

OFFICE OF GOVERNMENT ETHICS

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Letter to a Designated Agency Ethics Official
dated December 8, 1998

This is in response to your request for guidance concerning the application of 18 U.S.C. § 207(a)(2) to the former head of an office at [an agency within your Department]. The former [agency] official, who was a [uniformed service] officer, now seeks to represent a client in connection with a particular matter that was not pending in his [agency] office until after he had gone on terminal leave prior to his separation from service. For the following reasons, we conclude that the former [agency] official's terminal leave status did not terminate his official responsibility for matters within his [agency] office; section 207(a)(2) therefore bars the former [agency] official from representing his client, or any other person, before the Government in the matter for two years after his Government service ended.

According to your letter, before the former [agency] official separated from Government service, he went on terminal leave for a period of time. During the period of time when he was on terminal leave, prior to his separation date, his office received a particular matter pertaining to the prospective approval of a specific product manufactured by a company. The former official sought guidance as to whether he might represent the company before the Government concerning an issue raised in connection with that particular matter. Because the employee in question was not a "senior" employee and did not personally participate in the particular matter during his Government service, the only post-employment restriction relevant to this situation is the two-year official responsibility bar contained in 18 U.S.C. § 207(a)(2). After a brief informal consultation with the Office of Government Ethics (OGE), you advised the former employee that his proposed representation of the company was barred by section 207(a)(2). Because of the importance of the question, OGE indicated that we would reconsider the question, if requested. The former official and the firm have requested this review.

As you know, section 207(a)(2) bars a former executive branch employee from knowingly making, with the intent to influence, any communication to or appearance before, any officer or employee of any department, agency, or court of the United States, on behalf of any other person (except the United States), in connection with a particular matter involving specific parties, in which the United States is a party or has a direct and substantial interest, which the employee knows or reasonably should know was actually pending under his official responsibility during his last year of

Government service. Your letter asked us to focus solely on the question of whether an employee on terminal leave from a supervisory position has "official responsibility" for particular matters involving specific parties that become pending in the employee's former office solely during the employee's terminal leave.

"Official responsibility" is defined in 18 U.S.C. § 202(b) as the "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." Under OGE regulations, the scope of an employee's official responsibility is generally determined by those areas assigned by statute, regulation, Executive order, job description or delegation of authority. All particular matters under consideration in an agency are under the "official responsibility" of the agency head, and under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties. 5 C.F.R. § 2637.202(b)(2).¹

We have never directly considered the question of whether commencing terminal leave eliminates the "official responsibility" concomitant with an employee's Government position. The text of section 207(a)(2) does not directly address this issue. We must therefore look to the nature of the terminal leave itself in order to determine whether the fact that a member of the [uniformed service] is on terminal leave is sufficient to eliminate the "official responsibility" that would normally flow from his or her Government position. The relevant provisions of the [uniformed service] Personnel Manual (Manual) that you provided to us define annual leave as a period of one or more workdays during which a [uniformed service] officer is released from his or her scheduled working hours. The Manual clearly establishes that terminal leave is a subset of annual leave, defining it as "any approved annual leave taken after an officer has submitted a request for separation or retirement from active duty" (emphasis added). It is clear that such an individual remains a Government employee. The Manual states that an officer is on active duty while on terminal leave,

¹ Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, since the definition of "official responsibility" was not amended by the Ethics Reform Act, part 2637 still provides useful guidance concerning the scope of that term.

thus holding all the responsibilities, duties, obligations, privileges, and benefits applicable to all [uniformed service] commissioned officers. Indeed, the Manual makes it clear that the [uniformed service] may revoke approval of terminal leave and recall the employee because of program requirements. Your cover letter notes that, while terminal leave may be taken as a single, uninterrupted period of annual leave immediately prior to an officer's separation date, it is also commonly taken in multiple installments, interspersed with periods of work, including periods of work immediately prior to the separation date.

Applying these factors to the question of whether a member of the [uniformed service's] terminal leave status for a period of time prior to his or her official separation from service is sufficient to eliminate the official responsibility concomitant with his or her Government position leads us to conclude that it does not. As noted above, terminal leave is a form of annual leave. We have never questioned the official responsibility of a supervisor who has gone on vacation for a week or more. This is true even if a particular matter involving specific parties arises within the employee's area of responsibility after the employee has gone on annual leave and is disposed of prior to the employee's return therefrom. In the situation that you have presented, the fact that the annual leave is taken after the [uniformed service] officer has requested separation or retirement from service, and therefore any annual leave that he takes is considered terminal leave, is not a sufficient change to justify a distinction in treatment under the conflict of interest laws. Suppose, for example, a [uniformed service] employee chose to take his or her terminal leave in small increments. The employee continues to exercise the duties and responsibilities of his or her official position when the employee returns to the office just as any other employee who has taken annual leave does. Even if the terminal leave is taken in a large block at the end of the employee's service, the fact that the terminal leave may be revoked at the agency's discretion and the employee returned to his or her position indicates that the tie between the employee and his or her position is not severed.² Moreover, conversations with your office have given us to understand that personnel rules prevent the employee's office from filling the employee's position until the [uniformed service] officer's official separation date.

² Because [uniformed service] employees on terminal leave remain Government employees, it should be noted that they remain subject to the conflict of interest laws and regulations governing executive branch employees during the period of time prior to their official separation from service.

The conclusion that an employee's terminal status does not affect his or her official responsibility is also consistent with the nature of the section 207(a)(2) restriction, which does not require a former employee to actually have participated in any way in a particular matter involving specific parties to be subject to the two-year prohibition with respect to that matter. The former employee need not even have been aware of the existence of that particular matter at the time that it was pending before his or her former agency; if it was pending within the former employee's official responsibility during his or her final year of Government employment, the two-year restriction of section 207(a)(2) applies to that former employee with respect to that particular matter. 5 C.F.R. § 2637.202(b)(4). While section 207(a)(2) has a knowledge element, this is satisfied if the former employee, at the time of the post-employment representation, has sufficient facts so he or she knows or should know that the particular matter was pending within his or her official responsibility. Because no contact, or even knowledge of the matter, while a Government employee is required for section 207(a)(2) to apply, an employee cannot avoid the restriction by recusing from an individual particular matter or class of particular matters. 5 C.F.R. § 2637.202(b)(5).

If you have any questions concerning the issues discussed in this letter, please feel free to contact [my staff].

We have not consulted with the Department of Justice concerning your inquiry or this response.

Sincerely,

Stephen D. Potts
Director