

Office of Government Ethics

92 x 20 -- 07/23/92

Letter to a Designated Agency Ethics Official dated July 23, 1992

This is in reply to a question posed by a member of your staff concerning the definition of "Senior Employee" for purposes of 18 U.S.C. § 207(c). More specifically, the issue is whether an employee serving in a "senior-level" (SL) or "scientific and professional" (ST) position can become a "Senior Employee" for purposes of section 207(c) by virtue of pay adjustments resulting in a rate of basic pay equal to or exceeding the rate of basic pay payable for Level V of the Executive Schedule.

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 served in any capacity during the one-year period prior to his termination from a "senior" position. It is a one-year restriction that commences on the date that the individual terminates service in a senior position, regardless of whether he terminates Government service.

As defined in regulatory guidance published by the Office of Government Ethics (OGE) at 5 C.F.R. § 2641.101, the term "Senior Employee" means any employee who is:

- (1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. §§ 5311-5318 (the Executive Schedule);
- (2) Employed in a position for which the basic rate of pay, exclusive of any locality-based pay adjustment under 5 U.S.C. § 5302 (or any comparable adjustment pursuant to interim authority of the President) is equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule (including any such position in the Senior Executive Service or other SES-type systems, e.g., the Senior Foreign Service);
- (3) Appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B);

(4) Appointed by the Vice President to a position under 3 U.S.C. § 106(a)(1)(B);

(5) Employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in 37 U.S.C. § 201) is pay grade 0-7 or above; or

(6) Detailed to any such position.

The definition of "Senior Employee" excludes "very senior employees." Individuals serving in Cabinet-level or certain other high-level policy positions are subject to the more restrictive one-year bar set forth in 18 U.S.C. § 207(d) in lieu of that set forth in section 207(c).

Pursuant to the definition above, section 207(c) applies to an individual who terminates from a position for which the rate of pay, exclusive of any locality-based pay adjustment, is at that time equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule. The Level V triggering level is statutory.¹ Thus, section 207(c)(2)(A)(ii) provides that the one-year restriction set forth in section 207(c) applies to any person, other than a person covered by section 207(d), who is:

employed in a position . . . for which the basic rate of pay, exclusive of any locality-based adjustment under section 5302 of title 5 (or any comparable adjustment to interim authority of the President) is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule.

The Executive Schedule is divided into five pay levels, the lowest of which is Level V. Following a 25-percent pay increase enacted by the Ethics Reform Act of 1989 which became effective January 1, 1991, the annual rate of basic pay for each pay level continues to be determined in accordance with the procedures set forth in Chapter 11 of title 2, United States Code, with periodic adjustments as provided for in 5 U.S.C. § 5318.² The current rate of basic pay for Level V is \$104,800.

The Federal Employees Pay Comparability Act of 1990 abolished grades GS-16, GS-17, and GS-18 and created a new 5 U.S.C. § 5376

concerning the pay of SL positions classified above GS-15 pursuant to 5 U.S.C. § 108 and ST positions established under 5 U.S.C. § 3104. Office of Personnel Management (OPM) regulations implementing 5 U.S.C. § 5376 provide that pay for SL and ST positions shall be:

(a) Not less than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule; and

(b) Not greater than the rate of basic pay payable for level IV of the Executive Schedule.

5 C.F.R. § 534.502. The current rate of basic pay for Level IV of the Executive Schedule is currently \$112,100.

As explained in the "supplementary information" accompanying a rule amending 5 C.F.R. Part 534, agencies may use any dollar amount within the applicable minimum and maximum rates established by 5 U.S.C. § 5376 in order to assign a pay rate in the case of an initial appointment to an SL or ST position. 57 Fed. Reg. 10121, 10122, Mar. 24, 1992. Consequently, an individual may be initially appointed to an SL or ST position and be assigned a rate of basic pay equal to or in excess of the rate of basic pay for Level V of the Executive Schedule. An employee leaving such a position would be terminating service from a senior position for purposes of 18 U.S.C. § 207(c).

