

## Office of Government Ethics

84 x 7 -- 05/21/84

### Letter to a Former Employee dated May 21, 1984

In your letter of May 11, 1984 you request the opinion of this Office as to whether you may testify in (Phase II) [of a specific case] before [a regulatory] Commission.

From your letter and its attachments we have obtained the following background.

[Two companies] are parties in the above docketed rate proceeding before the Commission. Involved is a dispute as to the interpretation of certain pricing clauses contained in a settlement agreement negotiated by and among [the two companies] and the [present Commission's predecessor] in 1962. At that time you were a staff attorney representing [the predecessor Commission] in the negotiation of this settlement agreement and its approval by [that Commission].

You were employed by [the predecessor Commission] and its successor agency (the Commission) from October 1958 through November 1978 when you retired from the Commission. From April 1979 until December 1981 you served again with the Commission. You are now in private practice.

[One of these two companies, Company 1] filed testimony prepared by you in the pending proceedings before the Commission. Your statement covered (p. 2 of your letter):

(i) facts concerning the commercial and regulatory environment that existed at the time of the settlement negotiations; (ii) the Staff's position on several key issues involved in those negotiations; (iii) my knowledge of facts relating to the intention of [the two companies] when they entered into the settlement; and (iv) similar facts relating to the intention of [the two companies] to effectuate the terms of the settlement by incorporating that document into the contracts presently at issue. My testimony was based on the nonconfidential facts that I observed during the settlement discussions and did not disclose any privileged information.

[The other company, Company 2,] objected to the introduction of your testimony on the ground, among others, that you are prohibited from testifying by reason of the Commission's rules and section 207 of the Ethics in Government Act (the Act) -- 5 U.S.C. App. 207 (sic. [18 U.S.C. § 207]). The presiding Administrative Law Judge (ALJ) ruled that your testimony be stricken as irrelevant.

Your testimony has been revised and is scheduled for presentation on May 22, 1984. You have asked for our opinion on the conflict of interest question raised by Company 2.

We shall not concern ourselves at this time with the Commission's rules. Our focus will be on 18 U.S.C. § 207 as amended by the Ethics in Government Act of 1978 [the Act]. The amendments became effective on July 1, 1979 and apply to those employees who were then in the Federal Government. See 5 U.S.C. App. §§ 502 and 503 and 5 C.F.R. 737.29(a). Since you were employed by the Commission at that time, you are covered by section 207 as amended.

Section 207(a) prohibits a former Government employee from acting as agent or attorney or otherwise representing any other person before a Federal agency or court in any particular matter involving specific parties in which that individual had personal and substantial involvement as a Federal employee. The evidence you would furnish centers on the very contract that was negotiated in 1962 between [Companies 1 and 2] in the [predecessor Commission] proceedings and you were personally and substantially involved in it as attorney for [that] Commission. Section 207(a) standing alone might bar you from presenting such testimony. It must, however, be read in the light of subsection (h) which was added to 18 U.S.C. § 207 by the Act.

Subsection (h) provides:

Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

See H.R. Rep. No. 800, 95th Cong., 2d Sess. 10, 34 (1977).

The purpose of subsection (h) was to except from 18 U.S.C. §§ 207(a), (b), and (c) "testimony under oath." H.R. Conf. Rep.

No. 1756, 95th Cong., 2d Sess. 76 (1978).

Subsection (h) has been implemented by us in 5 C.F.R. § 737.19(b), reading, in pertinent part, as follows:

A former Government employee may testify before any court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee, otherwise barred under 18 U.S.C. 207(a), (b), or (c) to testify on behalf of another as an expert witness except: (1) To the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise . . . .

[Company 1] contends, as do you, that you would be testifying only as to matters within your personal knowledge and not as an expert. [Company 2] argues on the other hand that your statements amount to expert testimony. Whether the testimony you would give is factual or expert does not make any difference in the resolution of your problem. To the extent your evidence would be factual, the testimony would be under oath and within your "personal knowledge." It could be furnished under section 207(h) and section 737.19(b) of our regulations. If it should be considered expert testimony, you would not be barred since section 737.19(b) provides that, where you would be otherwise barred under section 207(a) to testify as an expert witness, you may do so when you would be testifying "from personal knowledge as to occurrences which are relevant to the issues in the proceeding," including those in which you had utilized your expertise.

We do not address other problems that have been raised, such as the relevancy of your evidence or whether your testimony would violate the "deliberative process privilege" of the Commission. These are matters for the ALJ and the Commission.

In view of the necessity for an expedited decision, we have not had time to verify the material we have extrapolated from your letter and its attachments.<sup>1</sup> Based solely on this material, we conclude that 18 U.S.C. § 207(a), as modified by

section 207(h) and 5 C.F.R. § 737.19(b), would not prohibit you from testifying in (Phase II) [of the present case] now pending before the Commission.<sup>2</sup>

Sincerely,

David H. Martin  
Director

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**1** For example, we have taken at face value your assertion that no privileged or confidential information of the Commission is involved.

**2** With respect to any questions of client responsibility, such as Canon 4, you should refer to the Rules Professional Conduct of the American Bar Association and the District of Columbia Bar.