OFFICE OF GOVERNMENT ETHICS

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Memorandum dated November 25, 1998,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials
Regarding District Court Decision on Remand in
Sanjour v. Environmental Protection Agency

The United States District Court for the District of Columbia has issued its decision on remand in Sanjour v. Environmental Protection Agency. The decision impacts enforcement of section 2635.807(a) of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. part 2635, and its prohibition on employee acceptance of travel expenses in connection with "teaching, speaking, or writing [that] relates to . . . official duties," under section 2635.807(a)(2)(i). Insofar as this travel expenses prohibition applies to employees "who work below the grade level of senior executive service," the district court declared it unconstitutional and permanently enjoined its enforcement. The decision is reported at 7 F. Supp.2d 14 (D.D.C. 1998).[1]

The Justice Department, with the concurrence of the defendants, the Office of Government Ethics (OGE) and the Environmental Protection Agency (EPA), has decided not to appeal the district court decision. OGE will now undertake to amend section 2635.807(a) to bring it into compliance with the district court ruling. Notice of regulatory changes will be provided to agencies as soon as possible.

We discuss below the history of the Sanjour litigation, the most recent decision in the case, and its significance for enforcement of section 2635.807.

BACKGROUND

[1] The district court decided the case in April 1998 but, for reasons that remain unclear, neither the Department of Justice nor the defendants in the case learned of the ruling until September 1998. Recognizing the failure of timely notice, the court issued an order on October 28, 1998, which allowed defendants until November 12, 1998, to decide whether to appeal.

The Sanjour case began in the early 90's when two EPA employees filed suit challenging the regulatory prohibition on employee acceptance of travel expenses from non-Government sources in connection with speech undertaken in a private capacity but related to official agency duties.[2] The district court rejected the plaintiffs' claims that the prohibition violates the First Amendment of the U.S. Constitution, 786 F. Supp. 1033 (D.D.C. 1992), as did the court of appeals on its first hearing of the case, 984 F.2d 434 (D.C. Cir. 1993). On May 30, 1995, however, the court of appeals, in a 5-4 en banc decision on rehearing, sustained the employees' First Amendment challenge and held invalid "the no-expenses regulations." 56 F.3d 85, 88 (D.C. Cir. 1995). The court reasoned that, since a regulation of the General Services Administration (GSA), 41 C.F.R. § 304-1.3(a), *allows* travel reimbursements in connection with *official* speech, whereas section 2635.807(a) *prohibits* travel reimbursements in connection with *unofficial* speech, the regulatory scheme poses a risk of censorship based on viewpoint. 56 F.3d at 97. At the same time, however, the court noted that "the balancing of interests relevant to senior executive officials might present a different constitutional question" and, therefore, explicitly reserved judgment on the constitutionality of the regulations as applied to "senior executive employees." Id. at 93.

Subsequently, the Solicitor General decided not to petition for further review in the Supreme Court and the case was remanded to the district court for entry of a final order. The parties were unable to agree, however, upon the relief to which the plaintiffs were entitled as a result of the court of appeals decision. Among numerous disagreements were questions regarding the impact of the court of appeals decision on the GSA regulation and on the various types of speech deemed related to official duties. The plaintiff employees argued that the appellate court's ruling required an injunction against enforcement of the GSA regulation and the section 2635.807(a) prohibition on acceptance of travel expenses in connection with *all* types of speech related to duties under 5 C.F.R. § 2635.807(a)(2)(i). The Government defendants took the

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[2] The prohibition, originally set forth in 5 C.F.R. § 2636.202(b), was later incorporated in section 2635.807(a) of the uniform Standards of Conduct. Section 2636.202(b) has since been removed from the Code of Federal Regulations. See 63 Fed. Reg. 43067, 43069 (Aug. 12, 1998).

position that the court should not enjoin enforcement of the GSA regulation and that the prohibition on acceptance of travel expenses in section 2635.807(a) was only in issue as applied to teaching, speaking, or writing that "relates to . . . official duties" under section 2635.807(a)(2)(i)(E)(*2*), i.e., the subject of which "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency.[3]

Pending issuance of a district court order resolving these issues, OGE originally advised executive branch employees to continue to comply in full with the requirements of section 2635.807. This decision was based on our understanding that Sanjour was not a class action and that, as a result, the decision would have immediate applicability only to the named parties before the court. OGE anticipated that, after the district court issued its ruling clarifying the reach of the court of appeals opinion, the Office would amend section 2635.807 to give executive branch-wide effect to the ruling. See DAEOgram DO-95-026 (June 26, 1995). With the passage of time, however, and on further review, OGE decided to issue an interim policy limiting enforcement of section 2635.807. See DAEOgram D0-97-025 (May 21, 1997). Consistent with the Office's position on the reach of the en banc ruling, the policy addressed only the prohibition on acceptance of travel expenses for unofficial teaching, speaking, and writing that is considered related to duties under section 2635.807(a)(2)(i)(E)(*2*) because it "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency." Pending issuance of a final order on remand in Sanjour and until further notice, ethics officials were asked not to enforce this prohibition against executive branch employees other than those senior officials covered by the definition of "covered noncareer employee" in 5 C.F.R. § 2636.303(a).

