

Office of Government Ethics
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Letter to a Designated Agency Ethics
Official dated June 25, 1990

This is in response to your letter of May 18, 1990, requesting our comment on issues arising out of a recommended decision by the [agency board] in an administrative enforcement hearing conducted pursuant to 18 U.S.C. § 207(j) in the case of [a former employee].

BACKGROUND

Sections 207(a) and (b)(i) of Title 18, United States Code, restrict representational appearances and communications before the Government in particular matters involving specific parties, where the former Government employee either participated personally and substantially in the same matter while an employee, or where such matter was under his official responsibility during the last year of that responsibility. In the first instance, section 207(a) bars such representation at any time, while the bar is only for two years where section 207(b)(i) applies because the matter was merely under the employee's official responsibility. Besides authorizing criminal penalties, section 207(j) provides for administrative enforcement, after opportunity for a hearing.

These statutory provisions are supplemented by regulations which the Office of Government Ethics (OGE) issued, in consultation with the Attorney General, at 5 C.F.R. Part 2637 (formerly Part 737). Additionally, pursuant to a Memorandum of Agreement with the Department of Justice, this Office has authority to provide interpretive assistance and to issue opinions concerning 18 U.S.C. § 207, as indicated in 5 C.F.R. Part 2638 C (formerly Part 738 C).

Under this authority, we can provide informal interpretive advice to you on the issue of law which you raised concerning when a particular matter may exist under section 207. However, we are not authorized to function as an appellate body and therefore cannot review the other issues on which you requested our comment, such as whether the Board's findings of fact were erroneous in concluding that [the former employee] had no

knowledge of prior involvement in the matter, or whether the Board applied the correct burden of proof in reaching its decision. Nor is it necessary to comment on the issue which you raised of whether Government officials have a duty to warn a former employee that certain conduct may violate the post-employment statute, since we do not read the Board's decision as requiring such a warning as a pre-condition to finding a violation of the statute.

FACTUAL SETTING

Having reviewed the Board's determination and recommendation, we understand the facts as follows. [The former employee] left [the agency] on November 23, 1987, as chief of [a specific] division's branch in [a] regional office. During her last few months in that position, she appears to have had under her official responsibility a project involving a [specific contract].¹ The existing [contract] had been entered [into in] 1983 and was to expire [in mid] 1988. While the new project had not reached the solicitation stage when [the former employee] left [the agency], these steps had occurred:

[an agency] form dated October 8, 1987, which identified the existing [contract] and its expiration date, had been referred to [the former employee's] branch and was assigned to one of her specialists;

on October 21, the specialist submitted an advertising authorization which was signed by [the former employee];

a notice was published which required expressions of interest by November 9, and three were received by that date, including one from the incumbent [contractors];

a separate letter to the incumbent [contractors] of October 26, which [the former employee] apparently signed, informed them directly of the upcoming competition and the deadline for expression of interest;

on November 4, the specialist prepared a plan for this [contract] project, signed by [the former employee], which detailed requirements, contract period, potential for competition, use of renewal options and subcontracting plans, and procurement

milestone dates for advertising, issuing the solicitation, evaluating offers, negotiating and auditing the contract; and

an interoffice form from [the former employee] advised the assignment and utilization branch that a market survey was scheduled.

ISSUE

After leaving the agency, [the former employee] was employed by the incumbent contractors in 1988 to assist them in the new contract negotiation. Whether she actually represented them before [the agency], as that term is defined in 5 C.F.R. Part 2637, is not clear, since the record does not detail any contacts other than to discuss her consultant role and to schedule and check status on negotiation meetings and submissions. However, assuming for the sake of argument that she did engage in representational activities, the issue is whether this [contract] had become a particular matter involving specific parties while she was chief of the division's branch at the regional office for [the agency], where the project was being handled.

