

Office of Government Ethics

95 x 12 -- 11/15/95

Letter to an Alternate Designated Agency Ethics Official dated November 15, 1995

This is in reply to your letter of May 4, 1995, concerning a former [agency] employee's representation of a current [agency] employee in settlement discussions with the agency relating to two equal employment opportunity (EEO) complaints. Prior to his retirement from the agency, the former employee had apparently assisted the complainant with the first of the two claims. You are seeking an opinion from the Office of Government Ethics (OGE) "on the issue of whether the activities of the former employee violated 18 U.S.C. § 207."(1)

Notwithstanding OGE's broad mandate with respect to the interpretation of Federal ethics provisions, the [agency's] functions are limited in the case of alleged violations of the conflict of interest laws in title 18 of the United States Code. Section 402(f)(5) of the Ethics in Government Act of 1978, as amended, provides that the Director of OGE may not "make any finding that a provision of title 18, United States Code ... has been or is being violated." 5 U.S.C. app., § 402(f)(5). See also 5 C.F.R. § 2638.501(c). Short of making such a finding, however, we can outline what we deem to be the appropriate analysis given the facts that you have presented.

As described in your letter and as further clarified in telephone conversations between [an attorney] of this Office and [a member] of your staff, the former [agency] employee has represented the current [agency] employee before the agency in relation to two EEO complaints since terminating Government service. He participated in only one of those complaints while still [an agency] employee. The agency initially viewed the complaints as separate "particular matters" for purposes of 18 U.S.C. § 207(a)(1). The two complaints were subsequently consolidated, and the former employee has since appeared before the agency in relation to that consolidated complaint.

Section 207(a)(1) of title 18, United States Code, prohibits a former employee from representing anyone else before a Federal department, agency, or court in connection with certain particular matters (such as the EEO complaint at issue) if the former employee participated personally and substantially in the matter as a Government employee. Since you have determined that the elements of 18 U.S.C. § 207(a)(1) are otherwise satisfied in relation to the former employee's post-employment activities,

you have narrowed the issue to that described in your May 4 letter. Thus, you have posed the following question concerning the former employee's participation in the complaint while still [an agency] employee:

Did the former [agency] employee's advice and counseling to the EEO complainant constitute an "official action" for purposes of determining whether section 207 would bar the employee from undertaking representational activities on behalf of the complainant after the employee had left Government service?

A current executive branch employee may serve as an EEO complainant's representative consistent with 18 U.S.C. § 205. Under 18 U.S.C. § 205(a)(2), a Federal employee is generally prohibited from acting as an agent or attorney for anyone else before an agency in connection with a particular matter in which the United States is a party or has a direct and substantial interest. The statute provides, however, that an employee may serve in such a representative capacity if he does so "in the proper discharge of his duties." As we noted in a 1994 OGE informal advisory letter, this phrase has been interpreted by the Department of Justice's Office of Legal Counsel to suggest that "Congress did not intend to limit the ability of Federal agencies to assign employees to tasks that would involve representing other parties." (2) Alternatively, an exception at 18 U.S.C. § 205(d) permits an employee, "if not inconsistent with the faithful performance of his duties," to act without compensation as agent or attorney for any person "who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings." Under this exception, an employee may serve as an EEO complainant's representative even though not assigned to do so as part of his official duties.

As my staff has indicated, we are not in a position to determine whether a particular former [agency] employee represented a complainant in his personal capacity or as part of his official duties. As we explained in the 1994 advisory letter cited above:

Deciding whether a representational activity is 'in the proper discharge' of an employee's official duties requires the employee's official superiors to make a factual determination of whether a proposed representational activity falls within the scope of the employee's official duties, i.e., whether the activity is part of the employee's job.

Since the submission of your letter, your staff has indicated by telephone that the [agency] has not determined whether the former employee

was assigned to represent the complainant as part of his official duties.(3) We agree that this question cannot be resolved solely on the basis that the employee may have engaged in the representational activity on "official time."(4)

If an individual served while a current Government employee as a representative in an EEO complaint pursuant to the exception at 18 U.S.C. § 205(d), we do not believe that he should be deemed to have "participated" in the complaint "as such officer or employee" within the meaning of 18 U.S.C. § 207(a)(1). On the other hand, a former employee could potentially be barred by section 207(a)(1) from continuing to represent a complainant if he participated in the complaint during Government service as part of his official duties. As noted above, OGE is not in the position to judge whether a particular former [agency] employee represented a complainant in his official capacity or, consequently, to determine whether referral to the Attorney General is warranted pursuant to 28 U.S.C. § 535.

Sincerely,

Stephen D. Potts
Director

Endnotes:

- (1) Your letter requests that OGE issue a "formal" opinion. While OGE does have the authority to issue formal advisory opinions, we have considered the criteria set forth in subpart C of 5 C.F.R. part 2638 and have determined that a formal opinion is not appropriate in this case.
- (2) See Office of Government Ethics (OGE) Informal Advisory Letter 94 x 8.
- (3) It is my understanding that members of my staff earlier provided oral advice to your office in connection with this matter. My staff believed at that time that the [agency] had determined that while still employed by the agency, the former employee participated as the complainant's representative within the scope of his official duties.
- (4) When we informally consulted with an Equal Employment Opportunity Commission (EEOC) staff attorney, she expressed her belief that employees are not ordinarily assigned to serve in their official capacities as representatives of EEO complainants. Consistent with the exception at 18 U.S.C. § 205(d), the EEOC regulations provide that a representative shall have a reasonable amount of official time to carry out the

representational activity if he is "otherwise on duty." 29 C.F.R. § 1614.605(b).