

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Grant Appeals Board

Civil Remedies Division

In the Case of:

The Department of Health and
Human Services, Complainant

Date: August 19, 1989

-v.-

Docket No. C-76
CR 39

Irving L. Becker,
Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

Complainant charged Respondent with engaging in unlawful representation activities subsequent to his retirement from federal employment. Respondent denied the charge and requested a hearing. I conducted a hearing on the charge. Based on the evidence introduced at the hearing, and on applicable law and regulations, I conclude that Complainant failed to establish its charge against Respondent. I therefore enter a decision in Respondent's favor.

BACKGROUND

Complainant served a notice to show cause and administrative complaint on Respondent on November 23, 1988, charging that Respondent had engaged in conduct which violated the provisions of 18 U.S.C. 207(a).

This section provides that:

Whoever, having been an officer or employee of the executive branch of the United States Government . . . after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to --

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed . . . shall be fined not more than \$10,000 or imprisoned for not more than two years or both.

A separate section of the law, 18 U.S.C. 207(j), provides that if the head of the department or agency finds, after notice and opportunity for a hearing, that a former employee violated section 207(a), then the department or agency head may prohibit the former employee from making any appearance before the department or agency for a period not to exceed five years.

The complaint specifically alleged that while employed by the Social Security Administration (SSA), an administrative component of Complainant, Respondent made favorable recommendations to his superiors concerning a candidate for an employment position announced pursuant to a competitive selection process.

The complaint further alleged that, as a direct result of Respondent's recommendation, the candidate recommended by Respondent was selected to fill the position. The complaint alleged further that subsequent to retiring from federal service, Respondent acted as an attorney for an individual on a discrimination complaint. The complaint asserted that the individual represented by Respondent had been a candidate for a position filled under the vacancy announcement with respect to which Respondent allegedly made recommendations. The complaint against Respondent further alleged that the individual represented by Respondent claimed in his discrimination complaint that his nonselection for that position was as a result of discrimination.

Therefore, according to Complainant, Respondent had engaged in unlawful representation activities subsequent to his retirement, because he represented a party to a particular matter in which Complainant had an interest, and in which Respondent had personally and substantially participated while an SSA employee. Complainant proposed as a remedy that Respondent be barred from representation activities before any component of Complainant for a period not to exceed three years.

Respondent timely answered the complaint. Respondent admitted that he had been employed by SSA and that he had retired on the date asserted in the complaint. He admitted that a vacancy announcement had been posted. He admitted representing in a discrimination complaint an unsuccessful candidate for a position filled pursuant to that announcement. However, Respondent denied having made recommendations concerning filling positions pursuant to the vacancy announcement. He requested a hearing before an administrative law judge.

The case was assigned to me for a hearing and decision. I conducted a hearing in Washington, D.C. on April 26, 1989, at which I admitted exhibits into evidence and heard the testimony of the parties' witnesses. I ordered the parties to file posthearing briefs, including proposed findings of fact and conclusions of law. The parties complied with these directions.

ISSUE

The issue in this case is whether Respondent engaged in unlawful representation activities in violation of 18 U.S.C. 207(a). This issue subsumes the questions of whether Respondent:

1. is a former employee of the executive branch of the federal government;
2. after ceasing his employment, knowingly represented a person other than the United States in a formal or informal appearance before an agency, officer or employee of the federal government;
3. engaged in representation in connection with a particular matter involving a specific party or parties in which the United States was a party or had a direct and substantial interest; and
4. participated personally and substantially as an employee in that matter.

APPLICABLE LAW AND REGULATIONS

A. Statutes.

1. 18 U.S.C. 207(a).

B. Regulations.

1. 5 C.F.R. Ch.1, Part 737--Regulations Concerning Post Employment Conflict of Interest.

