

NAVAIR EXECUTIVE SUMMARY

For

POST GOVERNMENT EMPLOYMENT

I. Introduction

There are a number of rules that can come into play when you are searching for employment prior to leaving the military, as well as after you actually retire or separate. This handout covers some of the major rules and gives common examples most applicable to NAVAIR personnel. Specific questions or concerns about your situation should be discussed with the NAVAIR Staff Judge Advocate who also serves as the Command Ethics Counselor for military personnel. Please note that seeking or receiving ethics advice does not create or imply an attorney client relationship.

Some of the major laws and regulations governing the ethical conduct of Government employees are found in Title 18 of the United States Code (18 U.S.C.) implemented through Title 5 of the Code of Federal Regulations (5 CFR 2635) and the Joint Ethics Rules (JER) found in DoD 5500.7-R. In some cases, the Procurement Integrity Act embodied in 41 U.S.C. 423 as implemented through part 3.104 of the Federal Acquisition Regulations (FAR), may apply to personnel involved in agency procurements.

II. Searching for a Job Prior to leaving DoD

Main rules here are the Criminal Ethics Statutes found in 18 U.S.C. §208 and Standards of Conduct for the Executive Branch found in 5 C.F.R. 2635.601 through .606. In some cases, the Procurement Integrity Act found in 41 U.S.C. §423 implemented in part 3.104 of the FAR applies.

Generally speaking, the standards of conduct found in the CFR are broader than the criminal statutes under the USC. If you participate “personally and substantially” in a “particular matter” through decision, approval, disapproval, recommendation, etc, in the matter (ie; contract, claim, determination, etc) that affects, or could affect, a prospective employer, you must disqualify yourself from taking any action regarding that prospective employer.

- “Personal” participation means direct participation and can include the actions of your subordinates when directed or approved by you as a supervisor.
- “Substantial” participation means that your involvement was significant to the matter.

So what actions should a law abiding and prudent person take to prevent potential conflicts arising under these statutes/regulations?

1. Before you begin "seeking" employment, you must disqualify yourself from taking any action involving a prospective employer whose financial interests could be affected by your official duties.

- “Seeking” employment under 5 CFR §2635.603 (b)(1) includes negotiations as well as any unsolicited communication from, or to, an entity regarding employment. It could include submitting a resume, but does not normally include:

- a. Requesting a job application;
- b. Submitting resumes to employers not affected by your governmental duties;
- c. Submitting resume to an employer affected by your governmental duties only as part of an industry or discrete (separate) class.

2. While negotiating employment, do not take official action involving the entity you are negotiating employment with.

“Negotiation” is defined by as "a discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position." Remember, a violation under 18 USC §208 may occur even if a formal offer of employment was not made.

3. Notify your superior of such negotiations, in writing, and disqualify yourself from performing duties affecting the entity/prospective employer. Unless the contact is initiated by another and you immediately reject it, you should submit a disqualification notice.

Generally, you are no longer considered to be “seeking employment” if you or the prospective employer reject the possibility of employment or 2 months passes without the employer indicating interest in hiring you. In addition to the criminal statute, remember that the standards of conduct (CFR) also prohibit acts which create the appearance of using public office for private gain or giving preferential treatment to the prospective employer, among others. In some limited circumstances, a waiver under 18 USC §208(b)(1) may be granted where disqualification or reassignment are impracticable (but this is rarely done).

Examples:

1. If an officer performs quality assurance inspections of products produced by Company X while negotiating for prospective employment with Company X, the employee violates the law. This is true even if the employee recommended that the government not accept any products from Company X during the period the employee was engaged in employment negotiations.

2. A Government employee is auditing the accounts of a DoN contractor. While at the contractor’s headquarters, the head of the accounting division tells the employee his division is thinking about hiring another accountant but he has not yet received authorization to do so. They discuss the duties and qualifications of the position but do not discuss salary. The contractor offers to get back with her when he gets approval for the position. The employee and contractor have engaged in negotiations regarding future employment. The employee must disqualify herself from taking any action that involves the contractor from that point forward.

If she continues to take official action (conduct audits), she violates both the criminal and regulatory prohibitions discussed above.

3. An aviator assigned to NAVAIR and evaluating new landing gear has mailed resumes to 50 defense contractors involved in manufacturing naval aviation equipment. Under the rules, he has begun to seek employment with contractors involved in the manufacture of landing gear. He has not begun seeking employment with any of the remaining contractors. This is so because the remaining contractors are not directly affected by the performance or non-performance of the aviator's duties or would be affected only because they are part of the aviation industry. He will be considered to be "seeking employment" with the landing gear manufacturers for the next 2 months unless they reject him or fail to respond to his resume.

