



United States
Office of Government Ethics
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June 26, 1995
DO-95-026

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts, Director

SUBJECT: Sanjour v. Environmental Protection Agency

On May 30, 1995, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, issued its decision in *Sanjour v. Environmental Protection Agency* (No. 92-5123). The decision sustains a First Amendment challenge to a portion of 5 C.F.R. § 2635.807, the section within the Standards of Ethical Conduct entitled "Teaching, speaking, and writing."

For your convenience, the court's decision is available on The Ethics Bulletin Board System (TEBBS).

The case was brought by two Environmental Protection Agency employees who sought to accept travel reimbursements for making speeches in their private capacities concerning the subject matter of their Government work. The Standards of Conduct provide that, subject to an exception for teaching certain courses, "an employee . . . shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties." §2635.807(a). "Compensation" is defined to include travel reimbursements. § 2635.807(a)(2)(iii). Teaching, speaking and writing "related to duties" is defined to include teaching, speaking, and writing where "the subject of the activity deals in significant part with: (1) [a]ny matter to which the employee is assigned or to which the employee had been assigned during the previous one-year period; [or] (2) [a]ny ongoing or announced policy, program or operation of the agency." § 2635.807(a)(2)(i)(E)(1)-(2). Accordingly, under the Standards, the employees were prohibited from accepting the offered travel expense reimbursements.¹

The employees challenged the regulation on First Amendment grounds. The district court dismissed the challenge, 786 F. Supp. 1033 (D.D.C. 1992), and a panel of the Court of Appeals for the D.C. Circuit affirmed. 997 F.2d 1584 (D.C. Cir. 1993). The court of appeals, however, subsequently vacated the panel decision and set the case for rehearing en banc. 997 F.2d 1584 (D.C. Cir. 1993). On rehearing, the court, as indicated, sustained the employees' First Amendment challenge and held invalid the prohibition on receipt of travel reimbursements for speech "related to duties" under § 2635.807(a)(2)(i)(E)(1)-(2). The court did not address the

other definitions of the term "related to duties" under § 2635.807(a)(2)(i) and it explicitly reserved judgment on the constitutionality of the rule as applied to "senior executive employees."

We believe that Sanjour was wrongly decided and that it adversely impacts the ability of the Federal ethics program to ensure conduct by Federal employees consistent with high ethical principles, especially the principle that employees shall not use public office for private gain. The authority to decide whether to seek further review in the Supreme Court, however, resides with the Justice Department. The Department has until August 28 to file a petition for writ of certiorari and this time period may be extended by the Supreme Court.

We have been advised by the Department of Justice that the relief granted by the court -- invalidation of § 2635.807 insofar as it prohibits reimbursement for travel expenses for unofficial speech about Government work by non-"senior" employees -- applies only to the named plaintiffs in Sanjour because the court did not certify a class including as plaintiffs persons in addition to those who brought the case. For the present, and pending further developments in the case that would foreclose the possibility of further review of the court's decision, we have decided, as a matter of policy, not to extend this relief to other Government employees. If the Solicitor General decides not to seek Supreme Court review or if the Supreme Court declines to review the decision, we will reevaluate this policy.

For the time being, and until further notice, we ask that you advise employees that § 2635.807 remains in effect as to them in all of its applications, including the prohibition on receipt of compensation, including travel expense reimbursement, for teaching, speaking, and writing activities that deal in a significant way with current or recent assignments or with current programs, policies, or operations of their agencies.²

We will advise you of further developments in the case as they occur.

¹ The prohibition was also set forth in 5 C.F.R. § 2636.202(b), an earlier synopsis of the policy later refined in § 2635.807, as well as in an advisory letter issued by the Environmental Protection Agency to its employees.

² Part-time or intermittent "special Government employees," as before, are subject to less restrictive standards. See § 2635.807(a)(2)(i)(E)(4). Other parts of § 2635.807, not addressed by the court in Sanjour, naturally also remain in effect. Thus, employees continue to be prohibited from accepting compensation, including travel expense reimbursement, for teaching, speaking, and writing activities that are "related to duties" as that term is defined in § 2635.807(a)(2)(i)(A)-(D). High-level noncareer employees are subject to additional restrictions under § 2635.807(a)(2)(i)(E)(3).