2. 45 C.F.R. Part 73b--Debarment or Suspension of Former Employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was employed by SSA from July 15, 1957 until he retired on January 3, 1987. Tr. at 151.
2. From 1980 until January 3, 1987, Respondent held the position of Chief, Representation Staff, in SSA's Division of Labor and Employee Relations. Tr. at 151-53.
3. Prior to August 4, 1985, Lionel J. Clary was employed as a Labor Relations Specialist GS-12 on the Representation Staff. Tr. at 109, 118-119; C. Ex. 6.
4. Beginning August 4, 1985 and until January, 1986, Mr. Clary was employed as a Labor Relations Specialist GS-13 on the Representation Staff. Tr. at 118-119; C. Ex. 6.
5. Respondent served as Mr. Clary's first-line supervisor during the period when Mr. Clary was employed on the Representation Staff. Tr. at 109.
6. On May 27, 1985, an announcement was made that three vacancies in the position of Labor Relations Specialist, GS-13, would be filled in the Division of Labor Relations. Tr. at 21-22, 58; C. Ex. 1, 5.
7. One of these positions was on the Representation Staff; another was on the Division of Labor Relations Headquarters Operations Branch; and the third was on the Division of Labor Relations Field Operations Branch. C. Ex. 1.
8. The vacancy announcement (VA) which announced these positions was titled VA A-62. C. Ex. 1, 5.

9. The applicants for the positions announced by VA A-62 included Mr. Clary and Beale E. Cooper. C. Ex. 2, 3.

10. Both Mr. Clary and Mr. Cooper met the qualification standards for the positions announced by VA A-62 and their names were included in the best qualified list of applicants eligible for selection to the positions. C. Ex. 5.

11. At the time the selections were made for the positions announced by VA A-62, Peter Spencer was the Director of the Division of Labor and Employee Relations. Tr. at 23, 55, 58.

12. At the time the selections were made for the positions announced by VA A-62, Respondent was Mr. Spencer's subordinate. Tr. at 61-62.

13. The selecting official for the positions announced by VA A-62 was Larry Massanari, Director of SSA's Office of Human Resources. Tr. at 21-22, 59.

14. At the time the selections were made for the positions announced by VA A-62, Mr. Spencer was Mr. Massanari's subordinate. Tr. at 23.

15. Prior to the date of the announcement of the vacancy on the Representation Staff advertised by VA A-62, Respondent told Mr. Spencer and Mr. Massanari that he believed that Mr. Clary was performing at the GS-13 level, and he recommended that Mr. Clary be promoted to that level. Tr. at 25, 28-29, 50, 63-66, 79-80, 112-113.

16. Prior to the date of the announcement of the vacancy on the Representation Staff advertised by VA A-62, Respondent prepared a supervisory appraisal of Mr. Clary's performance in which he rated Mr. Clary's performance as "excellent." Tr. at 35, 49-50, 70, 109-110; C. Ex. 3.

17. Prior to the date of the announcement of the vacancy on the Representation Staff advertised by VA A-62, Respondent recommended to Mr. Spencer and Mr. Massanari that Mr. Clary be given an award for sustained superior performance. Tr. at 35, 50, 70-71; C. Ex. 3.

18. Prior to the date of the announcement of the vacancy on the Representation Staff advertised by VA A-62, Respondent surveyed officials in offices whom Mr. Clary served, and asked these

officials how they would rate Mr. Clary's performance and effectiveness. Tr. at 50, 65-66.

19. Respondent reported to Mr. Spencer that the officials surveyed concerning Mr. Clary's performance had rated it as excellent. Tr. at 50, 65-66.

20. Prior to making his decision on whom to select for the position on the Representation Staff which was advertised in VA A-62, Mr. Massanari consulted with Mr. Spencer. Tr. at 23.

21. Mr. Spencer recommended to Mr. Massanari that Mr. Clary be selected to fill the position on the Representation Staff which was advertised in VA A-62. Tr. at 23.

22. Mr. Spencer's recommendation to Mr. Massanari was in part based on the information and advice concerning Mr. Clary that Mr. Spencer received from Respondent prior to the date of the advertisement for positions in VA A-62. Tr. at 64.

