Office of Government Ethics
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Letter to a Department General Counsel dated December 8, 1980

This letter responds to your October 6, 1980 request for this Office's opinion on whether the performance of certain services on behalf of a particular State before your Department by a former General Counsel of the Department which originally had jurisdiction over many of the functions of your Department, including the specific matter involved in this request, would constitute a violation of 18 U.S.C. § 207.

CONCLUSION

We conclude that the former employee's work for his Department on the development of the initial set of criteria, pursuant to which six States (not including the subject State) were to develop plans to desegregate their higher education systems, constituted personal and substantial involvement in a particular matter involving specific parties so as to trigger the 18 U.S.C. § 207(a) bar as to future participation on behalf of someone other than the United States regarding the same particular matter.

We further conclude, however, that a second set of criteria subsequently developed for use as investigatory guidelines in States that formerly had de jure dual systems of higher education, standing alone, does not constitute a "particular matter involving a specific party orparties." And, although the development of this second set of criteria was a matter under the former employee's official responsibility because of the involvement of a division of the Office of the General Counsel over which the former employee had administrative and operational authority, the section 207(b) bar would not attach since the criteria do not constitute a particular matter involving specific parties.

The review of the higher education system of the State now seeking the former employee's assistance is considered to constitute a particular matter involving specific parties. This proceeding was pending under the official responsibility of the former employee because attorneys in the Office of the General Counsel of his Department participated in the approval of the review standards

applicable to that State and because at least one attorney from the General Counsel's office participated as a member of the review team which investigated the higher education system in the subject State. Because the former employee left the Government in mid-1979, before July 1, the one year bar**1** of 18 U.S.C. § 207(b) otherwise applicable to the matter involving this State, has expired and he is not, therefore, precluded from representing this at this time.

FACTS

Your letter states that the former employee has been approached by the Attorney General of the State in question and asked whether he might assist and advise the Attorney General and other State officials regarding an ongoing investigation by an Office within your Department of public colleges and universities in the State. The employee's services would involve advising and consulting with officials of the State as well as representing such officials and the State before your Department. The scope of his representation would include counseling and advising State officials about compliance with criteria established by your Department and regulations, and negotiating with officials of your Department with respect to compliance by this State.

We understand that as General Counsel of his Department, the former employee was involved in several aspects of Federal policymaking and decision making that are apart of the chain of events leading to the request that he, as a former Government employee, represent this State. Specifically, he participated directly, personally and substantially in the development of criteria for the preparation of desegregation plans for the public higher education systems in six States, none of which is the subject State.

The former employee's work in this area was occasioned by the fact that in 1977 his Department was specifically directed by the U.S. District Court for the District of Columbia**2** to issue criteria upon which the aforementioned six States wereto develop plans to desegregate their higher education systems which the Court had found to be in violation of Title VI of the Civil Rights Act of 1964.**3** As noted above, the former employee participated personally and substantially in the development of those criteria which were issued four months after the court issued the Order.

Subsequent to the issuance of the aforementioned criteria, a second set of criteria was developed to serve as standards by which the former employee's Department's Office for Civil Rights (OCR) would undertake to eliminate segregation in eight other States that formerly had de jure dual systems of higher education. The subject State was identified as one of the States in which OCR would conduct a review in accordance with these criteria. The basic responsibility for preparing the second set of criteria was assigned to a division within the Office of the General Counsel while the employee served as General Counsel. You state that while these criteria were discussed with the fomer employee, you have no evidence that he played any direct role in thier prepartation, review or publication.

The former employee states, in his letter to you of September 10, 1980, that he does not recall having participated in any discussions concerning the issuance of the second set of criteria. He further states that he had no knowledge of any investigative activity with respect to the State in question. He does suggest, however, that it is possible that OCR, as part of its routing, sent him a copy of its decisional memorandum stating that the revised criteria were to be published in the Federal Register and would in the future be applied to all States that once had de jure dual systems of higher education. He further states that if that occurred, he would have concurred in the decision by initialing the decisional memorandum. He also states that by taking such action, he would neither have known of any facts specifically concerning this State's situation nor have gained any information that would be applicable to his proposed representation of this State should he undertake such representation.

