UNITED STATES OF AMERICA
DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Assistant Secretary
for Personnel Administration

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Complainant, v. IRVING L. BECKER, Respondent.	DATE: FEB 14, 1990 Docket No. C-76 DECISION CR 39

DECISION OF THE DEPUTY ASSISTANT SECRETARY TO AFFIRM THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent has been charged with engaging in representation activities in violation of 18 U.S.C. §207(a) subsequent to his retirement from Federal employment. In an initial decision dated August 18, 1989, the Administrative Law Judge (ALJ) found that Complainant had not established that Respondent's post-employment representation concerning a discrimination complaint violated 18 U.S.C. §207(a) and entered a decision in favor of Respondent.

Complainant appealed the decision of the ALJ, pursuant to 45 C.F.R. §73b.4(h). Pursuant to 45 C.F.R. §73b.4(h), when the initial decision of the ALJ is appealed, the Assistant Secretary is authorized to issue a final decision. By decision dated November 6, 1989, the Assistant Secretary for Personnel Administration recused himself from this proceeding and delegated the final decisional authority to the Deputy Assistant Secretary for Personnel Administration.

Based on my review of the record of the proceedings and the parties' post-decision pleadings, I agree with the decision of the ALJ that Complainant has failed to establish its allegations against Respondent. I hereby affirm and adopt the ALJ's opinion. Therefore, I will not repeat the findings of fact and conclusions of law contained in the initial decision. This opinion will address only the issue raised in Complainant's appeal. Pursuant to 45 C.F.R. §73b.4(h), this decision is the final decision of the Department in this matter.

BACKGROUND

The Complainant served a notice to show cause and administrative complaint on Respondent on November 23, 1988, charging that Respondent had engaged in conduct that violated the provisions of 18 U.S.C. §207(a). The alleged unlawful conduct involves Respondent's representation of Beale Cooper in a discrimination complaint against the Department of Health and Human Services. Complainant charges that this representation is unlawful because the discrimination complaint involves the same particular matter (i.e., the selection process for vacancy announcement A-62 (VA A-62)) in which Respondent was personally and substantially involved while a Federal employee. Respondent was allegedly personally and substantially involved with the selection process by virtue of certain recommendations that Respondent made with respect to Mr. Clary, an individual who was ultimately selected to fill one of the vacancies announced pursuant to VA A-62.

The ALJ held a hearing in Washington D.C. on April 26 and the parties filed post-hearing briefs, including proposed findings of fact and conclusions of law. Pursuant to 45 C.F.R. §73b.4(g), the ALJ issued an initial decision which included the following findings. First, the ALJ found that Respondent is a former Federal employee. Second, he found that Respondent, after ceasing Federal employment, knowingly represented a person other than the United States in a formal or informal appearance before an agency of the United States. Third, the ALJ concluded that the selection process for VA A-62 and Mr. Cooper's subsequent discrimination complaint constitute the same "particular matter" within the meaning of 18 U.S.C. §207(a). Finally, the ALJ determined that the record does not establish that Respondent actively participated in the selection process to fill positions advertised in VA A-62. Therefore, the ALJ concluded that Complainant had not demonstrated that Respondent violated 18 U.S.C. §207(a).

DISCUSSION

In the appeal from the initial decision, Complainant takes exception to one aspect of the initial decision. While Complainant agrees that the "particular matter" at issue is the process by which the selection was made for the vacancy which was announced pursuant to VA A-62, Complainant disagrees with the ALJ's conclusion that recommendations made by the Respondent prior to the posting of VA A-62 were not part of the selection process. See Complainant's Appeal from the Decision of the Administrative Law Judge (Com. App.) at 13.

