

OFFICE OF GOVERNMENT ETHICS

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Letter to a Designated Agency Ethics Official
dated August 2, 1996

This is in reply to your letter of July 8, 1996, in which you requested a waiver of 18 U.S.C. § 207(c) on behalf of a former "senior" employee of [your agency]. At the time she retired from the [agency], [the former employee] was serving [in a high-level position]. [The former employee] was a member of the Senior Executive Service paid at level ES-5.

Background

[The former employee] originally retired from the [agency] on March 4, 1995. However, as explained in your letter and its enclosures, she was "reinstated retroactively" after the Office of Personnel Management (OPM) determined that her retirement "was inconsistent with 5 U.S.C. § 3393a and implementing regulations." [1] As implemented, section 3393a requires that the decision to recertify an employee as a member of the SES be based on the executive's performance during the preceding three years. As confirmed by a member of your staff, in [the former employee's] case, the [agency] based its decision on [the former employee's] own assertion that she could not in the future satisfy the [agency] recertification criterion requiring her to "demonstrate interest, attitude and good career management objectives that will ensure future growth and success in new assignments."

When she was not recertified, [the former employee] became eligible for discontinued service retirement with a full annuity. After determining that her separation had been improper, OPM directed the [agency] to take corrective action. According to your letter, [the former employee] was reinstated retroactively effective June 1, 1996. She became entitled to back pay, but any overpaid annuity would be deducted from that pay in accordance with 5 C.F.R. § 550.805(e)(2).

Waiver Determination

We agree that [the former employee's] "technical" retirement on June 1, 1996, had the effect of once again triggering the applicability of 18 U.S.C. § 207(c). However, section 207(c) can be waived as to certain positions or categories of positions if the Director of the Office of Government Ethics determines that --

- (i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions; and
- (ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

You argue that the one-year restriction should be waived in [the former employee's] case "in the interest of fairness." Thus, you submit that the second of the statutory criteria quoted above is satisfied because [the former employee] has already been away from the agency for over one year and her return was merely a "formality." We believe, however, that the first of the statutory criteria clearly contemplates that waivers will be issued primarily to address programmatic concerns rather than to prevent or remedy individual hardship. While you assert that the renewal of the one-year restriction in [the former employee's] case will "undermine our Agency's relations with its career senior staff and contribute to the difficulty of recruiting qualified people," we are unwilling

to find that the first of the criteria is satisfied solely on the basis of this assertion. Moreover, we do not believe it appropriate to issue a waiver of 18 U.S.C. § 207(c) in order to mitigate the consequences of [the agency's] original interpretation of 5 U.S.C. § 3393a and applicable implementing regulations.

Should you have further questions regarding this matter, please contact my staff.

Sincerely,

Stephen D. Potts
Director

¹ The OPM regulations implementing 5 U.S.C. § 3393a are published at 5 C.F.R. part 317.