23. Mr. Massanari selected Mr. Clary to fill the position on the Representation Staff which was advertised in VA A-62. Tr. at 25-26.

24. Respondent's views as to Mr. Clary's qualifications expressed prior to the date of the advertisement for positions in VA A-62 were among the factors which influenced Mr. Massanari to select Mr. Clary to fill the position on the Representation Staff which was advertised in VA A-62. Tr. at 26.

25. Mr. Massanari did not have any discussions with Respondent after the date of announcement of positions in VA A-62, concerning the qualifications of applicants for those positions. Tr. at 25, 40.

26. Respondent did not recommend to Mr. Massanari that Mr. Clary be selected to fill the position on the Representation Staff which was advertised in VA A-62. Tr. at 25, 40.

27. Mr. Spencer did not have any discussions with Respondent after the date of announcement of positions in VA A-62, concerning the qualifications of applicants for those positions. Tr. at 66, 78-81.

28. Respondent did not recommend to Mr. Spencer that Mr. Clary be selected to fill the position on the Representation Staff which was advertised in VA A-62. Tr. at 25, 40.

29. Mr. Cooper was not selected for any of the three positions advertised in VA A-62. See C. Ex. 8.

30. On September 18, 1985, Mr. Cooper filed a formal administrative complaint against Complainant in which he alleged that he had been discriminated against on the basis of his race, sex, and age when he was not selected for any of the three positions advertised in VA A-62. Tr. at 73; C. Ex. 8.

31. On September 10, 1987, SSA issued a proposed disposition of Mr. Cooper's complaint, finding no basis for his allegations of discrimination. C. Ex. 12.

32. On October 26, 1987, Mr. Cooper requested a hearing on his complaint of discrimination. C. Ex. 13.

33. Respondent represented Mr. Cooper in Mr. Cooper's hearing request on his discrimination complaint. C. Ex. 13.

34. At the time Respondent agreed to represent Mr. Cooper, Respondent reviewed Mr. Cooper's complaint file in order to determine whether Respondent's representation would violate the provisions of 18 U.S.C. 207. Tr. at 174-175.

35. On December 3, 1987, Respondent wrote to Complainant, confirming that he represented Mr. Cooper with respect to his discrimination complaint. C. Ex. 14.

36. Respondent continued to represent Mr. Cooper until January 5, 1989. R. Ex. 10, 14.

37. In order to establish a violation of 18 U.S.C. 207(a), Complainant must prove that:

(a) Respondent is a former employee of the executive branch of the United States Government; and that

(b) after Respondent ceased his employment, he knowingly represented a person other than the United States in a formal or informal appearance before an agency, officer or employee of the United States Government; and that

(c) Respondent's appearance was in connection with a particular matter involving a specific party or parties in which the United States was a party or had a direct and substantial interest; and that

(d) Respondent participated personally and substantially in the matter.

18 U.S.C. 207(a).

38. Complainant has the burden of proving, by a preponderance of the evidence, that Respondent violated 18 U.S.C. 207(a). Tr. at 9-10; see 5 C.F.R. 737.27(a)(7); 45 C.F.R. 73b.4(f).

39. Respondent has not established that Complainant failed to comply with the requirements of 45 C.F.R. 73b.3. C. Ex. 18.

40. Respondent is a former employee of the executive branch of the United States Government. Finding 1.

41. Respondent represented Mr. Cooper after Respondent ceased his employment with the Executive Branch of the United States Government. Findings 32-35.

42. Respondent represented Mr. Cooper in a formal or informal appearance before an agency, officer or employee of the United States Government. Findings 32-35.

43. Respondent's representation of Mr. Cooper was in connection with the selections which were made to fill positions advertised in VA A-62. Findings 29-36.

44. The process by which selections were made for the positions advertised by VA A-62 is a "particular matter" within the meaning of 18 U.S.C. 207(a).

