Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated March 27, 1997

This is in reply to your letter of January 14, 1997, concerning [your agency's] regulations at [citation deleted] that prohibit former [agency] employees from practicing before the [agency] in connection with certain cases or proceedings. You accurately point out that the prohibitions at [citations deleted] ([agency] regulations) are broader in scope than the restrictions imposed by 18 U.S.C. § 207. You ask that the Office of Government Ethics (OGE) confirm its earlier oral advice that section 207 cannot be the authority upon which these broader regulatory restrictions are based. You also wonder if OGE is aware of any other authorities "which would allow for the continued viability of such regulations."

[Citation deleted] provides that:

> No person who has been an employee of the [agency] and attached to any of its regional offices shall engage in practice before the [agency] or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any regional office to which he was attached during the time of his employment with the [agency].

[Citation deleted] imposes a similar restriction on employees of the [agency] who were "attached to the Washington staff," except that in the case of these former employees, the bar extends to any case or proceeding "pending before the [agency] or any regional offices . . . ."

Section 207(a)(1) prohibits a former employee of the [agency] (or any other executive branch agency) from ever representing anyone before certain Federal entities in connection with any "particular matter" involving a "specific party or parties" in which the individual participated personally and substantially while employed by the Government. Under section 207(a)(2), the same representational bar applies in connection with any such matter if it was merely pending under the former employee's official responsibility during his last year of Government service. In these latter circumstances, however, the bar lasts for only two years.

Clearly, the [agency] regulations contain substantially broader restrictions than those imposed upon all former employees by section 207(a)(1) or (a)(2).[1] For example, the [agency] prohibitions are permanent even if the former employee was not personally and substantially involved in the matter as a Government employee. Moreover, the [agency] restrictions are triggered even if the former employee was not personally responsible for a matter. It is enough that the case or proceeding was pending under someone else's responsibility in the relevant headquarters or regional office.

As you suggest, the [agency] regulations were apparently first published on [date and citation deleted]. Thus, the regulations were promulgated a few months after the date 18

[1] Section 207(b) also applies to any former employee, but probably affects few, if any, former [agency] employees since it concerns only those former employees who participated in certain trade or treaty negotiations. Sections 207(c) and (d) bar representational activity even in connection with matters with which an individual was never involved while employed by the Government, but these two provisions apply only to former "senior" or "very senior" employees, respectively.

U.S.C. § 207 became effective[2]. We cannot say whether those who originally promulgated the [agency] regulations were purporting to implement the original versions of sections 207(a)(1) and (a)(2).[3] It is most definitely our view, however, that current sections 207(a)(1) and (a)(2) cannot be cited as the authority for the [agency] regulations to the extent that the scope of those regulations exceeds the scope of those statutory provisions. Although OGE promulgated regulations in 1980 at 5 C.F.R. part 737 indicating that each agency could provide additional guidance in its own regulations concerning the interpretation of section 207, the OGE regulations authorized such guidance only if "consistent with that contained herein."[4] As you know, the scope of the prohibitions as described in the [agency] regulations cannot reasonably be claimed to be consistent with the interpretation of the prior versions of sections 207(a)(1) and (a)(2) set forth in those regulations. Moreover, the [agency] regulations are not consistent with current section 207(a)(1) or (a)(2) as interpreted in OGE advisory letters or otherwise.[5]

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[2] Pub. L. 87-849, 76 Stat. 1119, was enacted on October 23, 1962, and became effective 90 days after that date.

[3] As originally enacted, section 207 contained a permanent and a one-year restriction generally equivalent to the permanent and two-year restrictions in current sections 207(a)(1) and (a)(2).

[4] That provision, originally published in 1980 (45 *Fed. Reg.* 7402, 7408), is currently published at 5 C.F.R. § 2637.101(c)(7). When OGE became a separate executive branch agency on October 1, 1989, part 737 was transferred and redesignated as part 2637 of title 5.

[5] Until OGE completes the new regulation at 5 C.F.R. part 2641 that will eventually reflect all amendments to section

(continued...)

While you speculate that the [agency] regulations may have been originally promulgated to implement the administrative enforcement procedures set forth in former section 207(j), this could not have been the case since, as originally enacted, section 207 did not provide for the administrative enforcement of its restrictions. In any event, as you point out, administrative remedies for violations of the current version of section 207 were eliminated by the Ethics Reform Act of 1989.

If we determined that 18 U.S.C. § 207 does not constitute authority for the [agency] regulations, you also asked for guidance concerning authorities other than section 207 that could provide the basis for your regulations. We are generally aware that some agencies have promulgated rules of practice that prescribe the qualifications of those who may appear in a representational capacity before the agency, including limitations specifically applicable to former agency employees. For example, section 10.26(b)(2) of Treasury Circular 230 provides that "[n]o former Government employee who participated in a transaction shall, subsequent to his Government employment, represent or knowingly assist, in that transaction, any person who is or was a specific party to that

[5] (. . . continued) 207 enacted by the Ethics Reform Act of 1989 and thereafter, we have advised that "[e]xcept where the underlying statutory provision has changed, Part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207." *See, e.g.*, OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992).

transaction."[6] Notably, unlike section 207(a)(1) or (a)(2), this section prohibits "behind-the-scenes" assistance. We have been advised by the Internal Revenue Service that this and other limitations set forth in section 10.26 derive from the authority of the Secretary of Treasury in 31 U.S.C. § 330 "to regulate the practice of representatives of persons before the Department of Treasury." We suspect that other agencies may cite similar statutory language as the basis for their rules of practice, or that they may be relying on even more general language in an enabling statute. We do not consider it within the purview of this Office, however, to judge whether a particular agency authority is sufficient to support rules of practice restricting the post-employment activities of former agency employees. As suggested earlier by a member of my staff, you may find it useful to contact other agencies that have promulgated rules of practice.

Sincerely,

Stephen D. Potts
Director

[6] 31 C.F.R. § 10.26(b)(2).