

Note: The honoraria ban was held unconstitutional by the U.S. Supreme Court in *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995).

Office of Government Ethics
92 x 24 -- 10/05/92

Letter to a Designated Agency Ethics Official
dated October 5, 1992

This is in response to your memorandum dated August 31, 1992, regarding the acceptance of honoraria. Enclosed with your memorandum is a copy of a memorandum dated August 14, 1992, that you addressed to a member of the staff of the Office of Government Ethics (OGE), and a copy of a letter dated July 27, 1992, that you received from [a fund], both of which provide additional background information.

These documents indicate that you have been invited by [a fund] to participate as a panelist in a symposium concerning [a memorial]. Each panelist will present a speech of approximately 10 minutes. The particular focus of the symposium will be the history of [the memorial], including its psychological and architectural impact. [The fund] is prepared to offer you an honorarium of \$250 for your participation. You indicate that [your agency] "was deeply involved in the original design approval process, and still is whenever changes are proposed." You state that you have been offered an honorarium because of your knowledge of the history of the design and competition. You ask whether such an honorarium may be accepted.

The Ethics Reform Act of 1989, as amended, (Pub. L. 101-194, as amended by Pub. L. 101-280 and Pub. L. 102-90) (the Act) establishes a ban on the receipt of any honorarium by a Federal employee. Section 501(b) of the Act states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." Section 505(3) of the Act, in relevant part, defines the term honorarium as follows:

The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee . . .

The OGE regulations implementing the honorarium provisions of the

Act define the term "speech," in relevant part, as follows:

Speech means an address, oration or other form of oral presentation, whether made in person, recorded or broadcast.

5 C.F.R. § 2636.203(c).

Your participation as a panelist in the symposium would be considered a "speech" within the meaning of the definition in the honorarium rule. Consequently, the statutory prohibition would apply in this case, thereby barring your acceptance of any honorarium for the speech.

In addition, the honorarium regulation notes that other laws and regulations may apply to the receipt of honoraria. See 5 C.F.R. § 2636.202. In particular,

[a]n employee is prohibited by the standards of conduct from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency.

5 C.F.R. § 2636.202(b). This provision of the honorarium rule codifies the guidance set forth in OGE informal advisory memorandum 85 x 18 issued October 28, 1985, that addressed the subject of participation in privately-sponsored seminars or conferences for compensation. This guidance is based on the principle contained in the currently effective standards of conduct that an employee may not use public office for private gain. 5 C.F.R. § 201a(a).

These regulatory requirements are carried forward in the final rule governing employee standards of conduct that was recently published. 5 C.F.R. Part 2635 "Standards of Conduct for Employees of the Executive Branch," 57 Fed. Reg. 35006 (August 7, 1992) (effective February 3, 1993). Section 2635.807(a) provides that, except 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. Section 2635.807(a)(2)(i) provides that speaking relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's

official duties;

(B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b); or

(E) [Except for special Government employees], the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee has been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

5 C.F.R. § 2635.807(2)(i)(A)-(E)(3).

The subject of a speaking activity such as the one offered to you at the symposium could be seen as dealing in significant part with an "ongoing policy, program, or operation of the agency" or with subject matter primarily affected by [your agency's] operations, based on the fact that the [agency] has been involved in the design process in the past and would continue to be involved in any future changes in the [memorial]. Depending on the nature of your own personal involvement in matters relating to the [memorial], such a speaking activity might also relate to your official duties if the invitation were extended by a person who has interests that may be affected substantially by performance or nonperformance of your official duties.

Future invitations made under different factual circumstances might implicate other provisions of the standards of conduct or the conflict of interest laws. For example, 18 U.S.C. § 209 would prohibit a Government employee from accepting an honorarium from a private source for a speech given in the course of the employee's official duties. These regulatory and statutory considerations would of course continue to apply even if the honorarium ban were to be lifted by Congress at some future time.

I hope that this is responsive to your inquiry as it concerns your own particular situation. If you have other questions concerning the honoraria regulation as it may apply to the staff or members of [your agency], please do not hesitate to contact my Office.

Sincerely,

Stephen D. Potts
Director