

Office of Government Ethics

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Letter to an Agency Attorney dated January 22, 1986

In your letter of December 12, 1985, you asked if a former employee of your agency who is now employed by the Tennessee Valley Authority (TVA) would be subject to the post-employment restrictions of 18 U.S.C. § 207. We presume this to mean whether section 207 would apply to his representations of TVA to other agencies such as [yours]. The answer to your question is that he is not prohibited by section 207 from representing TVA as an employee in any matter. The TVA in the interest of good government may, however, through their own standards of conduct, limit his representations on their behalf when those representations are on matters where TVA requires action from a Government agency as if it were a private corporation.

To explain this conclusion more fully, section 207 applies to a person who has "been an officer or employee of the executive branch, of any independent agency of the United States, or of the District of Columbia" and to representations which are made on behalf of "any other person (except the United States)." It does not apply to a person who is presently such an officer or employee or to someone who represents the United States.

Assuming the individual about whom you have asked is an employee of TVA (as opposed to an independent contractor), the questions are whether TVA is within the "executive branch" or is an "independent agency," and whether official representations of a TVA employee are made "on behalf of the United States." Both hinge on the status of TVA vis-a-vis the Federal Government. Section 207 does not include any definitions; however, in promulgating interpretive regulations, this Office at 5 C.F.R. § 737.3(a)(1) defined "United States" or "Government" to include, in part, "any department, [or] agency. . . ." At subsection 737.3(a)(2) an "agency" is defined as "an Executive Department, a Government corporation and an independent establishment of the executive branch, which includes an independent commission." Section 831 of Title 16, United States Code, states that "[f]or the purpose of maintaining and operating the properties now owned by the United States [in a specified vicinity], . . . there is created a body corporate by the name of the 'Tennessee Valley Authority.'" There is no additional language which further

qualifies that provision. In addition, 16 U.S.C. § 831r describes the TVA as "an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers. . . ." It is our position that TVA is therefore a Government corporation and agency for purposes of our definitions. Further, courts have long held that TVA is an "agency of the Federal Government" (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 315 (1936)), and "a corporation, an instrumentality of the United States" (*Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 134 (1939)).

Given these factors, it is our opinion that a TVA employee is still an employee of the executive branch. And any representations made on behalf of TVA within the scope of an employee's official duties for TVA are representations made on behalf of the United States. Consequently, section 207 would not apply to representations your former [agency] employee might make on behalf of TVA to [your agency]. Section 207 will apply to that individual if he leaves TVA for the private sector.

We recognize there are certain unique situations where an inherent conflict may exist but where the normal conflict of interest restrictions do not apply because the matters involved are intra-governmental. A prime example of this is the activities of the Federal Labor Relations Authority. It is basically an intra-governmental regulatory body whose employees sometimes come from other agencies having worked on pending matters before the FLRA or who may wish to leave FLRA for an agency which has a matter pending at the FLRA in which they are officially involved. The provisions of 18 U.S.C. §§ 205, 207 and 208 do not apply because in both instances the individuals are moving within the Government. The FLRA, however, has been very sensitive to these situations and has used its standards of conduct to provide guidance for its employees. We have appreciated their recognition of their somewhat unique problem and have encouraged the manner in which they have proceeded to address many of these questions.

We would hope that TVA will exercise the same sensitivity when it makes assignments to persons who have recently left other agencies where that assignment is to represent the TVA to the Government in matters where TVA's position is much the same as that of any private utility. We know they recognize the questions with regard to your agency's former employee and we trust they will use some discretion in his assignments.

If you have any further questions, please feel free to contact this Office.

Sincerely,

David H. Martin
Director