

07 x 8

Letter to the Executive
Vice President of an Organization
dated June 28, 2007

This is in response to your letter of June 8, 2007, in which you ask the Office of Government Ethics (OGE) for guidance on whether executive branch employees may accept reimbursement of travel expenses and training from the Annenberg Public Service Speakers Bureau (Speakers Bureau). You indicated that this Speakers Bureau has been established by the Partnership for Public Service (Partnership), a non-partisan, non-profit organization, to promote careers in the Federal Government. In particular, you asked for guidance on the authority of Government agencies to permit their employees to accept such travel expenses and training. You also asked for clarification of the distinctions that might apply depending on whether the employing agency concluded that the participation of its employee was in an official capacity or in a personal capacity.

We appreciate your sensitivity to the issues of public integrity that your inquiry raises. Our response below will discuss the specific facts that you described, examine the relevant laws and regulations, and provide other general guidance that we hope will be useful to you. As you will see from the following analysis, the final decision to accept the benefits you described must be made on a case-by-case basis by each employing agency.

BACKGROUND

Your letter explains that the Partnership has established the Speakers Bureau to showcase outstanding Federal employees in an effort to promote careers in the Federal service. Federal employees will be invited by the Speakers Bureau to speak on college campuses and in other venues about the value of Federal service while "weaving their own personal narrative into their remarks in order to 'put a face' on government for the audience." You plan to select speakers through your own outreach efforts and nominations from employees and their agencies. Your website notes that your organization's Call to Serve program, through a joint effort with the U.S. Office of Personnel Management (OPM), is trying to educate a new

generation about the importance of a strong civil service and to provide students with information about Federal jobs. The website also explains that the Call to Serve network consists of nearly 600 schools and 60 Federal agencies. You note that the entire budget of the Speakers Bureau is underwritten by a grant from the Annenberg Foundation. Your initial plan is to have the Partnership pay the travel expenses of participants in the Speakers Bureau. You plan to make every effort to place speakers at venues close to the speaker's location to reduce travel costs. Speakers will also receive "training" from the Partnership and "materials to support their efforts."

The analysis of the issues you have raised will differ depending on whether the executive branch employee speaker is acting in his official capacity or in his personal capacity. The determination of official versus personal capacity will turn on a number of factors that the employing agency will review. Ordinarily, OGE would not make this determination as it requires a fact-specific analysis of the employee's official duties, the mission of the particular Federal agency, and other factors such as the recruitment and public affairs value of the participation of a proposed speaker. You might, however, find the guidance in OGE Informal Advisory Letters 98 x 8 (June 25, 1998) and 01 x 6 (July 19, 2001) to be helpful on this important distinction. Only an agency can decide if an individual employee can speak in an official capacity on behalf of that agency.

OFFICIAL CAPACITY

If the employing agency determines that an agency employee may participate in the Speakers Bureau in an official capacity, there are a variety of authorities that could be used to accept the employee's travel expenses. Gifts of official travel are not governed by the executive branch Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) contained in 5 C.F.R. § 2635; rather, they are regulated under the authority of applicable agency gift-acceptance statutes or other appropriate statutory authority.¹ See OGE guidance in DAEOgram DO-06-008 (March 31, 2006). The two authorities for acceptance of gifts of travel from a non-Federal source are the Acceptance of Payment from a Non-Federal Source for Travel

¹ Generally, anti-augmentation principles bar agencies from accepting gifts without such statutory authority. See *GAO Principles of Federal Appropriations Law (Red Book)*, Third Edition (November 7, 2006) at 6-222.

Expenses, 31 U.S.C. § 1353, as implemented by General Services Administration (GSA) regulations at 41 C.F.R. §§ 301-1 and 304-1, and the Government Employees Training Act, 5 U.S.C. § 4111, as implemented by the OPM regulations at 5 C.F.R. §§ 410.501-410.503. Additionally, agencies may have agency specific gift acceptance statutes that apply.

The first statute, 31 U.S.C. § 1353, authorizes executive branch agencies to accept travel gifts from non-Federal sources for employees to attend meetings and other similar functions. Reimbursements of travel expenses accepted in connection with the official duties of an executive branch employee under this statute are accepted on behalf of the agency itself, rather than the employee. Agencies are required to submit semiannual reports to this Office on expenses received by employees under this statute. Generally, the agency authorization must be issued by the agency in advance of the travel. Further, acceptance is permitted only if the agency determines that acceptance will not create a conflict of interest and that a reasonable person would not question the integrity of the agency programs or operations. You should contact GSA for further specific guidance on issues related to compliance with these GSA regulations.²

In addition, the Government Employees Training Act, 5 U.S.C. § 4111, as implemented by OPM regulations at 5 C.F.R. §§ 410.501-410.503, authorizes an employee to accept contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings that an employee attends while on duty, if the donor is a non-profit, tax-exempt institution described by 26 U.S.C. § 501(c)(3). The head of the agency, or his or her designee, must authorize this acceptance in writing after an evaluation of the circumstances in each case including a conflict of interest and appearance analysis. Acceptance of benefits under this statute is a gift to the employee, not the agency, and accordingly would be reportable on the employee's financial disclosure form. Please contact OPM for guidance on this statute and the implementing regulations.

