

Office of Government Ethics

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Letter to a United States Senator dated February 16, 1993

[The agency which you initially contacted] forwarded your inquiry on behalf of your constituent to my Office for reply. [Your constituent] is a Federal employee who wishes to develop a part-time writing career, with the intention of eventually terminating her Government position and working full-time as a writer. She has raised a number of questions about whether, or to what extent, the prohibition on acceptance of honoraria by Federal employees will impact her plans.

The Ethics Reform Act of 1989, as amended, restricts Federal employees from receiving honoraria for certain speeches, articles and appearances. The Act amended Section 501(b) of the Ethics in Government Act to state that "[a]n individual may not receive any honorarium while that individual is a Member, officer, or employee." The term "honorarium" is defined for purposes of this section as "a payment of money or anything 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 employee's official duties or the payment is made because of the individual's status with the Government)." Payment of certain travel expenses incurred in connection with the activity is excluded from the definition of "honorarium." 5 U.S.C. App. § 505(3).

Regulations implementing the honoraria ban are published at 5 C.F.R. § 2636 (55 Fed. Reg. 1721 (January 17, 1991) and 57 Fed. Reg. 601 (January 8, 1992)). The regulations describe the extent of the honoraria ban, as well as specify the areas which are outside the scope of the restriction. Under the regulations, an executive branch employee may receive compensation for certain activities, such as writing books, chapters of books, or works of fiction without violating the honoraria ban. On the other hand, the ban would, for example, prohibit an executive branch employee from writing and selling a nonfiction story on a free-lance basis. The honoraria ban does not require any nexus between the appearance, speech or article and an employee's Government employment.

Additionally, as the regulation published on January 8, 1992,

makes clear, the statutory definition of a "series" of appearances, speeches or articles creates an exception to the honoraria prohibition for activities which occur in a series. The result is that an employee may not accept an honorarium for any single appearance, speech or article whether or not the subject of the activity relates to the employee's Government duties. If the activity occurs in a series, however, acceptance of an honorarium is prohibited only if the subject matter is directly related to the employee's duties or if payment is made because of his status with the Government. A "series" is three or more different, but related appearances, speeches or articles.

Two Government employee unions and a number of individual employees have challenged the constitutionality of these honoraria restrictions. The United States District Court for the District of Columbia ruled last year that the restrictions are unconstitutional as applied to executive branch employees. However, the Court has stayed implementation of its judgment pending the completion of appeal procedures. The Government's appeal is currently under consideration by the Court of Appeals for the District of Columbia. Therefore, the honorarium ban remains in effect until the Court takes further action.

In [your constituent's] case, it appears that some of what she proposes to undertake would be prohibited by the honoraria ban. She may accept compensation for works of fiction, whether or not they appear in books or articles. However, she may accept compensation for nonfiction writings only if they appear in books (or chapters of books), or if they amount to a "series" of articles as described above.

[Your constituent] should also be aware that, in addition to the honoraria ban, there are certain Standards of Conduct restrictions prohibiting the acceptance of compensation for writings related to the employee's official duties. These restrictions are found in a Government-wide Standards of Conduct rule which became effective February 3, 1993. The rule, 5 C.F.R. § 2635.807 (57 Fed. Reg. 35063 (August 7, 1992)), bars all executive branch employees from receiving compensation for any teaching, speaking or writing which is related to the employee's official duties. An activity is "related to an employee's official duties" if:

-- it is undertaken as part of his or her official duties;

- the circumstances indicate that the invitation to engage in the activity was extended primarily because of the employee's position, rather than his or her expertise in the subject matter;
- the invitation or the compensation is offered, directly or indirectly, by a person whose interests may be substantially affected by performance or nonperformance of the employee's duties;
- the information conveyed draws substantially on ideas or data that are nonpublic information; and
- the subject of the activity deals in significant part with any matter to which the employee is assigned, or has been assigned during the previous year, or any ongoing or announced policy, program, or operation of the employee's agency.

There is an exception to this general prohibition for teaching certain courses.

For employees like [your constituent] who are planning to engage in writing as an outside activity, there are some additional Standards of Conduct restrictions relating to the use of official title or position. In general, an employee may not use his or her title or position to identify him or her in connection with the writing activity, or to promote the book or article. 5 C.F.R. § 2635.807(b). However, an employee may permit the inclusion of his or her position or title when the information is provided as part of other biographical details, or if the title or position is used in connection with the publication of an article in a scientific or professional journal and the article is accompanied by a disclaimer that the author's views do not necessarily represent the views of the agency or the United States. These rules concerning use of title or position apply whether or not the employee receives compensation for the writing.

[Your constituent] had some specific questions about the establishment of escrow accounts under the honoraria statute. This Office issued a memorandum on this subject in 1991 (OGE advisory memorandum 91x19). Many of [your constituent's] questions on this issue can be answered by reference to the memorandum. In general, however, I think it is important for [your constituent] to understand that she cannot establish an

escrow account by simply setting up a separate account into which she deposits compensation she receives for her writing activities. As the memorandum makes clear, since the statute prohibits an employee from "receiving" an honorarium, only the person who has agreed to pay the honorarium may establish an escrow account.

Once an escrow account is properly established, it may not be paid to the employee until the Court that is considering the constitutionality of the honorarium provision renders a final, nonappealable decision that the statute is unconstitutional, or until Congress amends the statute to permit receipt of the escrowed honoraria. If an employee terminates Government employment before either of these events occurs, he may not withdraw the honoraria from the account since an employee may not "receive" an honorarium, and the implementing regulations provide that an "honorarium is received while an employee if it is for an appearance or speech made or any article submitted for publication by that individual while he was an employee." 5 C.F.R. § 2636.203(e). Also, if neither of the triggering events occurs, the escrow account does not become the property of the United States Government; under these circumstances the escrowed funds would remain the property of the payor. Matters relating to payment of taxes earned on income generated by the escrow account should be referred by [your constituent] to a tax specialist.

Finally, payment of expenses incurred by an employee in producing a writing may be accepted by the employee if they are "actual expenses in the nature of typing, editing, and reproduction costs...." See 5 C.F.R. § 2636.203(a)(5).

I hope this information will assist you in responding to your constituent's request. If she has other questions, or desires additional information, I suggest that she contact her Designated Agency Ethics Official whose responsibilities include answering questions such as this. Please let me know if I can be of additional assistance.

Sincerely,

Stephen D. Potts
Director