

Office of Government Ethics

90 x 10 -- 05/09/90

Letter to a Former Military Officer dated May 9, 1990

This is in response to your inquiry concerning the legality of your serving in various capacities with a corporation. In your letter, dated April 4, 1990, you indicate that you have received an unofficial opinion from the [military] Department [in which you hold retired status] concerning your proposed service [with the corporation], and that they referred you to this Office for an official opinion. Although your request for guidance does not meet the criteria for a formal opinion, 5 C.F.R. § 2638.303, we are providing the guidance below to assist you in considering your situation. See 5 C.F.R. § 2638.305(a)(2). Please note that the advice provided in this letter is general in nature and is not meant to address any particular fact situation. If you require assistance in applying these rules to a particular circumstance relating to a potential conflict of interest, you should contact the Department['s] Designated Agency Ethics Official (DAEO) to request guidance concerning the resolution of that situation.

Your letter states that you are retired [from the uniformed services as an 0-8] with a retirement date of December 31, 1988. You propose to serve with a corporation that would act as an agent for Federal employees, representing them in private personal property loss and damage claims against the United States Government. Your letter also states that you never acted in any official manner with respect to this business venture. Given these facts, you request our opinion as to whether:

(1) it would be appropriate for you to serve as president of a corporation if you do not personally sign any claim forms or personally represent a claimant before a United States Government agency;

(2) it would be appropriate for you to serve in a purely administrative and supervisory position with the corporation;

(3) it would be appropriate for you to work with represented clients (claimants) on the preparation of their claims; and

(4) there would be any restrictions on your activities on or

after January 1, 1991.

These questions are addressed below in relation to the individual statutory restrictions.

The primary restrictions applicable to former Government employees are found at 18 U.S.C. § 207. Section 207(a) imposes a lifetime prohibition on former employees representing or, with the intent to influence, making any oral or written communication on behalf of anyone other than the United States to an agency or court concerning any "particular matter involving a specific party or parties" in which they participated personally and substantially as Government employees. The phrase "particular matter involving a specific party or parties" refers to a judicial or other proceeding or a particular claim. See 5 C.F.R. § 2637.102(a)(7). It is important to remember that the same particular matter may continue in another form or in part. In determining whether two particular matters are the same, you should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important federal interest. 5 C.F.R. § 2637.201(c)(4).

As stated above, section 207(a) imposes a lifetime prohibition, and therefore continues to apply to you after January 1, 1991. This restriction focuses upon representational activities before, as well as communications to, a Federal department, agency or court or any officer or employee thereof. No limitation is placed on the internal administration or assistance rendered in connection with covered matters within a company even if representation concerning the matter would be forbidden. Service as president of the corporation or working with represented clients on an in-house basis is therefore permissible. It is only if you personally represent a claimant before a United States Government agency or personally make any written or oral communication on behalf of your client to the Government (such as the filing of claim forms) with the intent to influence in connection with a covered matter that you will be in violation of section 207(a).

In addition to the lifetime prohibition contained in section 207(a), section 207 also includes a two-year prohibition against a former officer or employee of the Government representing or, with the intent to influence, making any oral or written

communication on behalf of any other person in any "particular matter involving a specific party or parties" that was actually pending under the employee's "official responsibility" within a period of one year prior to the termination of Government service. 18 U.S.C. § 207(b)(i). Note that the two-year term of section 207(b)(i) begins to run at the termination of your official responsibility, which may be a different date from your actual termination of service. The term "official responsibility" is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions." 18 U.S.C. § 202[(b)]. The scope of the term is generally determined by those areas assigned to a position by statute, regulation, Executive Order, job description or delegation of authority. For example, all particular matters under consideration in an agency are under the "official responsibility" of the agency head, and each is also under the official responsibility of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties. 5 C.F.R. § 2637.202(b).

Similar to the lifetime restrictions found in section 207(a), the two-year "official responsibility" restriction of 207(b)(i) prohibits representation and communication with the intent to influence on behalf of another. This restriction therefore does not bar service as president of the corporation or working with represented clients. Only if you personally represent a claimant before a United States Government agency or personally make any written or oral communication (such as the filing of claim forms) with the intent to influence on behalf of your client will this provision potentially apply. In any event, for purposes of section 207 your Government employment ended December 31, 1988; these restrictions will therefore no longer apply to you after December 31, 1990.

