts if you disagreed with his conclusions. Subsequently, the matter was referred to the United States Attorney who declined prosecution.

On March 19, 1991, you responded to [the official] asserting that [the contract] was no longer the same particular matter in which you had participated personally and substantially in 1983. In effect, your argument was that the assignment of the contract and the amendments made to it created a new particular matter for purposes of 18 U.S.C. § 207. In a letter dated May 7, 1991, [the official] rejected this argument. He specifically found that the assignment of the contract to [Company B] did not create a new "particular matter" for purposes of 18 U.S.C. § 207. In short, [the official] determined that the particular matter ([product] quality testing procedures under [the contract]) which was the subject of your February 15, 1991 letter to the [agency] was part

of the same particular matter in which you participated as [an agency] employee in 1983.

You now raise the same arguments in your request for an advisory opinion. However, it does not appear that [the official] incorrectly advised you to cease representational activities in connection with [the contract]. While the terms of the contract you signed on behalf of the [agency] in 1983 changed in some respects after termination of your employment with the [agency,] nothing you have stated indicates that the contract became a new particular matter for purposes of 18 U.S.C. § 207.

Regulations implementing Section 207 clearly demonstrate that a particular matter may continue in another form or part. To determine whether two matters are part of the same continuing matter, agencies must consider the extent to which the two matters involve the same basic facts, the same or related parties, related issues, the amount of time elapsed, the same confidential information, and the continuing existence of an important Federal interest. See 5 C.F.R. § 2637.201(c)(4). Under these criteria, it appears that [the official] could properly find that the changes to the contract were not significant enough to create a new particular matter.

Accordingly, I recommend that you follow [the official's] advice and refrain from representing [Company B,] or anyone else, before the [agency] on this contract. Additionally, in any case where you anticipate making a representational communication to the [agency] concerning a matter in which you were involved as [an agency] employee, I suggest you contact [the official] for guidance prior to making the communication.

Sincerely,

Stephen D. Potts
Director