Your letter states that on February 17, 1978, the Deputy Director of OCR for Compliance and Enforcement, transmitted to the affected Regional Civil Rights Directors materials for planning and conducting the compliance reviews for the subject State and three others. A plan for the subject State's review was submitted to OCR approximately one month later by the Director of the appropriate regional Civil Rights Office.

The actual review of the higher education system in the State was initiated in 1978 and was ongoing at the time the former employee left his position at the Department. Your characterization of his role in such review coincides with his recollection: he was not involved in the review of the subject State. You state, how-

ever, that as part of the approval of the planned review, such approval provided that an attorney from the Office of General Counsel would be a member of every compliance review team. We assume, for purposes of this opinion, that such was the case in the review of this State.

The former employee left his position as General Counsel in mid-1979.

DISCUSSION

Since the former employee left Government service prior to the effective date of the amendment to 18 U.S.C. § 207 brought about by the passage of the Ethics in Government Act of 1978(Pub. L. No. 95-521),**4** the post employment prohibitions applicable to him are those found in the former 18 U.S.C. § 207 (Pub. L. No. 87-849) (1962).

To place the follow-on discussion in its proper context, we begin by discussing the limits of the statutory restrictions (18 U.S.C. § 207).

The restrictions that 18 U.S.C. § 207 impose are narrowly circumscribed. Generally, a former officer or employee of the executive branch is prohibited from acting as agent or attorney for anyone other than the United States in connection with any "particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest and in which he or she participated personally and substantially when employed by the Government. (emphasis added). The phrase "particular matter involving a specific party or parties" refers to a discrete and isolatable transaction between identifiable parties. Section 207(b) prohibited a former officer or employee, for one year after leaving his or her Government position, from appearing personally as agent or attorney for anyone other than the United States in any "particular matter involving a specific party or parties" which was under such employee's "official responsibility" within a period of one year prior to the termination of such responsibility.

The phrase "particular matter" as used in 18 U.S.C. §§ 207(a) and (b) is restricted in scope to mean "a particular contract, a particular case, a particular proceeding or a particular claim."**5** That phrase is further restricted, however, by the modifying phrase "involving a specific party or parties.

" Bayliss Manning, author of the authoritative treatise on this subject, commented on the importance of this limiting phrase, "involving a specific partyor parties," by concluding:

> Where the language is used, it is clear that the statute is concerned with discrete and isolatable transactions between identifiable parties . . . . A close standard of specificity is required in two different respects under subsection (a); for a matter to be swept under the subsection, it must involve a specific party both at the time the government employee acted upon it in his official capacity and at the subsequent time when he undertakes to act as an agent or attorney following termination of his government service.**6**

It should be noted that the word "particular" was chosen " to emphasize that the restriction applies to a specific case or matter and not to a general area of activity." (emphasis added).**7**

The original set desegregation criteria evolved from a particular case (hereinafter referred the as the "Case" and previously referred to in footnote 2). The criteria were issued as a direct result of the court order in that case and applied to six specific States, not includint the subject State. The Case constitues a particular matter involving specific parties as that phrase is used in 18 U.S.C. § 207. We believe, therfore, that the criteia for the six States, issued by the former employee's Department in response to the court's order in the Case, constitues a part of the same particular matter. Accordingly, since the former employee was personally and substantially involved in the Cas matter, he is forever barred from representing anyone other than the United States as to that particular Case.

The further questions to be answered here are: (1) whether the second set of criteria, which is a modified version of the initial set of criteria issued in response to the court order in the Case, and is applicable to the review conducted of the higher education system in the subject State, constitute the same or a part of the same particular matter involved in the Case continued in another form, and, if not, (2) does the second set of criteria constitute a particular matter involving a specific party or parties in and of itself.