45. Mr. Cooper was a specific party to the selection process made pursuant to VA A-62. Findings 9-10, 29.

46. Mr. Cooper was a specific party to the discrimination complaint and hearing request which he filed. Findings 30-32.

47. The selection process pursuant to VA A-62 and Mr. Cooper's discrimination complaint involve the same basic facts. C. Ex. 1-3, 6, 7-9.

48. Respondent's representation of Mr. Cooper involved the same particular matter as the process by which selections were made for the positions advertised by VA A-62. Findings 41-42.

49. Respondent's representation of Mr. Cooper was in connection with a particular matter involving a specific party or parties

in which the United States was a party or had a direct and substantial interest. Findings 41-42.

50. Respondent did not participate personally and substantially in the particular matter of the process by which selections were made to fill positions advertised in VA A-62, while employed as a federal officer and employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise. Findings 15-28.

51. Respondent's representation of Mr. Cooper subsequent to the cessation of Respondent's federal employment did not violate 18 U.S.C. 207(a).

ANALYSIS

Many of the relevant facts in this case are not disputed. The parties agree that, until January 3, 1987, Respondent was a federal employee. Finding 1. They agree that he served as supervisor of Mr. Clary, one of the employees who qualified for selection for one of the three positions advertised in VA A-62. Finding 5. They agree that Mr. Clary was selected for one of the positions advertised in VA A-62. Finding 23. The parties agree that the selection occurred on a date prior to Respondent's ceasing his federal employment. Id. The parties also agree that, after Respondent ceased federal employment, Respondent represented another individual in a discrimination complaint arising from this individual's failure to be selected for one of the positions advertised in VA A-62. Findings 29-36.

There is disagreement as to other relevant facts. Complainant contends that, prior to publication of VA A-62, Respondent touted Mr. Clary's virtues to his supervisors and urged that this employee be promoted to a higher graded position. Respondent contends that he never recommended that this employee or any other employee be promoted. Tr. at 211. I conclude that, contrary to Respondent's assertions, he actively supported Mr. Clary's promotion prior to the publication of VA A-62 and the selection process pursuant to that announcement. Finding 15. Respondent's denials are belied by the testimony of the other witnesses in this case, including Mr. Clary.

The evidence establishes that Respondent's supervisors, Mr. Spencer and Mr. Massanari, relied in some respects on Respondent's views as to Mr. Clary's qualifications, expressed prior to the date of publication of VA A-62, in selecting Mr. Clary to fill the position on the Representation Staff. Findings

22, 24. However, the evidence does not support Complainant's contention that Respondent actively recommended Mr. Clary for selection for a position advertised in VA A-62.

I conclude that the record does not establish communications between Respondent and either Mr. Spencer or Mr. Massanari concerning Mr. Clary's candidacy for a position advertised in VA A-62. Findings 25-28. There is no evidence that Respondent's views as to Mr. Clary's selection, or the selection or nonselection of other candidates for positions advertised under that announcement, were solicited by Respondent's supervisors. Id. Nor is there credible evidence to establish that Respondent volunteered his opinion as to who should be selected to fill any of the advertised positions. Id. Thus, while the record establishes Respondent to have been an interested bystander to the selection process, it does not establish that he directly participated in that process.

Given these fact findings, the question becomes whether Respondent's representation in a discrimination complaint against Complainant of an unsuccessful applicant for a position advertised in VA A-62, after Respondent ceased government employment, violated 18 U.S.C. 207(a). I conclude that Respondent's representation activity did not violate the law, because Respondent did not participate "personally and substantially" in the selection process used to fill positions under VA A-62.

There are four criteria which must be met in order to establish that an individual violated 18 U.S.C. 207(a). First, the person accused of violating the law must be a former federal employee. In this case, there is no dispute that Respondent is a former federal employee. Second, the former employee must, after ceasing his employment, knowingly represent a person other than the United States in a formal or informal appearance before an agency, officer, or employee of the United States Government. Respondent's representation of Mr. Cooper in a discrimination complaint against Complainant satisfies this statutory requirement.

