

## Office of Government Ethics

96 x 13--07/10/96

### Letter to a Private Attorney dated July 10, 1996

This is in reply to your letter of May 21, 1996, concerning your representation of [an individual] in his effort to compromise a [penalty assessment] by [a Federal agency]. [An agency official] has determined that because of your involvement with this assessment while you were employed by the [agency], you are prohibited from representing [the individual] by 18 U.S.C. § 207(a)(1) and [an agency regulation]. You are seeking Office of Government Ethics (OGE) review of these determinations.

OGE does not ordinarily serve in an appellate capacity. However, in his letter to you [of a certain date], [the agency official] indicated that you could seek an independent review of his opinions by contacting OGE. Consequently, we have reviewed an exchange of correspondence between you, [agency] ethics officials, and [a regional office]. While we can address the applicability of 18 U.S.C. § 207(a)(1) and the interpretation of OGE regulations at 5 C.F.R. part 2637, we lack any authority to interpret [the agency regulation]. Although section 207(a)(1) and [the agency regulation] are similar, the latter restriction derives from the authority of the Secretary of [the Department] [under a particular statute] "to regulate the practice of representatives of persons before the [Department]."

As a former executive branch employee, you are prohibited by 18 U.S.C. § 207(a)(1) from ever representing any other person before a Federal department, agency, or court concerning any particular matter, involving a specific party or parties, in which you participated personally and substantially while employed by the Government. 1 More specifically, this provision bars you from communicating to or appearing before the [agency], with the intent to influence, in connection with any such matter. 2

You argue that 18 U.S.C. § 207(a)(1) does not preclude your representation of [the individual] in connection with his offer of compromise. First, you argue that your participation in relation to the [penalty assessment] was not "substantial" within the meaning of section 207(a)(1) and 5 C.F.R. § 2637.201(d). Second, you conclude that even if your involvement was substantial, the offer to compromise the penalty is not the same matter as the assessment of the penalty. You cite the discussion at 5 C.F.R. § 2637.201(c)(4) in support of this conclusion.

## **Your Participation in Assessment of Penalty**

There is some disagreement concerning the nature of your participation in the [penalty assessment] against [the individual]. It appears that you neither prepared the internal recommendation to assess the penalty, nor approved it as group manager. However, after the recommendation had been approved by someone else, you initialed the penalty statute assessment date, apparently to ensure assessment before the expiration of the applicable statute of limitations. Subsequently, you signed what you characterize as a "standard form letter" to [the individual] which referred to his agreement to pay the penalty amount and advised him that he would be billed soon. As confirmed by [an agency employee] in a telephone conversation with a member of my staff on [date deleted], the [agency] believes both of these actions to have been substantial in relation to the assessment of the penalty against [the individual]. 3

The term "substantially" is defined in 5 C.F.R. § 2637.201(d) as follows:

'Substantially' means the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

Based upon the information that you and the [agency] provided to us, we do not believe that the [agency] applied this guidance unreasonably in your case. In one instance, you apparently took an action to ensure assessment before the expiration of the statute of limitations. Although your review and initialing of the document may have demanded little of your time or effort, we believe the [agency] may consider this action to have been substantial since the expiration of the statute of limitations would have precluded the collection of the penalty. Later, you signed a letter which, according to [agency] procedures, is routinely sent to a [person] who has agreed to pay a proposed penalty amount. As we understand it, the dispatch of this letter is essentially the last step in the processing of a penalty prior to the actual assessment. Again, we believe the [agency] could reasonably determine that you participated substantially in the assessment by signing this letter, even though the format of the letter was standard.

## **Relationship Between Assessment and Offer to Compromise**

It is also your position that you may represent [the individual] notwithstanding 18 U.S.C. § 207(a)(1) because the offer to compromise the [penalty assessment] is a different matter than the original assessment. Even if you participated personally and substantially in the assessment of the penalty, therefore, you argue that you are not barred from communicating with or appearing before the [agency] concerning [the individual's] offer to compromise.

In order to determine whether two matters are the same, 5 C.F.R. § 2637.201(c)(4) advises that "the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest." You conclude that only the parties are the same, and that all other factors support your conclusion that the assessment and offer to compromise are two different matters. We disagree. The matter at issue has always been the penalty. We do not see how the assessment of the penalty can reasonably be deemed separate from the [resolution of the matter]. We believe that the [agency] properly determined that the offer of compromise is not a new matter for purposes of 18 U.S.C. § 207(a)(1).

Consequently, we believe that you are barred by 18 U.S.C. § 207(a)(1) from representing [the individual] before the [agency] concerning his offer to compromise the penalty that was assessed against him in [a particular year]. The [agency] has already advised you concerning the significance of [the agency regulation] in relation to your representation of [the individual].

Sincerely,

Stephen D. Potts  
Director

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1 Since you retired from Government more than two years ago, you correctly assume that your post-employment activities can no longer be affected by 18 U.S.C. § 207(a)(2).

2 [The agency regulation] 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 transaction." Notably, unlike 18

U.S.C. § 207(a)(1), this section also prohibits "behind-the-scenes" assistance.

3 Regulations implementing 18 U.S.C. § 207 assign agencies the primary responsibility for providing advice to former employees regarding post-employment restrictions since an agency is generally in the best position to ascertain the facts and to make certain judgments that require an understanding of agency programs. See 5 C.F.R. §§ 2637.101(c)(8) and 2637.201(e).