The Case essentially became final when the court order was complied with; that is, when the former employee's Department issued the criteria and the States involved, utilizing those criteria, developed plans and moved to desegregate the educational systems in accordance therewith. The second set of criteria is essentially independent of and apart from the Case controversy. We are not aware of any provision in the court order directing the former employee's Department to extend the provisions of the order beyond those six States specifically mentioned. The fact that the second set of criteria is a modified version of the initial set does not, we believe, cause it to be considered a part of the same particular matter. The fact that the modified criteria address the generic issue of desegregation, as did the first, does not without more, cause the second set of criteria to become a part of the Case.

The second set of criteria addresses the problem of de jure segregation generally, that is, the criteria are to be used as investigatory guidelines in states that formerly had dual systems of public higher education under state law, only if the Office of Civil Rights determines after preliminary analysis that such a state has failed to remove the vestiges of racial segregation in its system in violation of Title VI. On the basis of its general application, we believe the second set of criteria equate to general rules or general standards. Commenting on the applicability of 18 U.S.C. § 207, a 1963 memorandum of the Attorney General of the United States Department of Justice reads in pertinent part as follows:

> Subsections (a) and (b) describe the activities they forbid as being in connection with 'particular matter(s) involving a specific party or parties' in which the former officer or employee had participated. The quoted language does not include general rulemaking, the formulation of general policy or standards or other similar matters. Thus, past participation in or official responsibility for a matter of this kind does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of such matter (emphasis added).**8**

Accordingly, we find that the second set of criteria do not constitute a particular matter involving a specific party or parties as that phrase is used in 18 U.S.C. 207.

It should be noted, however, because attorneys in the Civil

Rights Division of the General Counsel's Office (when the former employee served as General Counsel) participated in the clearance stage of the subject State's review standards and since at least one attorney within the former employee's Department participated as a member of the review team when there view was conducted, we conclude that the review standards and the actual review of the subject State are both particular matters involving a specific party that were pending under the official responsibility of the former employee, as General Counsel of that Department. However, since the former employee left Government service in mid-1979, the one year bar of 18 U.S.C. 207(b) expired in mid-1980 (one year after the date he left). He is, therefore, not barred by the provisions of section 207(b) from representing the subject State on mattersgrowing out of such review.

Also, since we have concluded that the second set of criteria was not a continuation or a part of the Case matter and does not, standing alone, constitute a particular matter involving a specific party, there would be no section 207(a) prohibition against the former employee representing the subject State in their response to the review conducted by the Office of Civil Rights.**9**

This letter represents our opinion concerning the application of general rules of law stated in 18 U.S.C. § 207 (Pub. L. No. 87-849) to the factual situation set forth in your letter of October 6, 1980 as modified herein.

Sincerely,

J. Jackson Walter
Director

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1 The amendment to section 207(b) increasing this bar to 2 years did not affect any employee leaving before July 1,1979. See footnote 4.

2 [Citation to the case number and order omitted.]

3 42 U.S.C. § 2000(d).

4 Section 502 of Pub. L. No. 95-521 provides: "The amendments

made by section 501 shall not apply to those individuals who left Government service prior to the effective date of such amendments . . . ."

Section 503 provides: "The amendments made by section 501 shall become effective on July 1, 1979."

5 B. Manning, Federal Conflict of Interest Law 55(1964).

6 Id. at 204. Manning's discussion of the statutory language relates to 18 U.S.C. § 207 (Pub. L. No. 87-849) as enacted in 1962, which is the provision applicable to the former employee.

7 B. Manning, supra at 55, H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961).

8 Memorandum of Attorney General Regarding Conflict of Interest Provisions of Public Law No. 87-849 (Feb. 1, 1963) (28 Fed. R. 985). Cf. 5 C.F.R. § 737.5(c)(1).

9 This Office has not considered the effect, if any, of the Code of Professional Responsibility in the present context, either with respect to any steps that may be required of the former employee to preserve the confidences and secrets of his former client, i.e., the Department (see Canon 4), or the effect, if any, of his past and present relationship with that client on his ability to exercise fully independent professional judgment on behalf of the subject State. See, Canon 5. We understand, however, that the applicability of the Disciplinary Rules is a matter which has been considered by the firm the former employee joined.