Third, there must be an identity between the subject matter of the post-employment representation and the particular matter with which that former employee was associated while serving as a federal employee. Complainant asserts that this criterion is satisfied in this case. Complainant argues that the "particular matter" at issue is the process by which persons were selected to fill positions advertised in VA A-62. Complainant's Brief at

14. Complainant argues that Mr. Cooper's complaint of discrimination is the same "particular matter" as the selection process for VA A-62. According to Complainant, the discrimination complaint involves the same basic facts as the selection process, and it involves the continuing existence of a federal interest--the government's desire to insure that its employment selection process is free from discrimination. Complainant's Brief at 15-16.

Respondent disputes this analysis. According to Respondent, Mr. Cooper's discrimination complaint is not the same particular matter as the selection process pursuant to VA A-62. Respondent asserts that the criteria for selection and the possible bases for a charge of employment discrimination are distinguishable. Respondent's Reply Brief at 2. Furthermore, according to Respondent, the mere fact that some of the factual elements in the selection process and in Mr. Cooper's discrimination complaint may be the same does not mean that the selection process and the discrimination complaint are the same particular matter." Id. at 2-3.

I conclude 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). I base my conclusion on the substantial identity of facts and issues in the selection process and Mr. Cooper's subsequent discrimination complaint.

Regulatory criteria have been established to determine whether two matters are the same "particular matter" within the meaning of 18 U.S.C. 207(a). In determining whether two particular matters are the same, 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. 5 C.F.R. 737.5(c)(4).

The selection process pursuant to VA A-62 and Mr. Cooper's discrimination complaint plainly involve the same basic facts. Indeed, Mr. Cooper would have had no basis to allege discrimination, but for the selection process. It is also apparent that the selection process and Mr. Cooper's complaint involve related issues--the criteria by which selections were made. The two matters involve the same or related parties, including the selecting officials, and the persons who made the best qualified list and who were either selected or not selected to fill the advertised positions. The selection process and Mr.

Cooper's complaint also involve an important federal interest, consisting of the need to assure that selections of individuals to fill vacancies for federal employment are free from unlawful discrimination.

The final criterion which must be met in order to establish a violation of 18 U.S.C. 207(a) by a former federal employee is that the particular matter at issue is a matter in which the former employee participated, personally and substantially: as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise 18 U.S.C. 207(a)(3).

The record in this case does not establish that Respondent actively participated in the selection process to fill positions advertised in VA A-62. The critical question, therefore, is whether Respondent's recommendations and expressions of interest made prior to the posting of VA A-62 suffice to satisfy the statutory requirement that he participate personally and substantially in the particular matter of the selection process. I conclude that Respondent's actions do not conform to the criteria stated in the law. While Respondent may have expressed his opinions before the inception of the selection process, the record does not establish that he was involved in the actual process of selecting persons to fill the positions advertised by VA A-62. He made no decision or recommendation, and rendered no advice, in the selection process.

The evidence establishes that Respondent made recommendations and offered advice concerning Mr Clary. He also took actions as a supervisor which affected Mr. Clary's standing as an applicant for positions advertised pursuant to VA A-62. However, this involvement by Respondent occurred prior to the posting of VA-A 62. Moreover, the recommendations and advice offered by Respondent concerning Mr. Clary did not directly pertain to decisions made with respect to filling advertised positions. Rather, it pertained only to Mr. Clary's job performance, and the merits of promoting this individual.

These distinctions may appear at first glance to be narrow, but they are neither meaningless nor artificial. As noted above, the law requires a specific degree of involvement by an individual in a particular matter, in order to render unlawful post-employment representation activities. Conduct does not fall within the statutory prohibition unless it meets the narrow and precise statutory criteria. In this case, the most that can be said about Respondent's involvement in the selection process

is that his views about Mr. Clary may have affected Respondent's supervisors' judgment when they made selections to fill the advertised positions. However, Respondent's expressions of opinion, made prior to the commencement of the selection process, do not amount to substantial participation in the selection process.

