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Office of Government Ethics
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May 21, 1997
DO-97-025

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Interim Policy on Acceptance of Travel Expenses in Connection with Certain Unofficial Teaching, Speaking, and Writing Activities

In the wake of the court of appeals decision in Sanjour v. United States, 56 F.3d 85 (D.C. Cir. 1995) (en banc), the Office of Government Ethics (OGE), in consultation with the Department of Justice, has decided to recommend an interim policy of partial nonenforcement as to an application of section 2635.807(a) of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards), 5 C.F.R. part 2635. Specifically, this policy addresses the prohibition on acceptance of travel expenses for unofficial teaching, speaking and writing (speech) 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 the district court's issuance of a final order on remand in Sanjour and until further notice, we ask you to advise employees that this prohibition will not be enforced against executive branch employees other than "covered noncareer employees," as defined in 5 C.F.R. § 2636.303(a).

Background

The Sanjour case was brought as a challenge to the regulatory prohibition on employee acceptance of travel expenses from non-Government sources in connection with certain unofficial speech related to agency policies and programs.[1] The district court rejected the plaintiffs' claims that the prohibition violates the First Amendment, 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.

[1] 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.

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). At the same time, the court explicitly reserved judgment on the constitutionality of the rule as applied to "senior" executive branch 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 are entitled as a result of the court of appeals decision. Accordingly, there followed a round of briefing on the question of the appropriate relief, with plaintiffs taking an extremely expansive view of the decision's impact on section 2635.807 and defendants (EPA and OGE) taking the position that the court of appeals addressed only the prohibition on travel expense reimbursements in connection with "subsection (E)(2) speech," i.e., unofficial speech that "deals in significant part with . . . [a]ny ongoing or announced policy, program or operation of the agency." Section 2635.807(a)(2)(i)(E)(2).

Pending the district court's issuance of an order clarifying the reach of the en banc decision, OGE decided to advise executive branch employees to continue to comply in full with the requirements of 5 C.F.R. § 2635.807. Our decision was based on the fact that Sanjour was not a class action, and that, as a result, the decision in the case would have immediate applicability only to the named parties before the court. We always have intended, and still do intend, to amend our regulations to give executive branchwide effect to Sanjour; however, in view of the uncertainty regarding the reach of the court of appeals decision and the fact that it did not have immediate applicability to executive branch employees other than the plaintiffs, it was reasonable, on an interim basis, to continue to advise compliance with all of section 2635.807. We anticipated that after the district court issued an appropriate order for relief, this Office then would make whatever regulatory amendments might be necessary to give effect to the appellate court's decision, as clarified by the district court's order. Upon further review, however, we have now decided to issue this interim policy limiting enforcement of the ban described above to "senior" executive branch employees, by which we mean "covered noncareer employees" under 5 C.F.R. § 2636.303(a).

Enforcement as to "Covered Noncareer Employees," No Enforcement as to Others

As defined in 5 C.F.R. § 2636.303(a), and consistent with the provisions of the Federal Employee 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.[2] 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).

The decision to continue enforcement of the prohibition against "covered noncareer employees" comports with the assertion by the court of appeals that "the balancing of interests relevant to senior executive officials might 'present a different constitutional question than the one we decide today'" and the court's determination, accordingly, to "express no view on whether the challenged regulations may be applied to senior executive employees." 56 F.3d at 93, citing, United States v. National Treasury Employees Union, 513 U.S. 454, 115 S. Ct. 1003, 1018 (1995). The decision to rely on the definition of "covered noncareer employee" in 5 C.F.R. § 2636.303(a) as a means of distinguishing "senior" from "nonsenior" employees is consistent with the imposition of greater restrictions on covered noncareer employees elsewhere in section 2635.807. See 5 C.F.R. § 2635.807(a)(2)(i)(E)(3).

Conclusion

Once the district court issues its order implementing the court of appeals decision, we will reassess, in light of that order, this interim enforcement policy. Our intent, moreover, as already noted, is to eventually implement our response to Sanjour through amendment of our regulations.

In the meantime, please be aware that this nonenforcement policy affects only acceptance of travel expenses, not other forms of compensation, and affects acceptance of travel expenses only when the teaching, speaking, or writing is "related to duties" under subsection (E)(2) and is performed by an employee who is not a "covered noncareer employee," as that term is defined in 5 C.F.R.

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[2] 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.

§ 2636.303(a). All other applications of section 2635.807 remain enforceable as written.