

Office of Government Ethics

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Letter to a Member of Congress dated August 27, 1993

This is in response to your letter of August 12, 1993, concerning the matter of reemployment rights with a former employer retained by an executive branch employee. You indicate that a constituent has expressed concern regarding the treatment of reemployment rights under the "Standards of Ethical Conduct for Employees of the Executive Branch," 5 C.F.R. part 2635, issued by the Office of Government Ethics (OGE), which recently became effective on February 3, 1993. You request our views on this subject.

The basic statutory provision which needs to be considered is section 208 of title 18 of the United States Code. Section 208 prohibits an employee of the executive branch from participating personally and substantially in an official capacity in any particular matter in which, to the employee's knowledge, the employee or any person whose interests are imputed to the employee has a financial interest.

Section 208 specifically prohibits an executive branch employee from taking official action in a particular matter in which "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment" has a financial interest. See 18 U.S.C. § 208(a). The express language of the statute covers the situation of an executive branch employee who has reemployment rights with a former private employer because such an agreement constitutes an "arrangement concerning prospective employment." The financial interests of that private employer are therefore imputed to the Federal employee for the purposes of section 208.

The fact that a right of reemployment may be held as a result of a binding contractual agreement does not mean that it is not an "arrangement concerning prospective employment." Even though such a right may be fixed or defined by a labor agreement and not subject to any further negotiations, it nevertheless constitutes an arrangement by which the Federal employee may return to employment with the former private employer at some future time. The fact that a substantial period of time may elapse before the right is exercised does not in any way diminish the legal effect of that

arrangement.

Under the statute, the effect of retaining a right of reemployment is that the Federal employee is disqualified from acting in an official capacity on any particular matter that would affect the former private employer. Furthermore, under the statute there is no requirement of a showing that the employee would be actually influenced by the holding of such a reemployment right. The mere fact that the right is retained disqualifies the employee from acting on particular matters that would affect the former employer.

The "Standards of Ethical Conduct for Employees of the Executive Branch," issued by OGE, provide guidance on the requirements of 18 U.S.C. § 208. Subpart D of the rules, 5 C.F.R. §§ 2635.401-2635.403, provides guidance and examples with regard to conflicting financial interests. Subpart F of the rules, 5 C.F.R. §§ 2635.601-2635.606, provides guidance regarding seeking other employment and arrangements concerning prospective employment. In particular, 5 C.F.R. § 2635.606(a) states that an employee "shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person . . . with whom he has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3)."

To sum up, an executive branch employee is not prohibited by the basic conflict of interest statute or OGE regulation from retaining reemployment rights with a former private employer. An employee, however, may not participate personally and substantially in a particular matter that would affect that former employer, unless the employee has obtained a statutory waiver.

I hope that this is responsive to your inquiry. If you have any questions concerning this letter, please do not hesitate to contact my office.

Sincerely,

F. Gary Davis
General Counsel