² Although 31 U.S.C. § 1353 authorizes executive branch agencies to accept travel gifts from non-Federal sources for an employee to attend meetings and other similar functions, the GSA's implementing regulations provide that travel gifts (including upgrades) accepted pursuant to this statute may not be solicited. See 41 C.F.R. § 304-3.5; see also OGE guidance in DAEOgram DO-06-034 (November 7, 2006).

PERSONAL CAPACITY

If the agency determines that the executive branch employee may participate in the Speakers Bureau in a personal capacity, then the controlling regulations and analysis change significantly. Outside teaching, speaking and writing that relates to the employee's official duties is covered under 5 C.F.R. § 2635.807(a). For purposes of this provision, speaking "relates to the employee's official duties" if, among other things, 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" or the "subject of the activity deals in significant part with any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period."³ Under section 2635.807(a), compensation for speaking that relates to the employee's official duties is prohibited. The definition of compensation, however, specifically excludes travel expenses, consisting of transportation, lodgings or meals for "other than a covered noncareer employee." Accordingly, for other than a covered noncareer employee,⁴ acceptance of travel expenses for speaking may be approved by the employing agency. There is no equivalent exclusion for covered noncareer employees to accept travel expenses in their personal capacity for speaking that relates to the employee's official duties. Travel expenses for these employees are included in the definition of prohibited compensation. Additionally, the employee must comply with the guidance on use of official title or position contained in

³ Each individual agency will have to determine if a proposed speech "relates" to the employee's official duties as defined above. This analysis is fact specific to the employee's job responsibilities, agency mission, content of the proposed speech and the totality of the surrounding circumstances.

⁴ As defined in section 5 C.F.R. § 2636.303(a), 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. The term excludes Special Government Employees (SGEs), 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. § 2635.807(b).⁵ Additionally, some agencies have policies requiring advance agency review, clearance, or approval of speeches to determine whether the speech contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with the agency's conflict of interest and appearance rules.

Although acceptance of the travel expenses for other than covered noncareer employees may be permissible as set forth above, employees should be mindful of some additional considerations. When required by the agency supplemental regulations, an employee must obtain prior approval before engaging in outside employment or activities. Together with 5 C.F.R. § 2635.703(a) a variety of Federal statutes prohibit unauthorized disclosure of nonpublic information. Also, if an employee is speaking in his personal capacity, under 5 C.F.R. § 2635.705, he must prepare his speech on his own time and be in a nonduty status when giving his presentation. Further, as set forth in 5 C.F.R. § 2635.704, an employee may not use Government property for other than authorized purposes. Government property, as used in the above regulation, includes any "office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, government records, and Government vehicles." *But see* 5 C.F.R. § 251,

⁵ An employee who is engaged in speaking as outside employment or an outside activity "shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity . . . except that . . . an employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his . . . speaking . . . provided that his title or position is given no more prominence than other significant biographical details." 5 C.F.R. § 2635.807(b). Further, section 2635.807(b)(3) provides that an employee "who is ordinarily addressed using a general term of address, such as 'The Honorable,' or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his . . . speaking."

Agency Relationships With Organizations Representing Federal Employees and Other Organizations.⁶

An employee must also be aware that he may not accept gifts given to him because of his official position or from a prohibited source. There is not enough information contained in your letter to determine if the training and support materials you plan to give Speakers Bureau participants would contravene this rule. This decision would be made by the individual agency ethics counselor and would depend on numerous factors including the specific nature and purpose of the training and materials, the source of the training and materials, the source of funding for the training and materials, and what services would be included in the training. If the training and materials are a "gift" within the meaning of the Standards of Conduct, an exception to the gift prohibitions contained in 5 C.F.R. § 2635.204 would have to apply before an employee could accept them.⁷

CONCLUSION

We hope you find the above summary of the controlling laws and regulations on the acceptance of travel expenses and training with support materials to be helpful. As you can see from the above discussion, in most cases the acceptance authority is held by individual executive branch agencies. When you are ready to invite a speaker to participate in the Speakers Bureau, please provide the particular employee's Designated Agency Ethics Official (DAEO) with the details of the proposed speaking engagement and related training so he or she may

⁶ These OPM regulations, at 5 C.F.R. § 251.202, state that an agency may provide support services to an organization when the agency determines that such action would benefit the agency's programs. OPM should be consulted for further guidance on this provision. Additionally, some agencies have regulations or personnel rules that authorize the use of excused absences in limited circumstances such as attendance at a conference or training.

⁷ It is possible that an agency ethics official could conclude that the value of the training and supporting materials is not a gift, if there is a written agreement to provide repeated services as a speaker given in exchange for these benefits, or if the training and materials are simply provided to facilitate the speaking activities. See DAE0gram DO-04-020 (July 7, 2004) (Train Ridership Program for Law Enforcement Personnel).

provide a case-by-case analysis and authorize acceptance of the offered benefits, if appropriate. Please do not hesitate to contact our Office, if you need additional assistance in this matter. Thank you for your inquiry.

Sincerely,

Marilyn L. Glynn
General Counsel