

Office of Government Ethics

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Letter to an Alternate Designated Agency Ethics Official dated April 21, 1993

This is in response to your April 1, 1993, letter in which you request a formal advisory opinion with respect to the applicability of the one-year ban of 18 U.S.C. § 207(c). Because the criteria delineated in 5 C.F.R. § 2638.303 do not weigh in favor of the issuance of a formal opinion, we will respond by way of an informal opinion.

Briefly stated, the issue that you raise is whether a Senior Executive Service (SES) employee at your agency who is paid at the ES-5 level would be subject to the one-year restriction of 18 U.S.C. § 207(c) upon taking a position at the agency that the agency normally staffs with (and has targeted pay rates established for) persons paid at an ES-4 level. The answer to your question is "yes."

Section 207(c) prohibits a former "Senior Employee" of the executive branch from making certain communications or appearances, on behalf of another, before an employee of a department or agency in which he or she served during the one-year period prior to his or her termination from a "senior" position. The restriction lasts for one year from the date the individual terminates the senior position. Section 207(c)(2) states that the restrictions of section 207(c) apply to any person:

- (i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,
- (ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay . . . is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule

Clause (i) references the statutory pay rates for Executive Schedule positions. Clause (ii) identifies a class of individuals also subject to the restrictions of section 207(c) who hold positions other than those specified in the Executive Schedule, such as certain SES employees.

The SES is defined as "consist[ing] of Senior Executive Service positions." See 5 U.S.C. § 2101a. Persons in SES positions are paid basic rates of pay which range from ES-1 (currently \$92,000 per annum) to ES-6 (currently \$115,700 per annum). See 5 U.S.C. § 5382 and Executive Order 12826. The rates of basic pay for both ES-5 (currently \$111,800 per annum) and ES-6 are higher than the rate of basic pay for level V of the Executive Schedule (currently \$108,200 per annum).

According to the Federal Personnel Manual, an individual SES member's pay rate is based upon a number of factors such as performance, expertise, qualifications required, scarcity of qualified personnel, and pay for comparable private sector personnel, in addition to the duties and responsibilities of the executive's position and its organizational level. See FPM Supp. 920-1, 6-3. Presumably, an ES-5 employee is entitled to be paid at a particular level because of the application of all of the above factors. To the extent that the application of the factors does not warrant being paid at an ES-5 level, but rather an ES-4 level, the agency has more leeway in lowering the pay level than it might in the case of an employee subject to the GS system. See 5 U.S.C. § 5383(d), 5 C.F.R. § 534.401. In any event, for purposes of applying the restriction of 18 U.S.C. § 207(c), the fact that he or she holds a position that is or has been held by persons paid at ES-4 is irrelevant. For purposes of determining the applicability of section 207(c) to SES employees, the critical factor is not the "position" of the employee in the sense of job title, but the employee's ES level, *i.e.*, the employee's basic rate of pay.

The theory espoused in your letter is that the actual pay that an SES employee is paid is irrelevant: what triggers the application of section 207(c) is the target pay rates that an agency has established for the position that the employee occupies. If this were true, an agency could undermine the intent of the legislation by targeting positions for ES levels that are ES-4 and below and staff the positions with ES-5 and above. This theory also contravenes the intent of the Civil Service Reform Act of 1978 which established the SES and attempted to divorce pay rates from job titles with respect to SES employees.

There is no evidence that Congress intended to leave to agencies the question of which employees are covered by section 207(c). To the contrary, the language of the statute suggests that Congress intended that pay rates would determine

coverage of the statute with respect to SES employees. To the extent that an official is paid an amount that is equivalent to or greater than an Executive Level V position, the statutory scheme presumes that the individual serves in a position warranting coverage by the statute.

This letter does not address the situation where an agency intentionally pays a person an amount under the Executive Level V threshold with the intent of avoiding application of section 207 (c). The Office of Government Ethics has not consulted with the Department of Justice with respect to any matter discussed in this letter.

Sincerely,

Stephen D. Potts
Director