The more difficult issue arises in the case of an employee whose rate of basic pay in an SL or ST position is initially set in an amount below Level V of the Executive Schedule, but whose pay eventually equals or exceeds that level by virtue of a subsequent pay adjustment. The language of section 207(c) itself indicates that, in determining whether the Level V threshold is met, "any locality-based pay adjustment under section 5302 of title 5 should be excluded."³ The statute does not, however, address the effect of "step" increases, cost of living adjustments, awards or bonuses, and various allowances.

During consultations with OPM last year concerning the effect of step increases that cause pay to equal or exceed Level V of the Executive Schedule, we observed that section 207(c)(2)(A)(ii) includes the term "basic rate of pay" as well as the term "rate of basic pay." In the case of pay systems providing for several steps per grade, we had proposed to interpret the term "basic rate

of pay" to mean that rate of pay for the lowest step of the grade at which an individual is employed. However, OPM advised us that there is essentially no difference between the two terms and that both refer to the actual amount paid to the employee, exclusive of certain kinds of "additional" pay. Based upon these consultations, we have concluded that step increases, or their equivalent, must be considered in determining whether an employee's "basic rate of pay" equals or exceeds the "rate of basic pay" for Level V of the Executive Schedule.⁴

OPM regulations at 5 C.F.R. §§ 534.503 and 534.504 indicate two ways in which SL and ST pay can be adjusted for incumbents of such positions. Section 534.504 provides for an annual cost of living increase to be effective "at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. § 5303 in the rates of pay under the General Schedule."⁵ In addition, section 534.503 grants agencies discretion in establishing written procedures and guidance to be used in assigning rates of pay to individual employees serving in SL and ST positions. A pay adjustment made pursuant to this section may not be made by an agency more than once in any 12-month period.

We are of the opinion that both the annual pay adjustment provided for in 5 C.F.R. § 534.504 and the periodic pay adjustment authorized in section 534.503 should be considered in determining whether an employee's "basic rate of pay" equals or exceeds the Executive Level V threshold for purposes of 18 U.S.C. § 207(c). Like step increases, both adjustments lead to a new rate of basic pay, and neither adjustment is the equivalent of compensation commonly referred to as "additional" pay, including bonuses, awards, and various allowances.

This opinion has been coordinated with OPM.

Sincerely,

Stephen D. Potts
Director

¹ Section 207(c) was originally enacted by the Ethics in Government Act of 1978. It was amended effective January 1, 1991, by the Ethics Reform Act of 1989, Pub. L. No. 101-194, Nov. 30, 1989, 103 Stat.

1716, which included a GS-17 triggering rate. As a result of the subsequent amendment of 18 U.S.C. § 207(c)(2)(A)(ii) by the Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, Nov. 5, 1990, 104 Stat. 1389, the triggering rate was changed to Level V of the Executive Schedule.

2 Chapter II of title 2, United States Code, provides for a Citizens' Commission on Public Service and Compensation which makes quadrennial recommendations to the President concerning Executive Schedule pay. After considering the recommendations of the Commission, the President transmits to Congress his recommendations with respect to the exact rates of Executive Schedule pay. The President's recommendations take effect only upon enactment into law of a bill or joint resolution approving such recommendations. 2 U.S.C. § 359. In each year that rates of pay under the General Schedule are adjusted in accordance with the Employment Cost Index (ECI) under 5 U.S.C. § 5303, the rate of basic pay for each level of the Executive Schedule is adjusted in accordance with the most recent percentage change in that index.

3 This exclusion would also apply in determining whether the rate of basic pay for a position in the Senior Executive Service (or other SES type system, such as the Senior Foreign Service) is equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule.

4 Senior Executive Service positions do not have steps. Also, General Schedule rates cannot by law exceed Level V of the Executive Schedule. 5 U.S.C. § 5303(f).

5 Section 5303(a) of title 5, United States Code, provides that "[e]ffective as of the first day of the first applicable pay period beginning on or after January 1 of each calendar year, the rates of basic pay for each statutory pay system shall be increased by the percentage (rounded to the nearest one-tenth of 1 percent) equal to one-half of 1 percentage point less than the percentage by which the ECI for the base quarter of the year before the preceding calendar year exceeds the ECI for the base quarter of the second year before the preceding year (it at all)."