



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 2, 1994
DO-94-006

MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Stephen D. Potts
Director

SUBJECT: Honoraria

On January 19, 1994 the Department of Justice filed a petition for certiorari asking the Supreme Court to review the decision of the Court of Appeals for the District of Columbia Circuit in *NTEU v. United States*, 990 F.2d 1271 (D.C. Cir. 1993). As you know, the Court of Appeals previously had denied the Government's request for a rehearing en banc of an earlier panel's decision affirming a District Court ruling which invalidated the statutory ban on acceptance of honoraria by executive branch employees for speeches, articles or appearances.⁽¹⁾ See 5 U.S.C. app. § 501(b). As a result of the Court of Appeals' denial of rehearing en banc, the District Court's injunction against enforcement of the honoraria ban for officers and employees of the executive branch, which had been stayed pending appeal, became effective September 28, 1993. On September 29, 1993, this Office issued a DAEOgram informing you of the decision of the Court of Appeals and explaining that the Department of Justice had not yet decided whether it would file a petition for certiorari. Moreover, at that time the Department had not decided what remedies might be available and appropriate if the decision of the Court of Appeals were to be ultimately reversed and executive branch employees had accepted honoraria during the interim period between September 28, 1993 and a reversal in the Supreme Court.

We have received the attached letter from the Department of Justice dated February 1, 1994. The third paragraph of that letter sets forth its position regarding honoraria received by executive branch officials during the period between September 28, 1993 and the date on which the Supreme Court issues its decision in this case.

The policy uses the term "receive." If you have any questions about the meaning of that term, please refer to its definition in 5 C.F.R. § 2636.203(e). In the case of monies held in an escrow account, it is our view that where the account was properly established by the payor as outlined in our DAEOgram of June 24, 1991, an honorarium paid from that account to and accepted by an executive branch employee after September 28, 1993 (regardless of when the speech or appearance occurred or the article was published) is an honorarium "received" after September 28, 1993.

We urge that you stress to employees that they continue to be subject to other statutory and regulatory provisions that restrict their ability to accept honoraria under certain circumstances. For example, 18 U.S.C. § 209 prohibits an employee from accepting from an outside source any salary, or contribution to or supplementation of salary, as compensation for his services as an employee of the executive branch. Additionally, the Standards of Ethical Conduct at 5 C.F.R. § 2635.807 prohibit receipt of compensation for teaching, speaking, or writing that relates to an employee's official duties. And certain noncareer employees are subject to a 15 percent limitation on outside earned income and may not receive any compensation for teaching except when specifically authorized in advance. See 5 C.F.R. §§ 2636.304 and 2636.307. Presidential appointees to full-time noncareer positions may not receive any outside earned income for outside employment or other outside activity performed during their Presidential appointments. See 5 C.F.R. § 2635.804. These restrictions on noncareer employees' receipt of compensation have been in effect since the honoraria statute first took effect on January 1, 1991, and are applicable to deferred and escrowed honoraria, as well as to honoraria for current and future activities.

We will keep you informed of any developments in *NTEU v. United States* as we are apprised of them. It is anticipated that the Supreme Court will decide whether to grant the Government's petition for a writ of certiorari in the spring of this year. If the Court grants the petition, the case will be heard next fall and the Court will decide the case before July 1995. If the Court denies the petition, the Court of Appeals decision will become final.

(1) The District Court's opinion applies to the receipt of honoraria by all officers and employees of the executive branch, regardless of position or pay. The opinion does not affect the statute's application to Members of Congress or officers and employees of the legislative and judicial branches.

Attachment

February 1, 1994

Mr. Stephen D. Potts Director
Office of Government Ethics
1201 New York Avenue, N.W. Suite 500
Washington, D.C. 20005-3917

Dear Mr. Potts:

On January 19, 1994, the Department of Justice filed a petition for a writ of certiorari in the Supreme Court seeking review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. United States*, 990 F.2d 1271

(1993). In that case, the court of appeals held that the statutory ban on the acceptance of honoraria for appearances, speeches, or articles, 5 U.S.C. App. 501(b) (Supp. IV 1992), is unconstitutional as to executive branch employees. As a result, a district court injunction against enforcement of the honoraria ban, which had been stayed pending appeal, became effective on September 28, 1993.

Your staff has informed us that the Office of Government Ethics has received inquiries with respect to whether, if the Supreme Court were to grant review and reverse the court of appeals' decision, the Department of Justice would seek to enforce the honoraria ban as to activities by executive branch employees occurring prior to the Supreme Court's ruling. Similar inquiries have also been made of officials in the Department of Justice.

To resolve uncertainty on this issue, the Department has determined, in the circumstances of this case, that it will not request remedies under 5 U.S.C. App. 504 (Supp. IV 1992) with respect to executive branch employees who receive honoraria between September 28, 1993, and the date on which the Supreme Court issues its decision in this case. It should be emphasized that this determination with respect to the honoraria ban does not affect the Department's enforcement policies under any other statutory or regulatory provisions that restrict or prohibit the acceptance of honoraria by executive branch employees.

In order to provide guidance to the federal workforce, you may disseminate this letter as you believe appropriate. Thank you for your cooperation.

Cordially yours,

Frank W. Hunger Assistant Attorney General