4. Procurement Integrity Law provides special rules for agency officials participating personally and substantially in a federal procurement. You must promptly report, in writing to your Supervisor and the Ethics Counselor, an employment contact with a bidder or offeror in a \$100,000 or greater DOD procurement. (\$100,000 is the simplified threshold).

41 USC § 423 (Procurement Integrity Act's effect on searching for a job)

The Procurement Integrity Act restricts job search activities as well as post-government offers for federal employees who have been involved in agency procurements in excess of \$10 million dollars. It also prohibits disclosing contractor bid or proposal information before award of the contract.

- If you are "personally and substantially" participating in an agency procurement in excess of the acquisition threshold (currently \$100,000) and initiate a contact, or are contacted, about possible non-federal employment by a bidder or offeror in that procurement, you must:

1. Report the contact to your supervisor and ethics counselor, and;
2. Either reject the possibility of employment or disqualify yourself (per FAR 3.104-6) from personally and substantial involvement in the procurement until notified by Chain of Command.

- "Personal and substantial" participation in the procurement is defined as:

1. Drafting, reviewing or approving specifications or statement of procurement;
2. Preparing or developing the procurement;
3. Evaluating bids or proposals, or selecting the source;
4. Negotiating price or terms and conditions of employment;
5. Reviewing and approving the award of the contract.

- To participate "personally" means to participate directly and includes the direct and active supervision of a subordinates participation. To participate "substantially" means that the employee's involvement is significant to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not

determinative of the outcome of a particular matter. Substantiality is based not only on the effort devoted to the matter, but the importance of the effort.

Generally, an individual will not be considered to have participated personally and substantially in a procurement solely by participating in:

- a. Agency level boards, panels, or other advisory committees that review program milestones; evaluate or recommend alternative technologies or approaches satisfying broad agency objectives, or;
- b. the performance of general, technical, engineering or scientific effort with broad application not directly associated with a particular procurement;
- c. clerical functions supporting a particular procurement;
- d. participation in management studies, preparation of in-house cost estimates, furnishing of data or technical support to be used by others in the development of performance standards, statements of work or specifications.

III. Job restrictions after leaving DoD

Main rules here include the Criminal Ethics Statutes found in 18 U.S.C. §207 and Standards of Conduct for the Executive Branch found in 5 C.F.R. 2637 and 2641. In some cases, the Procurement Integrity Act found in 41 U.S.C. §423 implemented in part 3.104 of the FAR may also be applicable depending on your position, duties and the post-government employment involved.

41 USC § 423 (Procurement Integrity Act)

As described above, the Procurement Integrity Act restricts job search activities not only while on active duty, but may also restrict employment activities with an employer after you leave the service.

The 1 Year Ban under 41 USC 423 (d) (c) applies to you:

- If you served, at the time of selection or contract award, as the procuring contracting officer, source selection authority, source evaluation board member or the chief of a technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10 million dollars.
- If you served as the Program Manager, Deputy Program Manager or Administrative Contracting Officer for a contract valued at more than \$10 million dollars for that contractor.
- If you served as the procuring contracting officer, source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team at the time of selection of the award (valued at more than \$10 million dollars).

- If you personally made a decision to award a contract, subcontract, modification or task or delivery order in excess of \$10 million dollars to that contractor, settle claims, establish overhead rates approve issuance of payments, etc.

In short, if you were personally and substantially involved in contracts in excess of \$10M, then you may not receive compensation from that contractor for 1 year after leaving government service. This does not preclude you from accepting a position with a different division of the prohibited contractor if the division does not produce the same or similar products or services.

Examples:

1. A retired Marine Corps Colonel served as the Program Manager on a particular ordnance procurement 5 years before he retired. He wishes to work for the company that was awarded the contract in a job unrelated to the old contract. He may do so since his service as program manager terminated more than 1 year ago.

2. A Warrant Officer recently served as a member of a source selection evaluation board on a contract worth \$8 million. Company X was a bidder in the procurement. Under the Procurement Integrity Act, the Warrant Officer may work for Company X because the contract was worth less than \$10 million. (However, the Warrant should insure that no action is taken in violation of 18 USC §207 discussed below).

3. A Navy Captain recently served as the Program Manager for a certain aircraft procurement which involved Company X. The Captain wishes to work for Company Y, which is an automobile subsidiary of Company X. Since the subsidiary does not manufacture aviation parts, he may accept the employment.

4. A retired officer is interested in accepting compensation from a consulting firm. The consulting firm wants to hire the retired officer to provide in-house assistance to a contractor. The contractor was awarded a \$20 million contract that the retired officer took action on while on active duty six months ago. The retired officer should not accept compensation from the consulting firm since such compensation is an indirect payment from the contractor.

18 U.S.C. § 207 – Prohibits former government employees from engaging in certain advocacy roles (Applies to Officers – not Enlisted Personnel)

This statute is designed to deter “switching sides” when a government employee leaves federal service and then returns to represent his new employer back to the government. The statute does not limit your acceptance of any job in the private sector – but it does restrict the kinds of issues (matters) you may undertake for that employer.

