

Office of Government Ethics

83 x 12 -- 08/03/83

Letter to a DAEO dated August 3, 1983

You have asked for confirmation of your opinion that a former Director of [an] Office within [your agency] may have violated 18 U.S.C. §§ 207(a) and (c) in light of his actions as set forth by you in the meeting at our Office on July 29 and in your letter of August 1, 1983.

From the material you have furnished us and from follow-up telephone discussions between [an OGE staff member] and your staff, we have adduced the following pertinent facts.

[The former employee in question ("the employee")] served from April 1981 through April 1983 as Director of [the Office], a position which made him a Senior Employee pursuant to 18 U.S.C. § 207(d). A major function of [the Office] is to resolve the problems of failing institutions [regulated by your agency]. One such institution, [Institution X], has been under active consideration by [the Office] for possible merger or purchase since the Spring of 1982. During the intervening period [the Office] has evaluated and rejected several bids for [Institution X]. [The employee] participated personally in reviewing his staff's recommendations on bids and in communications with [Institution X] (your attachments A and B). In March of this year a bid was received by [the Office] from [Institution Y] and was under active consideration by [the Office] prior to [the employee's] resignation which occurred [in the Spring of] 1983. An unsolicited application dated [within 2 months after the employee's resignation] to acquire [Institution X] was filed with [your agency] by [Institution Z], signed by [the then former employee] as President of [Institution Z] and as one of the persons to be contacted.

Individual bids in connection with the merger or purchase of failing institutions such as [Institution X] are not available to the public. Normally, invitations are sent to [other] institutions that [the Office] believes will be able to accomplish the takeover of the particular failing institution. [The employee], by reason of his position as Director of [the Office], was in a position to know the contents of the bids made for [Institution X]. This was an advantage which other bidders

did not have.

The post employment statute -- 18 U.S.C. § 207 -- bars acts by former Government employees "which may reasonably give the appearance of making unfair use of prior Government employment and affiliations." 5 C.F.R. § 737.1(c). One such provision, 18 U.S.C. § 207(c), prohibits former Senior Employees of an agency from contacting their agency on any discretionary matter for a period of one year. [The former employee] by virtue of his former position as Director of [the Office] is considered such a Senior Employee and is subject to that bar. See 5 C.F.R. § 737.33. His signing the application of [Institution Z] as its President and listing himself as a contact constitute such a communication or representation. The application had to be submitted to obtain the approval of the [the agency] pursuant to the requirements of [a specific agency administered statute (citation omitted)] and cannot be viewed simply as a reporting requirement with no element of controversy or intent to influence involved. See 5 C.F.R. § 737.11(e). Under the circumstances, this conduct on the part of [the former employee] would appear to be a clear violation of 18 U.S.C. § 207(c).

In addition, subsection (a) of section 207 makes it a criminal offense for a former Government employee who was personally and substantially involved in any particular matter involving a specific party to represent a private party or parties in that matter. One of the main functions of [the former employee's] office was to evaluate and recommend to the [agency] proposals for mergers or acquisitions of failing institutions. From the facts as you have presented them we believe the merger or acquisition of [Institution X] was a particular and specific matter in which [the former employee] was personally and substantially involved [while employed by the agency]. Accordingly, this subsection would prohibit him from representing [Institution Z] as he did by signing the application as its President.

Both of these apparent violations, as you know, must be brought to the attention of the Department of Justice by your [agency] pursuant to 28 U.S.C. § 535. Such a referral would also be the initial step in any administrative action the [agency] might wish to consider under the [agency's] regulations implementing 18 U.S.C. § 207(j).

Should any proposal be made that [Institution Z's] application

be deemed viable if [the former employee] should withdraw from [Institution Z], there would be the problem of whether the application has been tainted beyond further consideration. See United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

By reason of the urgency of your request, we have not developed our answer as fully as we might otherwise have done.

Sincerely,

David H. Martin
Director