



United States
Office of Government Ethics
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March 3, 1995
DO-95-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts, Director

SUBJECT: Honoraria

On February 22, 1995, the Supreme Court decided *United States v. National Treasury Employees Union*, a class action case that had challenged the honoraria ban in the Ethics in Government Act, at 5 U.S.C. app. § 501(b). The Court held that the honoraria ban in the Ethics in Government Act violates the First Amendment rights of the persons on whose behalf the case was brought. The receipt of compensation for work-related outside activities by the persons on whose behalf the case was brought and other executive branch employees remains restricted by various provisions other than 5 U.S.C. app. § 501(b).

The Court's decision is being made available on The Ethics Bulletin Board System (TEBBS) for your convenience.

The Court's Decision

The Court affirmed a court of appeals decision, insofar as that decision had upheld a district court decision to enjoin enforcement of the honoraria ban against the persons on whose behalf the case was brought. However, the Court reversed the court of appeals decision insofar as the court of appeals decision had let stand the district court decision to enjoin enforcement of the honoraria ban against persons who were not among those on whose behalf the case was brought. During the course of this litigation, there was a stipulation that the persons on whose behalf the case was being brought included every "employee," as defined at 5 C.F.R. § 2636.102(c) and (d), "below grade GS-16," who -- but for 5 U.S.C. app. § 501(b) -- would receive "honoraria," as defined in 5 U.S.C. app. § 505(3).

There is some question as to how the description of employees "below grade GS-16" should be applied to employees who are not in General Schedule (GS) positions at GS-15 or below, or who were not among the respondents in *United States v. National Treasury Employees Union*. A substantial number of executive branch employees are paid under a variety of pay systems other than the General Schedule. Moreover, grade GS-16 was abolished by the Federal Employees Pay Comparability Act of 1990, Pub. L. 101-509.

We are working with the Department of Justice to resolve the question of how to interpret "below grade GS-16." In addition, the Department of Justice is reviewing the enforcement policy set forth in the memorandum dated February 1, 1994, from the Assistant Attorney General for the Civil Division to this Office. In that memorandum, the Department of Justice advised that it would "not request remedies under 5 U.S.C. App. 504 . . . 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 [i.e., United States v. National Treasury Employees Union]." (A copy of that memorandum was attached to the DAEOgram dated February 2, 1994, regarding honoraria). We will let you know as soon as we have additional information regarding these matters.

Other Restrictions on Honoraria

All officers and employees continue to be subject to other statutory and regulatory provisions that restrict their ability to accept honoraria under certain circumstances. For example, the Standards of Ethical Conduct issued under the authority of Executive Order 12674 (as modified by Executive Order 12731) prohibit all executive branch officers and employees from receiving compensation, including travel expenses, for teaching, speaking or writing that "relates to the employee's official duties." 5 C.F.R. § 2635.807(a). For most employees, teaching, speaking or writing is considered related to duties if 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 had been assigned during the previous one-year period; [or]

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

5 C.F.R. § 2635.807(a)(2)(i)(E). Teaching, speaking or writing is also deemed related to duties if the invitation to engage in the activity or the offer of compensation was extended by a person or entity substantially affected by the performance of the invited employee's official duties, or if the invitation was extended to the employee primarily because of his official position rather than his expertise in the subject. 5 C.F.R. § 2635.807(a)(2)(i)(B) and (C). In addition, an officer or employee may not accept compensation from an outside source for teaching, speaking or writing based substantially on nonpublic information or when the activity is undertaken as part of the employee's official duties. 5 C.F.R. § 2635.807(a)(2)(i)(A) and (D). The receipt of compensation in the last of these circumstances is also prohibited by the supplementation of salary bar in 18 U.S.C. § 209.

Noncareer officers and employees who occupy positions above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule, are subject to a 15 percent limitation on outside earned income. "Outside earned income" is defined in 5 C.F.R. § 2636.303(b) to mean "wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government." As described in 5 C.F.R. § 2636.304(a), an employee subject to the limitation "may not, in any calendar year, receive

outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule" The annual rate of basic pay for level II of the Executive Schedule is currently \$133,600. Regardless of when paid, outside earned income is attributable to the calendar year in which the services for which it was paid were provided. Section 102 of Executive Order 12674, as modified by Executive Order 12731, prohibits certain Presidential appointees, including all Executive Schedule officials, from receiving any outside earned income -- including honoraria -- for any outside activity performed during their appointments. See 5 C.F.R. § 2635.804(a).