BOARD FINDINGS

The Board determined that the lease project had not yet become a particular matter when [the former employee] left [the agency], which would preclude a violation of section 207(a) or section 207(b)(i). The basis for that conclusion was its factual finding, which we are not in a position to challenge, that the actual formulation of a solicitation for the new [contract] did not begin until after her departure. The Board noted that although the solicitation was originally scheduled in the acquisition plan for December 4, 1987, it was not issued until March 17, 1988, and the specialist stated that he had not commenced formulation of a request for proposals (REP) before [the former employee] left [the agency], but was still in the midst of the market survey. With this factual finding, the Board turned to example 2 in the regulation at 5 C.F.R. § 2637.201(c)(2) (formerly § 737.5(c)(2)), which indicates that a former employee could represent a party in a procurement matter where the REP to construct a satellite communications system was issued after his departure from Government, even though he had worked for years on the design of that system, because the

contract did not become a particular matter involving specific parties until after his departure. The example notes that the contract became a particular matter when the REP was being formulated, and that specific parties became involved when initial proposals or indications of interest by contractors were first received. Applying this example to the [contract under discussion], the Board, having already made a factual finding that a solicitation was not being formulated when [the former employee] left [the agency], concluded that the [contract] had not yet become a particular matter when she left, notwithstanding that specific parties apparently had been identified by their expressions of interest.

DISCUSSION

We disagree with the Board's conclusion. Its application of the above example to the [contract] is misplaced, in our judgment. The principle which that example and the related regulatory text attempt to illustrate is that a particular matter may exist well before it involves specific parties. Details of the process leading up to formulation of this REP for a satellite communications system are not provided, and it was sufficient for purposes of the example to state that the contract became a particular matter "when the REP was being formulated," without specifying exactly when that may have occurred. The example then states its point that the particular matter would not ordinarily become one involving specific parties until proposals or indications of interest were received.

We believe that under the facts in this case, the numerous specific steps which had been taken in preparation for a solicitation were sufficient to characterize the [contract] as a particular matter prior to [the former employee's] departure, without regard to whether an REP was technically being formulated at that time. The term "particular matter" has a similar meaning throughout the conflict of interest statutes, 18 U.S.C. §§ 203-208. Though not always narrowed by the phrase "involving specific parties," each of these statutes details virtually the same examples of particular matters coming before an agency: a proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter. Examining this term "particular matter" in the context of 18 U.S.C. § 208 (which is not narrowed by the "specific parties" requirement), the Office of Legal Counsel (OLC) at the Department of Justice stated that

the word "particular" was included to indicate that while the term would not apply to an entire area or range of an employee's activities, it would be comprehensive of all discrete and identifiable matters.²

Likewise, in the context of section 207(c), which bars former Senior Employees from representational activities in particular matters (without regard to whether specific parties were involved), OGE's regulation discusses the term "particular matter" at 5 C.F.R. § 2637.204(d) (formerly § 737.11(d)): "Thus such matters as the proposed adoption of a regulation or interpretive ruling, or an agency's determination to undertake a particular project to open such a project to competitive bidding are covered (emphasis added). Not included are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects."

CONCLUSION

The [steps taken toward a contract to secure certain goods and services after a current contract for those items expires] were not a broad technical area, policy issue or conceptual work preliminary to particularization into a specific project; rather, it was an identifiable plan for a specific [contract], and before [the former employee] left [the agency], it had already been the subject of an advertising authorization, a notice and letter advising of the deadline for expression of interest, three responses expressing interest, an acquisition plan which detailed various requirements and procurement milestone dates, and the scheduling of a market survey. Under these circumstances, we cannot escape viewing the project as a particular matter. We also believe that the facts support the existence of specific parties, as three had affirmatively expressed interest in the matter.

As indicated above, we are not in a position to determine whether [the former employee] violated section 207, as issues involving other essential elements of the offense are not matters for decision by this Office, such as factual questions of whether she had knowledge of prior involvement in the project and whether she engaged in post-employment representational activity. We note that the Board's recommended decision found in favor of [the former employee] on the knowledge issue. Our opinion relates

solely to the narrow legal question of whether the new contract was a particular matter prior to [the former employee's] departure from [the agency]. We conclude that it was a particular matter, under the facts which the Board found.

Sincerely,

Donald E. Campbell
Acting Director

1 She also signed some documents relating to the project, though it is not clear whether she "participated personally and substantially," as that phrase is used in section 207(a). However, this question need not be resolved, since her apparent official responsibility over the project would make section 207(b)(i) potentially applicable, which is sufficient to raise the issue before us of when a particular matter exists.

2 See 2 Op. OLC 151, 153 (1978), and OLC memorandum of January 12, 1987, to the Solicitor of the Interior.