

Office of Government Ethics

85 x 4 -- 04/02/85

Letter to a DAEO dated April 2, 1985

This is in response to your letter of March 6, 1985, requesting an opinion on 5 C.F.R. § 735.203(b), which prohibits employees from receiving "anything of monetary value" from a private source for their services to the Government. Your request is prompted by a practice at [your agency] of assigning employees to give speeches to organizations on subjects such as collective bargaining, mediation techniques, or the functions of [your agency]. The host organizations are generally those to whom [the agency's] voluntary programs are available, and these speeches serve as a public relations device to acquaint them with [the agency]. At the close of the speech, the host organization frequently presents the employee with a gift of appreciation. Examples of these gifts are pen and pencil sets, glassware, and bookends. You indicate that employees find it embarrassing to return or refuse the gifts and that they are also concerned about the effect of such action on the willingness of the organizations to participate in the mediation program. Because of these employee concerns and the time-consuming task of turning the gifts over to GSA, you seek an exception to the prohibition on gifts that will allow [agency] employees to accept the items presented by their hosts.

In your request for an opinion, you ask the following three questions, which will be answered in the following discussion.

1) Notwithstanding the strict prohibitory language in 5 C.F.R. § 735.203(b), does the agency head have authority to issue a regulation establishing a de minimis provision so that an item of that value or less would not be considered a thing of monetary value?

2) If not, does OGE favor the establishment of such an exception in 5 C.F.R Part 735?

3) If OGE does not favor an exception, is there another provision that would permit the agency to establish such an exception to sections 735.203(b), 735.202(a), and 735.203(c)?

In evaluating the possibility of an exception for the gifts

to [your agency's] employees, we will discuss the two categories of prohibitions you raise in your questions. First, we will evaluate the restriction on compensation from private sources, which appears in 5 C.F.R. § 735.203(b) and in 18 U.S.C. § 209. Then we will consider the prohibition in 5 C.F.R. § 735.202 on gifts to employees.

Section 735.203(b) of 5 C.F.R. prohibits an employee from receiving "any salary or anything of monetary value" from a private source as compensation for his or her services to the Government. The basis for this prohibition is 18 U.S.C. § 209. The criminal statute contains the same prohibition as the regulations do, but exempts a few items from coverage, none of which relates to your request. In interpreting 18 U.S.C. § 209, and thereby its counterpart in the regulations, both the Department of Justice and the Office of Government Ethics have rejected attempts to create a de minimis exception, and [the agency] lacks authority to carve out its own exception to the prohibition on outside compensation. Because the host organizations give employees these items in appreciation for the speeches the employees have given in their official capacity, these items could be considered prohibited supplementations of salary. If so, employees who accept these items are subject to the penalties in 18 U.S.C. § 209 and the regulations.

Another provision under which you suggest establishing an exception is section 735.203(c), which regulates outside employment and other activity. While it discusses teaching, lecturing, and writing, that provision does not specifically address the situation at [your agency]. Section 735.203(c) prohibits [certain] Presidential appointees from receiving anything of monetary value for lectures given outside their Government employment, the subject matter of which is devoted substantially to the programs of their agencies. You indicate that [agency] employees give their speeches as part of their official duties and not as an outside activity. Therefore, this section does not apply to the situation at [your agency]. Furthermore, because section 735.203(c) must be read in conjunction with the other laws and regulations governing this area, which prohibit the receipt of items such as those given to [your agency's] employees in the course of their official duties, there is no basis for creating an exception applicable to [these] employees under section 735.203(c).

In general, when an executive branch employee is offered

something of value from a private source for his or her official duties, the payment can only be accepted, if at all, by his or her employing agency. The agency can only accept when it has statutory gift acceptance authority, which few agencies have. There are a few narrow exceptions in this area, which OGE has addressed in its Memorandum 84 x 5, but none of them appears to apply in this situation. As a result, there is no exception available under section 735.203(c), and the employee must refuse the gift.

The second area to consider is how the regulations would apply to these items if they are viewed as gifts and not as a prohibited form of compensation under 18 U.S.C. § 209. The basic standards concerning the acceptance of gifts for all executive branch employees are set forth in 5 C.F.R § 735.202. At a minimum, each agency must adhere to these standards, although an agency can promulgate stricter regulations. Section 735.202(a) prohibits an officer or employee from accepting anything of monetary value from a person who --

- (1) Has or is seeking to obtain, contractual or other business or financial relations with his agency;
- (2) Conducts operations or activities that are regulated by his agency; or
- (3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

[Certain employees] from [your agency] assist representatives of labor and management in settling disputes about wages, hours, and other aspects of the employment relationship that arise during negotiations. Each organization represented in the negotiations has interests that may be affected by [this employee's] performance of his or her official duty. As a result of the prohibitions contained in section 735.202(a), employees of [your agency] may not accept anything of monetary value from these organizations, even if the item is considered strictly a gift and not compensation.

Although the language in paragraph (a) does not provide for any exceptions, section 735.202(b) permits an agency to promulgate regulations implementing paragraph (a) that provide for such exceptions as may be "necessary and appropriate in view

of the nature of the agency's work and the duties and responsibilities of the employees." Permissible exceptions include those that govern obvious family or personal relationships, permit acceptance of food and refreshments of nominal value on infrequent occasions, permit acceptance of loans from financial institutions on customary terms, and permit acceptance of unsolicited advertising or promotional material. Although the return or refusal of these gifts can be time-consuming and embarrassing to the employee, OGE does not view this as an appropriate instance for carving out an exception as "necessary and appropriate in view of the nature of the agency's work and the duties and responsibilities of the employees" under section 735.202(b).

As you point out in your letter, none of the exceptions in section 735.202(b) covers the gifts presented to [agency] employees. In addition, you correctly point out that the other possible exception in the regulations, found at section 735.203(e)(3), for awards granted for meritorious public contribution or achievement, does not apply.

Because there are no exceptions to permit the employee to accept the gifts from the host organization, you must continue to notify your employees who are assigned to make speeches before these organizations that they cannot accept the offered gifts. In its communications with a host organization prior to the employee's speech, the agency should make the host organization aware of this policy and of the actions the agency must take when an employee does accept the gift. According to section 735.107, a violation of these regulations by an employee may be cause for appropriate disciplinary action, which may be in addition to any penalty prescribed by law.

In the small number of cases in which returning or refusing the gift would cause embarrassment to or would otherwise adversely affect the agency and not just the employee, the agency may remedy the situation by turning the gift over to GSA and sending a letter to the donor explaining the agency's actions.

I hope this provides guidance to [your agency] in this area.

Sincerely,

David H. Martin

Director