

Note: The honoraria ban was held unconstitutional by the U.S. Supreme Court in *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995).

Office of Government Ethics

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Letter to a Federal Employee dated July 30, 1992

This is in response to your letter of May 28, 1992, and your follow-up note of July 21, 1992, in which you ask several additional questions concerning honoraria.

Your first question concerns the definition of "honorarium." You quote a dictionary definition of honorarium as "a payment to a professional for services on which no fee is set." You focus on the phrase "on which no fee is set" and suggest that this language may be interpreted to mean that the definition of honorarium covers only a fee that is variable at the discretion of the payor. You ask whether a magazine fee that is fixed for all authors, i.e., "set," is not covered by the term "honorarium" and therefore not prohibited by the honorarium ban.

The answer to this question is that Congress defined the term "honorarium" by statute to mean "a payment of money or any thing of value for an appearance, speech or article" and to exclude certain actual and necessary travel expenses. See section 601(a) of the Ethics Reform Act of 1989, amending section 505 of the Ethics in Government Act

of 1978. It is clear from this statutory definition that the term "honorarium" covers a fee for an article whether the same fee is set for all articles or varies from author to author. The statutory definition is controlling, and, consequently, the fact that a particular publication might follow a policy of paying all authors the same fee would not avoid the honorarium ban.

You also raise questions concerning the status and interpretation of the exemption for a "series" of articles, the relatedness of the subject matter of a series of articles, and the interval at which three or more articles must be published in order to qualify as a series. You indicate that you have written two articles for a woodworking magazine but that the publication of a third planned article dealing with woodworking in the same traditional method has been delayed. You ask whether this interruption in publication terminates the series and whether there is any interval of time beyond which a series is considered broken.

Payment for a series of articles is not prohibited unless the

subject matter of the article is directly related to the employee's official duties or payment is made because of the recipient's status as an employee. The honorarium regulation defines a "series" as three or more different but related appearances, speeches or articles. Thus, the honorarium regulation provides an exemption for

(13) Payment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

See 5 C.F.R. § 2636.203(a)(13).

The question concerning the degree of relatedness of subject matter of a series to a large extent would depend upon the understanding between the publisher and the author and a common-sense judgment about

the subject matter of the series. Based on the information that you have provided, it would appear that a series of articles concerned with woodworking in a particular method with each article addressing a particular project utilizing the method could reasonably be seen as a group of articles that were "different but related."

There is no particular time period in which a group of three or more articles must be published in order to qualify as a series. The mere fact that three articles were published in the same magazine, even within a relatively short time period, would not necessarily mean that the three articles are a series. But if the understanding of the author and publisher prior to publication contemplated a series of three or more articles, then the series requirement would appear to be met. An exchange of correspondence describing the series of articles would be evidence of such a mutual understanding. The fact that the vicissitudes of publishing might alter the original plan for a projected series would not necessarily mean that the series was terminated. Each situation would be evaluated on its own facts. A mere delay in publication, standing alone, would not terminate a series.

As is evident from this discussion, the question in the case which you describe is whether the series requirement is met and not whether the payment is at a "standard rate." If the series and other requirements are met, then the honorarium could be accepted whether or not it was for a "standard rate."

Finally, you may be interested in knowing that the Department of Justice has filed a formal appeal of the ruling of the Federal district court on the honoraria ban and that the matter is now pending in the United States Court of Appeals for the District of Columbia Circuit.

While I understand the frustration that you express over the impact of the honorarium law, I can only note that this Office has no authority to modify this legislation. In testimony before the Senate Committee on Governmental Affairs, this Office has supported proposed legislation that would amend the honoraria ban and lessen its impact on career employees of the executive branch. However, until such legislative relief is enacted or there is a final court ruling on the constitutionality of the ban, these restrictions remain in effect.

Sincerely,

Stephen D. Potts
Director