

Office of Government Ethics

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Letter to an Agency Ethics Official dated September 7, 1989

Your letter to our General Counsel of August 22, 1989, requested an opinion regarding 18 U.S.C. § 207(a). At issue is whether a provisional decision by an Administrative Law Judge (ALJ) correctly interpreted that statute and the implementing regulations at 5 C.F.R. Part 737. We understand that the ALJ's opinion becomes final unless you file exceptions not later than September 18.

According to the facts as found by the ALJ, a former employee had several discussions with two of his superiors, recommending one of his subordinates for promotion from GS-12 to GS-13. He also rated [his subordinate's] performance in a supervisory appraisal as excellent, and nominated him for a performance award. Subsequently, an announcement of three GS-13 vacancies was posted. [The employee] had no more discussions with these superiors regarding [his subordinate]. One of the superiors to whom [the employee] had previously spoken about [his subordinate] was the hiring official for the positions advertised in [a public announcement]. Based in part on [the employee's] previously related information and advice about [his subordinate,] [the subordinate was hired] into one of the announced GS-13 positions.

After leaving federal employment, [the now former employee] represented another party before your agency on a discrimination complaint arising out of his nonselection for the GS-13 position for which [the subordinate] was selected. Your agency then brought an administrative debarment action against [the former employee], pursuant to 18 U.S.C § 207(j), on the grounds that his representation of [the non-selected party] to your agency violated 18 U.S.C. § 207(a). Section 207(a) provides in pertinent part that a former employee is permanently barred from representing any other person before the government in connection with a particular matter involving specific parties, wherein the former employee participated personally and substantially while an employee.

The ALJ found in his provisional decision that [the former employee's] actions did not violate the statute, as implemented

by 5 C.F.R. Part 737. He did find that the selection process to fill the three positions advertised [in the agency announcement] was the same particular matter as [the nonselected party's] subsequent discrimination complaint wherein he was represented by [the former employee]. However, the ALJ determined that [the former employee] did not participate personally and substantially in that selection process. Under the facts as found by the ALJ, we concur in that finding.

The ALJ found that there were no communications subsequent to the posting of [an announcement] between [the former employee] and his superiors concerning the qualifications of applicants or [the subordinate's] candidacy, and that [the former employee] did not participate in the selection for positions actually identified in [the announcement] by decision, approval, recommendation, advice, investigation or otherwise. The issue then becomes whether the particular matter in question, the selection process, might be viewed as having commenced prior to the posting of [the announcement], at a time when it has been established that [the former employee] was personally and substantially involved by his recommendations that [the subordinate] should be promoted.

The regulations at 5 C.F.R. § 737.5(c) define "particular matter involving specific parties" by noting that such matters typically involve a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identifiable parties. The statute itself defines such a matter as any "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest." Based strictly on the ALJ's findings of fact, the particular matter involving specific parties which constituted the selection process for the GS-13 positions identified in [the] announcement could not have commenced until that announcement was posted. Prior to that time, there was no specific proceeding or isolatable transaction; rather, [the former employee] made recommendations generally, based on his own observations and those of others, that [the subordinate] was ready for promotion and was already performing at the GS-13 level. Even assuming, *arguendo*, that those general recommendations did constitute a particular matter involving specific parties, it was separate from the particular matter of selections under [the

announcement], which was the matter in which [the former employee] became involved after leaving Government.

Our opinion that [the former employee's] recommendations prior to the posting of [the job] were not part of the selection process thereunder might be different if the facts indicated that [the former employee] discussed with the hiring officials any of the specific positions which were later the subject of the announcement; or that those positions were the only possible ones open to [the subordinate]; or that [the former employee's] recommendations were made at a time when he knew that the posting of [the announcement] was imminent; or that the announcement was posted as a direct result of those discussions, with [the subordinate] in mind as a likely selectee; or that the performance appraisal was prepared as a special evaluation, in anticipation of the posting of [the announcement]. However, we cannot assume any of these circumstances to be facts, as the record which was provided to us is silent on these matters. You may wish to pursue such avenues of inquiry further.

We are not unmindful that, in subsequent discussions with [the subordinate], [the employee] claimed credit for obtaining [the subordinate's] promotion and told him that he had supported it. Absent additional findings of fact on this point by the ALJ, however, that circumstance is equivocal.

Accordingly, based on the information presented, we agree with the ALJ's provisional decision that [the former employee's] representation of [the nonselected party] to your agency on a discrimination complaint arising out of [the subordinate's] selection for a GS-13 position announced by [an announcement] was not a particular matter in which [the former employee] had previously participated personally and substantially.

Sincerely,

Frank Q. Nebeker
Director