

Office of Government Ethics

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Letter to an Attorney dated August 4, 1993

This is in reply to your letter of July 20, 1993, concerning certain post-employment activities proposed to be undertaken by a former [Federal employee]. Specifically, [the former employee] wishes to serve on the board of directors of [a nonprofit corporation]. On behalf of [the former employee], you seek our views concerning the applicability of 18 U.S.C. § 207(a) in light of [the former employee's] participation during his tenure as [a Federal employee] in a Federal program [with the same goals and a similar name as the nonprofit corporation.]

First, we agree that section 207(a) does not prohibit [the former employee] from serving on the board of directors of [the nonprofit corporation]. Section 207(a) prohibits a former executive branch employee from making, with the intent to influence, a communication to or appearance before a Federal department, agency, or court, on behalf of another, in connection with the same "particular matter" which "involved a specific party or parties" in which he participated personally and substantially while a Government employee. Absent such a communication or appearance, [the former employee] could otherwise fully participate as a member of the board. However, since it is anticipated that [the former employee] and other members of the board may find it necessary to contact [his former] Department or other executive branch officials concerning the coordination of the Federal and local programs, you wish to determine whether section 207(a) is otherwise inapplicable.

As noted above, section 207(a) does not restrict a former employee's representational activities unless they are in connection with the same particular matter in which the individual participated as a Government employee. Since this determination is generally a factual one that requires knowledge of a particular agency's programs, OGE generally defers to the cognizant agency ethics official when the issue is whether two particular matters are the same for purposes of the permanent bar. Since you have already consulted with ethics officials [of his former Department], we chose in this case to contact one of those officials to confirm your description of the relationship of the two programs and to ensure that [the Department] is comfortable with our analysis.

As you state in your letter, the local program "will seek to extend the successes of the Department's program to other neighborhoods" While it will share the same purpose and employ many of the same techniques as the Federal program, "it will neither receive Federal funding itself, nor be involved in the distribution of any [money from the Federal program]." The board of directors of [the nonprofit corporation] is composed of business and civic leaders and not of Federal employees. From these and other factors mentioned in your letter, we see the local program as, in some respects, a copy of the Federal program but do not think it reasonable to consider it as the same program.

We would, however, recommend that [the former employee] exercise care when participating in discussions with current departmental and agency officials intended to "coordinate" the two programs. We can imagine many communications that would not raise questions under section 207(a), such as a discussion with [an] employee of [a second Federal agency] about services that should be provided in neighborhoods that fall within the local program's "jurisdiction." Such a communication would concern the local program and not the Federal one. On the other hand, [the former employee] should avoid discussions (or written communications) that concern the conduct of the Federal program. In this regard, we believe [the former employee] would be making a communication relating to the same Federal program in which he participated, if he were to argue that [the second Federal agency] should augment services in a neighborhood covered by the Federal program or if he were to make a communication in relation to any number of other issues relating to the administration of the Federal program.

Given the substantial latitude that we believe is offered by a determination that the Federal and local programs are different particular matters, we have chosen not to address in detail your argument that the Federal program may not involve "a specific party or parties." Your letter indicates that [the former employee] "submitted the application for Department funds for the [Federal] program in [the city] and selected a [certain] nonprofit corporation to administer the grant." You go on to say that [a certain nonprofit corporation] continues to administer that grant. In light of the existence of this grant and given the limited facts available to us concerning the creation, organization, and administration of the Federal program, we cannot say that the "specific party" element of section 207(a) is not satisfied. Accordingly, as noted in the previous paragraph, we suggest that [the former employee] avoid discussions that could be construed as

relating to the conduct of the Federal program.

Finally, while not addressed in your letter, we wish to emphasize that [the former employee] is a former "Senior Employee" covered by 18 U.S.C. § 207(c) for one year from the date he terminated service [with his former Department]. Applicable in his case only to communications directed to employees of the Department, the representational bar of section 207(c) is not limited to communications relating to the same particular matters in which [the former employee] participated as a Government employee.

Sincerely,

Stephen D. Potts
Director