In its appeal, Complainant cites to the regulations of the Office of Government Ethics (OGE) which explain that whether a matter should be treated as a "particular matter involving specific parties" may depend on the "employee's own participation in events which give particularity and specificity to the matter in question." 5 C.F.R. §737.5(c)(3). The regulations provide the following example:

> [I]f a Government employee (i) personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons was identified to perform services thereunder and (ii) actively urged that such a contract be awarded, but the contract was actually awarded only after the employee left, the contract may nevertheless be a particular matter involving a specific party as to such former Government employee.
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> Example 1: A Government employee advises her agency that it needs certain work done and meets with private firm to discuss and develop requirements and operating procedures. Thereafter, the employee meets with agency officials and persuades them of the need for a project along the lines discussed with X. She leaves the Government and the project is awarded by other employees to X. The employee is asked by X to represent it on the contract. She may not do so.

Id. Complainant argues that Respondent's recommendations and expressions of interest made prior to the posting of VA A-62 are similar to the employee's actions in the above example and that the Respondent's recommendations and opinions are part of the particular matter in this case, i.e., the selection process.

For the reasons discussed below, I find that Complainant's arguments that Respondent's actions in this case are analogous to the actions of the employee in the example from the OGE regulations quoted above are unpersuasive.

Complainant argues that Respondent was involved in the selection process for VA A-62 by virtue of the fact that prior to the posting of the announcement, Respondent recommended that

Mr. Clary be promoted to a GS-13 level position on Respondent's staff, which turned out to be one of the positions that was the subject of VA A-62. Com. App. at 16. Respondent's recommendations and opinions concerning Mr. Clary's promotion were made in the context of a supervisory relationship, not in the context of the selection process (which involved 17 applicants for three positions).

The announcement for the positions that were the subject of VA A-62 was made on May 27, 1985. Initial Decision at 5. The record demonstrates that Respondent's opinions and recommendations regarding Mr. Clary were made prior that date. For example, in late 1984 and early 1985, Respondent told his superiors that Mr. Clary was performing at the GS-13 level, and Respondent recommended that Mr. Clary be promoted to that level. Initial Decision at 6. In January 1985, Respondent recommended to his superiors that Mr. Clary be given an award for sustained superior performance. Id. There is no evidence in the record that Respondent made any recommendations after VA A-62 was announced. Initial Decision at 7. As the ALJ noted, Respondent's actions "pertained only to Mr. Clary's job performance, and the merits of promoting this individual." Initial Decision at 13. The facts in this case are thus markedly different from the facts in the example, where the employee's discussions with agency officials apparently had no relevance outside the award of the contract.

Complainant argues that since Mr. Clary was particularly well-qualified for a position on the Representation Staff at the time Respondent made his recommendations concerning Mr. Clary, Respondent's comments concerning Mr. Clary's promotion were part of the selection process for VA A-62. Com. App. at 17. The position on the Representation Staff had not been posted at the time that Respondent made his recommendations to his superiors concerning Mr. Clary, therefore, the position on the Representation Staff was not "open to Mr. Clary" as Complainant contends. Id. Complainant's allegations simply do not support the conclusion that Respondent participated in the selection process for VA A-62. As discussed in the preceding paragraphs, Respondent's statements were made in the context of a supervisory relationship, not in the context of the selection process.

The Complainant also contends that Respondent's recommendations and opinions regarding Mr. Clary directly led to the posting of VA A-62. Com. App. at 18. The evidence offered by Complainant concerning this point, including references to Respondent's testimony and a statement by the ALJ, are insufficient to support Complainant's contention. As the Complainant has noted,

the ALJ found that the Respondent was generally not a credible witness. Com. App. at 16. The ALJ's statement that "it was possible that the selection process was made in some respects in contemplation of what [Respondent] wanted" (see Com. App. at 18 (emphasis added)) does not contain any factual support for this contention and is therefore not controlling. In contrast, in the example, the existence of the project (the particular matter in that case) was the direct result of the employee's discussions with the agency officials.

CONCLUSION

Based on my review of the record of the proceedings, Complainant's Appeal, Respondent's Opposition to Complainant's Appeal and Complainant's Reply, I affirm the initial decision of the ALJ dated August 18, 1989 that Complainant has not established that Respondent's post-employment representation of Mr. Cooper violated 18 U.S.C. §207(a).

/s/

Eugene Kinlow
Deputy Assistant Secretary
for Personnel Administration

Date: February 9, 1990