Section 207 places additional post-employment restrictions upon employees who are considered Senior Employees. Section 207(c) bars Senior Employees from representing or making any oral or written communication on behalf of anyone other than the United States before the department or agency in which the employee served concerning any particular matter pending before such department or in which such department has a direct and substantial interest. This bar, however, only extends for a

period of one year after the affected employment has ended, and therefore would not apply to you because your Government employment ended more than one year ago. More importantly, section 207(b)(ii) places a two-year restriction prohibiting former Senior Employees from aiding or assisting (in addition to the lifetime prohibition on actually representing) anyone other than the United States concerning any particular matter involving a specific party or parties in which such employee participated personally and substantially as an officer or employee. This restriction does not prevent a former Senior Employee from serving as president of a corporation directly. It does, however, make it illegal for him or her to aid or assist in the representation of clients (claimants) "by personal presence" at any formal or informal appearance before a court, agency, court-martial, or any civil, military or naval commission of the United States, or any officer or employee thereof in certain instances. As with the two-year restriction of section 207(b)(i), this restriction will no longer apply to you in any event after December 31, 1990.

Please note that the restrictions found at 18 U.S.C. §§ 207(b)(ii) and 207(c) apply only to Senior Employees; as a [military rank] (0-8), you would not automatically be considered a Senior Employee for the purposes of these restrictions. 18 U.S.C. § 207(d)(1)(B). However, your position may have been one of significant decision-making or supervisory authority, and therefore designated as a Senior Employee position pursuant to 18 U.S.C. § 207(d)(1)(C). If you are not sure whether your position was so designated, you should contact the DAEO for the Department to ascertain whether these restrictions apply to you.

You also should be aware of certain other restrictions that may affect you. Section 2397b of Title 10, United States Code, prohibits former or retired members of the Armed Forces from accepting compensation from certain private employers. Congress has suspended this statute from having any force or effect for a period of one year by the Ethics Reform Act of 1989. Pub. L. No. 101-194, § 507, 103 Stat. 1716, 1759-60 (1989). If Congress takes no further action this statute will become effective again on December 1, 1990. We note that restrictions imposed under 10 U.S.C. § 2397b are two-year restrictions, and therefore would not apply to you in any event after December 31, 1990. If Congress takes no further action, this restriction would therefore apply to you from December 1 to December 31, 1990.

Section 2397b applies to officials who engaged in procurement activities while serving as officers or employees of the Government. Your letter did not provide any information to allow us to determine whether the statute would apply to you even if the statute were currently being enforced. We therefore recommend that you contact your DAEO to determine the extent to which these restrictions would apply to you.

Another statute that may restrict your proposed service is 18 U.S.C. § 281. This statute prohibits retired military officers from acting as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving the military Department in which they hold a retired status or involving any subject matter with which they were directly connected while in an active duty status, for two years after retiring. This statute does not prevent you from serving in a purely administrative or supervisory capacity with the corporation. It does, however, prohibit you from signing or filing claim forms on behalf of a client, representing a client, or assisting in the representation of any client concerning a claim against the [Department] or involving a subject with which you were directly connected while on active duty. Like 10 U.S.C. § 2397b, this statute has no force or effect for a period of one year from the passage of the Ethics Reform Act of 1989. Pub. L. No. 101-194, § 507, 103 Stat. 1716, 1759-60 (1989). If Congress takes no further action this statute will therefore become effective again on December 1, 1990. If this occurs the restrictions of 18 U.S.C. § 281 will apply to you from December 1 to December 31, 1990.

Another statutory prohibition that may affect you as a retired officer is found at 18 U.S.C. § 203. This statute would prevent you from sharing in any fees earned by the corporation for representing clients to or before the United States Government (except Congress) if those representations were made at a time when you were on active duty or otherwise employed by the Federal Government. For example, this restriction would not prohibit you from receiving a straight salary from the firm, but it would prohibit you from receiving a distribution or bonus that was calculated in any part based upon the corporation's receipt of such fees.¹

You are also subject to the restriction prohibiting retired Regular officers from selling, contracting or negotiating to sell supplies or war materials to an agency of the Department of

Defense, the Coast Guard, the National Oceanic and Atmospheric Administration or the Public Health Service for three years after retirement. 37 U.S.C. § 801. This restriction applies to the sale of goods only, however, and does not apply to the sale of services. We also note that the services provided by the corporation in question are rendered to individuals and not to agencies.

If you require assistance in applying these rules to a particular circumstance relating to a potential conflict of interest, you should contact the Designated Agency Ethics Official (DAEO) [of the military] Department [in which you hold a retired status] to request guidance concerning the resolution of that situation.

We hope that the information provided in this letter is helpful to you.

Sincerely,

Donald E. Campbell
Acting Director

1 Retired officers of the uniformed services are exempt from the restrictions of 18 U.S.C. § 206. This exemption, however, does not apply until after retirement. Section 203 therefore continues to prohibit you from receiving a portion of compensation for representational services in connection with a particular matter claim or contract if those services were undertaken while you were an active-duty officer.