The Lifetime Ban under 18 U.S.C. §207 (a)(2):

- This ban precludes you from appearing before any office, department, agency, etc; on behalf of your new employer regarding any “particular matters” in which you “personally and substantially” were involved while in government service.

- You must not attempt to influence government officials - but you are permitted to provide “in house” (behind the scenes) assistance to the employer.

- A violation of this section occurs when the following four criteria are met:

1. That you worked on a “particular matter” while in government service;
2. The work amounted to “personal and substantial” participation in the matter;
3. A (any) specific party to that matter was identified at the time of your work;
4. That you, with intent to influence, communicated with or appeared before an officer or employee of the federal government on behalf of your employer regarding that same particular matter.

A “specific matter” means any specific contract, application, request for a ruling or determination, rulemaking, claim, controversy, investigation, charge, accusation, arrest or judicial or other proceeding.

- Not included is the formulation of general policy, or other actions of general applicability in which the former officer was involved unless his involvement has a direct and predictable effect on a particular person (or contractor).

- “Personal and substantial” participation means that you exercised “decision, approval, disapproval, recommendation, the rendering of advice or other such action”. It means you took action which was significant to the matter. Mere official responsibility over a matter, knowledge of it or perfunctory involvement on an administrative or peripheral issue does not amount to substantial participation (but the 2 year ban discussed below may apply). Conversely, participating in a single critical step may be considered substantial (based on the totality of the circumstances).

Examples:

1. An officer is regularly involved in the formulation of policy, procedures and regulations governing departmental procurement and acquisition functions. Participation in such activities does not restrict the officer after leaving the government as to particular cases involving the application of such policies, procedures, or regulations. [But 1 year waiting period required by Procurement Integrity Act may apply if you took action concerning contractor. See discussion below.]

2. An officer personally approves the departmental budget, but does not participate substantially in the approval of all items contained in the budget. Participation is substantial only in those cases where a budget item is actually put into issue. Even then, the retired officer is not disqualified with respect to an item if it is a general program rather than a particular matter involving a specific party. However, see the "Official Responsibility 2 Year Ban."

The 2-Year Ban under 18 U.S.C. §207 (a) (2)

- Same restriction on representation as 18 U.S.C. §207 (a) (1) above – but applies to matters arising under your official responsibility during your last year of government service.

- “Official responsibility” means direct administrative or operating authority exercised personally or through subordinates, to approve, disapprove or otherwise direct government actions.

Examples:

1. During tenure as NAVAIR, an officer's subordinates undertook major changes in the agency enforcement standards involving safety. Eighteen months after retiring, the officer is asked to represent Z Company that believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the officer terminated employment. The officer may represent Z Company because the matter pending under the officer's official responsibility was not one involving a specific party.

2. Same as above except the changes were undertaken by subordinates during the officer’s last year of government service and the complaint is made by Z Company 25 months after the officer retired. The result would be the same in that the officer may represent Z company because more than 2 years have passed.

18 U.S.C. §207 (b) – Restrictions on trade or treaty negotiations

- Prohibits former officers from knowingly representing, aiding or advising an employer regarding ongoing trade or treaty negotiations based on information they had access to which is exempt from disclosure under the Freedom of Information Act.

18 U.S.C. §207 (c) – 1 year ban “Cooling Off period” applicable to Flag Officers

- Former senior employees (0-7 and above) are prohibited from knowingly making, with the intent to influence, any communication to, or appearance before, the department, agency or designated component in which they served during their last year of government service if made on behalf of any person (employer) seeking official action on a matter.

- This is a blanket prohibition. The former senior employee need not have had any prior involvement or responsibility for the matter.

- This rule does not preclude “behind the scenes” assistance to the employer nor does it preclude the former senior employee from making communications to other designated components. So a Navy Admiral may undertake communications on behalf of another person or company to the U.S. Air Force, Army, etc; but not the U.S. Navy.

III. Miscellaneous Restrictions

Foreign Employment

Absent prior authorization from SECNAV, you may forfeit your military retired pay during the time you perform compensated services for a foreign government.

Employment by DOD

Absent waiver from SECNAV, there is a six-month waiting period for DoD jobs. (But see local HRO for current rules).

Employment During Terminal Leave

You can not work for a state or local government while on active duty, including terminal leave. Also, Filers of OGE 450’s must get permission from their “Agency Designee “ (Supervisor) before going to work for a “Prohibited Source” on terminal leave. Also, you cannot represent any party other than the U.S. before any federal agency while on terminal leave.

Use of Nonpublic Information

You may never use nonpublic information to further your own private interests, or those of another, including a subsequent employer.