DISTRICT COURT DECISION ON REMAND

The district court's decision on remand makes clear that, with respect to enforcement of section 2635.807(a) against "employees below the senior executive service level of employment," the court of appeals ruling invalidates the ban on travel expenses in connection with *all types* of teaching,

[3] The plaintiff employees also sought legal expenses and costs, which the Government defendants opposed.

speaking, and writing related to duties under section 2635.807(a)(2)(i), not just those related to duties under section 2635.807(a)(2)(i)(E)(*2*). The court agreed with the Government defendants, however, that enforcement of the GSA regulation need not be enjoined to vindicate the plaintiffs' interests. According to the court, "[o]nce the prohibition on travel expense reimbursement for unofficial speech . . . is lifted, then there can be no possible constitutional objection to allowing agencies to accept travel reimbursements from outside sources for official travel."[4]

ENFORCEMENT OF SECTION 2635.807(a)

In light of the district court decision, agencies may no longer enforce against employees "below the senior executive service level of employment" section 2635.807's prohibition on acceptance of travel expenses in connection with any type of teaching, speaking, or writing "related to duties" under section 2635.807(a)(2)(i).[5] Pending amendment of

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[4] The court also ruled against plaintiffs on the question of attorneys' fees and costs. Although plaintiffs "prevailed" on their First Amendment claim, the court held that the Government's position was "substantially justified" in regard to both the underlying action that gave rise to the civil litigation and the conduct of the litigation. Plaintiffs thus failed to meet the standard for an award of fees and costs under the Equal Access to Justice Act.

[5] Ethics officials should be aware, however, that, under certain circumstances, authorities *other than* section 2635.807(a) may limit or entirely preclude acceptance of travel expenses by employees, including nonsenior employees. For example, in an appropriate case 18 U.S.C. § 209 might preclude an employee's acceptance from a non-Government source of travel expenses incurred in connection with official travel. Moreover, while Sanjour dictates that nonsenior employees may no longer be disciplined for accepting travel expenses in connection with a speech that is related to duties under section 2635.807(a)(2)(i)(D), i.e., because the speech "draws substantially on . . . nonpublic information," employees should be aware that the underlying disclosure of the nonpublic information remains punishable for other reasons. Together with 5 C.F.R. § 2635.703(a), a variety of Federal statutes prohibit unauthorized disclosure of

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section 2635.807(a), OGE advises ethics officials to continue enforcement of the ban on travel expenses *only* against senior executive branch officials who are "covered noncareer employees" under 5 C.F.R. § 2636.303(a).

As defined in section 2636.303(a), and consistent with the provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA), the term "covered noncareer employee" covers a variety of noncareer employees who are in positions "above GS-15," including certain Presidential appointees, noncareer members of the Senior Executive Service (SES) or other SES-type systems, and Schedule C or comparable appointees.[6] The term excludes special Government employees, Presidential appointees to positions within the uniformed services, and Presidential appointees within the foreign service below the level of Assistant Secretary or Chief of Mission. 5 C.F.R. § 2636.303(a). OGE's decision to limit application of the travel expenses ban to "covered noncareer employees" comports with the stated inapplicability of the Sanjour decision to senior executive employees. It also accords with the higher standards to which the Ethics Reform Act, along with related and other regulations, hold senior officials who are "covered noncareer employees," particularly with regard to their outside activities. See 5 U.S.C. appendix, §§ 501(a), 502; 5 C.F.R. §§ 2635.804 and accompanying note, 2635.807(a)(2)(i)((E)(3) and example 6, 2636.301-307.

Regarding enforcement of other applications of 5 C.F.R. § 2635.807(a), ethics officials should be aware that the travel expenses addressed in Sanjour are only one form of "compensation" prohibited by section 2635.807(a). The term

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[5](...continued)
nonpublic information. See 5 C.F.R. § 2635.902.

[6] The triggering rate of pay, i.e., the rate of pay at or above which an employee must be paid to be considered a "covered noncareer employee," is set forth in section 2636.303(a) as the "annual rate of basic pay in effect for GS-16, step 1 of the General Schedule." However, the FEPCA eliminated the GS-16, 17, and 18 classifications and replaced them with a new pay structure for positions classified "above GS-15." Under the new pay structure set by the FEPCA, the rate of basic pay for positions "above GS-15" can be no less than 120 percent of the rate of basic pay for GS-15, step 1. 5 U.S.C. § 5376.

"compensation," as defined in section 2635.807(a)(2)(iii), goes well beyond payments for "transportation, lodgings and meals" to cover "any form of consideration, remuneration or income." Employees "below the senior executive service level of employment" remain subject, along with other employees, to the prohibition on acceptance of compensation that is, for example, in the form of fees for speech "related to duties."

It may be helpful to illustrate some of these distinctions, as follows:

> *Example*: Suppose that Alan, a GS-13, and Sarah, a noncareer member of the Senior Executive Service, are invited to speak, in their private capacities, at an interest group meeting to be held in Seattle. Assume that the sponsor of the meeting offers to reimburse each of them for their travel expenses and to pay each a $200 speaker's fee. Assume further that, given the source of the payment, the subject matter of the speeches, or some other reason, the speaking "relates to . . . official duties" under section 2635.807(a)(2)(i).
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> *Question*: May Alan and Sarah accept the payments?
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> *Answer*: Alan may accept the travel expenses but not the $200 fee. Sarah may accept neither the expenses nor the fee. If Sarah were a *career* member of the Senior Executive Service she would be able to accept the travel expenses but not the fee.

Finally, please note, as indicated, that Sanjour does not affect enforcement of the GSA travel regulation, 41 C.F.R. § 304-1.3(a). This regulation, which concerns only *official* travel, authorizes agencies to accept travel expenses from non-Federal sources in connection with an employee's attendance at certain meetings and similar functions relating to the employee's official duties. Agencies may continue to use the GSA regulation in appropriate cases without regard to whether the employee traveling on behalf of the agency is below or above "the senior executive service level of employment."