

MEMORANDUM

November 21, 1994

TO: Jack Tunheim
David Marwell

FROM: Sheryl Walter

RE: Christopher Barger's eligibility for employment as a Review Board staff analyst

You have asked for a legal opinion as to whether Christopher Barger, who has applied for a position on the Board's review staff, is eligible for employment with the Assassination Records Review Board as an analyst. It is my understanding that Barger is in the Naval Reserve, currently receives a regular paycheck as part of his relationship with his unit, and has some years left before he has completed his tour of duty. The Naval Reserve, at Barger's request, has agreed that he can be placed on administrative leave for the duration of his employment at the Board, which would presumably mean that he would not perform the duties usually associated with a reserve unit member and accordingly would not receive compensation from that entity during his tenure on the Board's staff. However, the Naval Reserve cannot release him from the requirement that he complete his tour of duty upon the end of his employment with the Board. His administrative leave would also not exempt him from being called up for active military service at any time a national emergency might arise (for which he presumably would be compensated by the federal government), even if such emergency should occur during Barger's employment with the Board.

The Assassination Records Collection Act of 1992 establishing the Board provides that "[a] person appointed to the staff of the Review Board shall be a private citizen of integrity and impartiality **who is not a present employee of any branch of the Government . . .**" 44 U.S. C. section 2107 (8) (b)(2) (emphasis added). The technical amendments, signed into law in October, 1994, amend section (8) only to create a narrow exception to this prohibition which allows that "[an] individual who is an employee of the Government may be appointed to the staff of the Review Board if in that position the individual will perform only administrative functions."

The 1992 Senate Report's section-by-section analysis of the Act does not explain Congress's intent behind the provision barring the employment of current government employees other than to reiterate that the statute does contain that express prohibition. See S.Rep. 102-328 at 44. The Report's purpose and summary section does note, however, that the "underlying principles guiding the legislation are independence [and] public confidence" in the work of the Board. Id. at 18. In describing the intent behind the law's provisions for the appointment of the Board members, the Report further states that "[t]he approach presented in the legislation was developed out of a desire to satisfy the public demand for an independent entity which is not controlled by either the Congress or the President. These are essential and vital principles to prevent a conflict of interest and ensure efficient, speedy, and full disclosure of

records to the American public." Id. at 30. The Conference Report on the 1994 technical amendments further observes that although Congress agrees that the Board should be authorized to hire individuals who are currently employed by the Government solely to perform administrative functions in order to expedite the commencement of the Board's work, it reiterates that "the committee continues to believe, however, that the Review Board should not appoint a present employee of any branch of the Government . . . in any other staff position involved in the substantive work of the Review Board." H.Rep. 103-587 at 22. These passages in the legislative history, taken together, indicate that Congress intends the ban on employing current government employees for substantive positions on the Board's staff to be broadly construed and with an eye to potential credibility problems that such hires could raise in the future regarding the Board's work.

Given Barger's continuing and apparently unwaivable commitment to complete his tour of duty with the Naval Reserve after the end of his employment with the Board and that the Naval Reserve would in any event retain the right to call him for military service in a national emergency throughout his tenure at the Board (a power it does not have over other persons not members of Naval Reserve), it appears that Barger falls into the category of current government employees ineligible for employment by the Board except for purely administrative positions. Despite the Naval Reserve's agreement to place Barger on unpaid leave for the duration of his employment by the Board, the conditions Barger still labors under of a mandatory return to military reserve service after completing his time at the Board and the potential (however remote) that he may be required to report for military service even during his tenure at the Board tend to create the appearance that Barger is still attached to a branch of the federal government and is or may be answerable now or in the future to another agency.

Compliance with Congress's mandate that the Board be staffed in a way that preserves public confidence in the Board's work, ensures independence from pressures from other agencies, and avoids potential appearances of a conflict of interest suggests that the Board be scrupulous about obeying the Act's express requirement that no persons with a current or continuing relationship with the federal government be involved in the Board's substantive work. Barger's situation is more akin to that of a current government employee detailed to another agency, an arrangement that the Act clearly prohibits for purposes of staffing the Review Board, than it is to that of an agency employee who by quitting his or her position would sever all current relationships and future commitments with the federal government before joining the Board's staff. This similarity indicates that the Board should be especially sensitive to the potential for problems of real or perceived conflicts of interest and lack of independence on the part of a staffer performing substantive work on the Board's behalf which arguably could arise in case like Barger's.

Based on the statute's clear provisions on this issue, the legislative history explaining Congress's intent and concerns, and the particular facts and circumstances of Barger's continuing, inescapable commitments to the Naval Reserve, it appears that although he could be hired in an administrative capacity Barger probably is not eligible for a position as an analyst on

the Board's review staff.

cc: Jeremy Gunn