

OFFICE OF GOVERNMENT ETHICS

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**Letter to an Alternate Designated
Agency Ethics Official
dated August 10, 2001**

You have requested our opinion on the applicability of 5 C.F.R. § 2635.807 to a pair of proposed books by an [agency] Administrative Judge (AJ) on the subject of compensatory damages [in a certain type of] cases. The subject of one book will be damage awards in private sector cases; the subject of the other book will be damage awards in Federal sector cases. The significance of this distinction is that the [agency] is a party to many private sector cases, but is the adjudicatory forum with respect to Federal sector cases.

Your initial review of this matter has led you to conclude that the AJ may receive compensation under section 2635.807 for the book on private sector discrimination cases, but not for the book on Federal sector cases. In reaching this conclusion, you reason that the former book, though dealing with the [certain type of] laws that are the central aspect of [the agency's] mission, will be limited to discussion of statutes and Federal court cases, and will not discuss [agency] decisions. Because of this, you conclude that it does not focus on the policies, programs, and operations of the [agency]. The book on Federal sector cases, by contrast, must discuss to some extent decisions issued by the [agency], a discussion that you believe is more directly related to the policies, programs and operations of the [agency], and therefore would trigger the restrictions of section 2635.807. While we agree that section 2635.807 bars receipt of compensation for the book on Federal sector cases, for the reasons explained below, we would extend that reasoning to the book on private sector cases as well.

ANALYSIS

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) prohibit an employee of any agency from receiving compensation for teaching, speaking, or writing that "relates to the employee's official duties." 5 C.F.R. § 2635.807(a). In this case, the most pertinent subsection of the regulation provides that a writing will be considered related to official duties if the subject matter "deals in significant part with "[a]ny ongoing or announced policy, program or operation of the agency." 5 C.F.R. § 2635.807(a) (2) (i) (E).

The analysis you have provided turns primarily on whether the book will discuss [agency] decisions. We see no reason to question your conclusion that the book dealing with Federal sector cases, in

discussing [agency]-issued decisions, will focus too closely on [agency] policies and programs for compensation to be permissible. The decisions themselves may be considered to represent [agency] policy for purposes of section 2635.807, and the issuance of those decisions is a core [agency] mission.

However, with respect to the book on private sector cases, we are not convinced that receipt of compensation is permissible simply because [agency] decisions will not be covered. In addressing this issue, you have raised questions concerning some of the examples the Office of Government Ethics (OGE) has used to illustrate section 2635.807 in the past. You note that, in the preamble to the final rule, we provided an example in which we stated that it was permissible for a National Aeronautics and Space Administration (NASA) engineer to receive compensation for a book on aeronautics, but not for a book on the space shuttle. You also cite Example 5 of section 2635.807(a)(2), which states that a labor relations specialist of the Department of Commerce (Commerce) may accept compensation for a series of lectures on Federal Labor Relations Authority (FLRA) decisions, as long as she does not discuss Commerce cases or policies. The example goes on to note that an FLRA employee may not receive compensation for the same series of lectures. Finally, you note that Example 2 to section 2635.807(a)(3) prohibits an EEOC employee from receiving compensation for a continuing legal education course on employment discrimination law, although the example is intended as an illustration of a different point. We believe that these examples are in harmony with respect to the AJ's request.

The basis for the distinction you draw between the two proposed books would appear to be the above-referenced Example 5 to section 2635.807(a)(2), where the applicability of the compensation ban turned on whether the employee would be discussing decisions issued by her employing agency. Therefore, a close reading of this example is in order. The FLRA employee clearly cannot present the lecture series because it would deal with decisions issued by his employing agency. However, the Commerce employee may present the lectures, because the decisions are issued by FLRA, not Commerce, and because they do not otherwise deal with the policies, programs or operations of Commerce. If her lectures dealt with cases handled by Commerce or Commerce's policies, she would be subject to the compensation ban, even though it is not Commerce that is issuing the decisions. The question posed by this example then is whether the AJ's proposed book on private sector damages is analogous, that is, whether it will deal in significant part with cases handled by [the agency] or [agency] policies, even though it is not [the agency] that is issuing the decisions.

Our answer to this question must be consistent with our long held view that an employee may receive compensation for writings that discuss a general area of expertise. The example of the NASA engineer, who may receive compensation for a text on aeronautics, but

not for one on the space shuttle, remains valid. We recognize that, in some sense, the proposed subject matter is the professional expertise of an AJ who presides over [the certain type of] cases. However, we do not believe that the AJ's proposed topic is sufficiently general to be analogous to an aeronautics text. A general discussion of aeronautics does not inherently implicate NASA programs. The NASA engineer's book need not refer to any program in which NASA was involved, and the primary use of the book will not be to assist the reader in future programs in which NASA will likely be involved. By contrast, an individual seeking relief under [a certain law] must file a charge with [the agency] within 180 days of the alleged [illegal] act.¹ [The agency] was created by [a certain law] for the express purpose of enforcing [that law].² [The law] thus inherently involves [the agency], and the proposed book will deal directly with a highly specific subject matter to which [the agency] is integral. It will be, in effect, a practitioner's handbook for analyzing, settling, and trying cases in which [the agency] will likely be involved at some stage.

As you note, the entire job of an [agency] AJ is to apply the statutes and Federal court decisions that will be the focus of the book. Further, although the AJ himself may not be involved in the private sector complaint process, [the agency] plays a critical role as the portal through which charging parties pass in seeking enforcement of [certain] laws. Many, if indeed not most, of the Federal court cases that will be discussed in the book will have been investigated and analyzed for merit by [the agency]; [the agency] will have been a party in many of the cases as well. In discussing those cases, it will be impossible to present the contentions of the parties or the resolution of the issues presented without reference to specific positions taken by [the agency] in litigation, even if [the agency] is not mentioned by name. Presumably, many of those decisions represent judicial adoption of positions advanced by [the agency]. Thus, it appears that, rather than a general topic of professional expertise, the proposed books will necessarily involve close examination of specific policies, programs, and operations of the employing agency.

We believe that this conclusion is in harmony with the examples you have cited. The example of the NASA engineer does not apply, because, rather than being general discussions of the AJ's professional expertise, both of the proposed books in this case deal specifically with the policies, programs, or operations of [the agency]. The example of the Commerce employee applies, but only in the sense that the example specifically states that her activity

¹ An individual may file with [the agency] within 300 days if the charge is first filed with an appropriate state or local authority. [Citation deleted.]

² [Citation deleted.]

will be permissible, "provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies." Since the AJ's proposed books must deal with cases investigated by, brought by, or resolved by [the agency], the express condition of the Commerce example is not met. Finally, of course, our conclusion is on all fours with Example 2 of section 2635.807(a)(3).

Conclusion

In light of these considerations, we believe that both of the proposed books "deal in significant part with. . .[an] ongoing or announced policy, program, or operation of the agency," and thus the AJ is barred from receipt of compensation as set forth in the rule. Further, we believe that this conclusion harmonizes the examples you have cited.

Sincerely,

Marilyn L. Glynn
General Counsel