

Office of Government Ethics
80 x 1(1) -- 02/04/80

Memorandum to the Ethics Council
of an Agency dated February 4, 1980

In accordance with your request, we have reviewed the proposed response from the Office of General Counsel to the query submitted by [a former attorney in that Office], concerning potential post-employment conflict of interest problems he may encounter as a result of his prior employment with [your agency].

For the reasons discussed below, I am of the opinion that the provisions of 18 U.S.C. § 207(a), as amended, prevent [the employee] from representing certain [companies] who [provide services under contract to a Federal program].

Section 207(a) provides, in part, that a former officer or employee of the Government may not knowingly act as agent or attorney for anyone, except the United States,

(2) in connection with 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 . . . is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed (emphasis added).

Review of the proposed reply and [the former employee's] letter transmitted previously reveals that [he] was employed as Counsel for a specific agency program, (Program X)] in the Office of General Counsel, [of your agency], serving in the grade of GS-15. In that capacity he was responsible for regularly reviewing [certain service] contracts between [your agency] and [contracted companies that provide services to

a Federal program]. [The employee] noted that most of the contracts were executed in 1960 and were amended annually. His review was limited to the amendments and new clauses resulting from such amendments; he had no responsibility for the administration, negotiation or enforcement of the contracts. He did, however, from time to time, render legal opinions concerning the administration of the contracts.

The exact extent of [the employee's] involvement in any particular contract is not clear from the documentation provided. However, as to those contracts which he reviewed for purposes of amending and those concerning which he rendered legal opinions, it is concluded that such activity would constitute personal and substantial involvement so as to trigger the restriction of section 207(a). The review and creation of amendatory language would constitute an extension of the same particular matter as represented by the executed contract. Similarly, the review of contracts for the purpose of rendering legal opinions as to the legality of certain provisions or the legal sufficiency of such contracts would constitute personal and substantial involvement in the administration of such contracts through the rendering of advice so as to fall within the parameters of section 207(a).

The contract itself constitutes the particular matter involving specific parties to which the prohibited subsequent representation applies. This Office has previously held that the rendering of advice concerning the validity or meaning of a standard term or clause embodied in a specific contract is an aspect of the "particular matter" and not merely an ancillary matter under 5 C.F.R. § 737.5(d)(2). Moreover, passing upon the legality of a particular contract by an attorney does not constitute involvement with an ancillary aspect of the matter but is, rather, involvement which cannot reasonably be separated from the substantive merits of the particular matter.

What must be ascertained is whether the total of [this employee's] personal activity in a particular matter, i.e., contract(s), either through "decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise" (emphasis added) constituted substantial participation therein. The activity of [the employee], as revealed in his letter and your proposed response, plainly comes within that standard as to the specific contracts to which such activity applies. To fractionalize a specific contract and to say that a former employee

is barred as to representation on a particular clause or amendment but not as to other clauses or provisions contained therein is not consistent with the law.

Accordingly, I am of the opinion that as to those contracts reviewed by [the employee] for the purpose of amendment as well as those which he reviewed in order to render legal advice concerning the administration thereof, he would be barred from subsequent representation of the carriers as to the contract, in toto, and not just as to those amendatory clauses in which he had participated either in the drafting or approval thereof.

I trust these comments will prove of service to you. The material which you forwarded is attached.

Enclosures