Complainant argues that even if Respondent did not actually participate in the selection process under VA A-62, his opinions to his supervisors concerning Mr. Clary significantly influenced their decision to select Mr. Clary for the position on the Representation Staff. Complainant asserts that this level of involvement by Respondent is sufficient to meet the "participate personally and substantially" test of 18 U.S.C. 207(a). Complainant grounds this argument on language in 5 C.F.R. 737.5(d), which provides in relevant part:

To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance

(Emphasis added). According to Complainant, Respondent's advice to his superiors concerning Mr. Clary formed a basis for a "reasonable appearance" of significant involvement in the selection process, and therefore met the "participate personally and substantially test" of 18 U.S.C. 207(a). C.'s Reply Brief at 1-3.

I disagree with this analysis and Complainant's conclusion. Both the statute and the regulation require the employee to directly participate in a particular matter in order to bring that employee's post-employment representation activities within the law's prohibitions. Although the record establishes that Respondent's opinions as to Mr. Clary's qualifications influenced his superiors' selection of Mr. Clary, there is no evidence that Respondent participated in the selection process. Respondent was simply not involved, either as a recommending or selecting official. Moreover, the possibility that his superiors may have felt no need to consult with Respondent, because his views were well known, does not serve to make Respondent a de facto participant in the selection process.

In reaching this conclusion, I have considered relevant examples of prohibited conduct contained in 5 C.F.R. 737.5. They are distinguishable from the facts established by the evidence in this case.

The regulations make clear that the principal intent of the law in the area of representation is to make unlawful post-employment conduct which amounts to switching of sides by a former employee. Example 1, set forth in 5 C.F.R. 737.5(b)(1), addresses the case of the government attorney who changes sides in an antitrust case after leaving federal employment. This example is distinguishable from the present case, because, in the example, the attorney was directly involved in an ongoing litigation as a decision-maker, both before and after leaving federal employment. In this case, Respondent was not directly involved in the process of making selections pursuant to VA A-62, prior to leaving federal employment.

The regulation cites examples to explain what is meant by personal and substantial participation in a particular matter. 5 C.F.R. 737.5(d)(1). Example 2 under this subsection describes the situation where a government lawyer is not in charge of a particular litigation, but is frequently consulted as to filings, discovery, and strategy. According to this example, the lawyer has personally and substantially participated in the litigation, and would be barred from representing the other side after leaving federal employment. Again, this example is distinguishable from the present case by virtue of the fact that the employee in the example was directly involved in the actual decision-making process of the particular matter at issue.

Respondent raised other issues which I either decided prior to the hearing or which I find unnecessary to decide. Respondent asserted that Complainant had not complied with procedures prescribed by regulation in investigating the case and filing its complaint. See 45 C.F.R. 73b.3. According to Respondent, such prescribed procedures are a jurisdictional prerequisite to filing the complaint, and even if they are not a prerequisite, Respondent would be prejudiced by Complainant's failure to follow prescribed procedures. I ruled that, even assuming Respondent's allegations were true, the regulatory pre-complaint procedures were not jurisdictional in character, and Respondent would not be prejudiced by Complainant's failure to follow these procedures. Tr. at 8-9. The parties have submitted additional argument as to these issues; I have considered their arguments and find no basis to change my ruling.

However, I also conclude that there does not exist credible evidence of record in this case to substantiate Respondent's claim that Complainant did not follow prescribed regulatory procedures prior to issuing its complaint. Finding 39.

Respondent also asserted that Complainant's allegations against him were generated as an act of retaliation for Respondent's representation activities. I find little or no evidence in the record of this case which supports this allegation. However, there is no need for me to rule on it, because I conclude that Complainant did not establish its allegation that Respondent engaged in activities which violated 18 U.S.C. 207(a).

CONCLUSION

Based on the evidence in this case and the law, I conclude that Complainant has not established that Respondent's post-employment representation of Mr. Cooper on a discrimination complaint violated 18 U.S.C. 207(a). Therefore, I enter a decision in favor of Respondent.

_____/s/_____
Steven T. Kessel
Administrative Law Judge