Office of Government Ethics
91 x 2 -- 01/04/91

Letter to a Deputy Agency Ethics Official dated January 4, 1991

This is in reply to your letter of April 18, 1990, in which you requested that we reconsider informal advisory letter [89 x 8] issued by this Office on June 30, 1989, concerning the application of 18 U.S.C. § 209(a) to a proposed agreement between an employee of [your agency] and her former private sector employer. Section 209 prohibits any outside "contribution to or supplementation of salary, as compensation for . . . services as an officer or employee of the executive branch of the United States Government . . . ."

The proposed agreement dated January 23, 1989, (as revised in response to earlier [agency] concerns), provided that [the employee] would receive three bonus payments totaling $80,000 at six-month intervals to commence upon her return to her former employer. Based in part on U.S. v. Boeing Co., 845 F.2d 476 (4th Cir. 1988), OGE advised that it was "unable and unwilling to advise that [the employee's] acceptance of the payments proposed under even the revised agreement would not violate section 209." Since the Boeing case had clearly stated that employment status in the Federal Government at the time of payment was not an element of a section 209 violation, OGE was of the view that a restructuring of the bonus payments to begin following separation from Government service would not necessarily cure the problem that would be created by [the employee's] receipt of the payments. OGE was of the opinion that the circumstances surrounding the payments to [the employee] supported the inference that the payments were intended to replace the salary she would forfeit while employed by [your agency]. As stated in the revised agreement, the arrangement was "subject to the express written approval of the [agency]," and "objectionable provisions will be void to the extent not approved." We understand from a member of your staff, however, that the [agency] does not consider the pertinent provisions to have been voided.

Your request for reconsideration is prompted by the U.S. Supreme Court's recent reversal of the Fourth Circuit's decision in Boeing. Crandon v. U.S., 110 S.Ct. 997, [494 U.S. 152]

(1990). In Crandon, the Supreme Court considered "whether section 209(a) applies to a severance payment that is made to encourage the payee to accept Government employment, but that is made before the payee becomes a Government employee." Id., [110 S.Ct.] at 1001. The case arose in connection with severance payments paid by the Boeing Company to five of its employees prior to, and in anticipation of, their subsequent Federal service. A majority of the Supreme Court determined that "[t]he text of section 209(a) thus indicates that employment status is an element of the offense." Id., at 1002. Writing for a majority of the Court, Justice Stevens focused on the wording of the second paragraph of section 209(a) prohibiting the payment of salary supplements. That paragraph is directed at any person who "pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee . . . ." The wording of that paragraph was cited in support of the majority's conclusion that the first paragraph of section 209(a) requires that the payee must be a Government employee at the time the payment is made by the non-Federal source. The majority concluded that "[d]espite the awkward drafting of the paragraphs, they appear to be coextensive in their coverage of both sides of a single transaction." Id. Further, Justice Stevens added that this reading of the text was supported both by the legislative history and the public policy underlying section 209, noting that "it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." Id.

It is our understanding that [the employee] will remain an employee of the [agency] until approximately February 28, 1991. As noted above, the proposed agreement dated January 23, 1989, indicates that those of its provisions not approved by the [agency] would become void. However, we understand from discussing this matter with a member of your staff that the [agency] does not consider the bonus provisions to have been voided. Therefore, assuming that the original bonus provisions can still be given effect, it is our view that section 209 will not preclude [the employee] from accepting the three bonus payments provided for in the January 23 agreement. Given the Supreme Court's opinion in Crandon, it is unnecessary to consider whether [the company's] intention was that [the employee] be compensated by [the company] for her Government service. It is sufficient for purposes of section 209 that [the company] would make the payments and [the employee] would receive them at a time when she would not be an officer or employee of the Executive

Branch.**1**

I trust that this information will permit you to advise [the employee] concerning her acceptance of bonus payments from [the company]. We consulted with the Department of Justice prior to the issuance of this opinion.

Sincerely,

Stephen D. Potts
Director

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1 Since [the employee] entered into the January 23 agreement before becoming a Federal employee, it was not necessary to consider the implications of a contractual right to similar payments during Government service.