

OFFICE OF GOVERNMENT ETHICS

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**Letter to an Administrative Law Judge
dated November 13, 2001**

You have requested our advice as to the applicability of 5 C.F.R. § 2635.807 to a proposed book on [a certain agency] adjudicatory system. You are currently [an agency's] Administrative Law Judge (ALJ) in [a specific] Office. [The Office] is responsible for holding hearings and issuing decisions that determine whether or not a person may receive benefits. The bulk of [the Office's] work is comprised of [Type 1] cases and [Type 2] cases. As an ALJ, your duties include the conduct of de novo hearings and decisions on appealed [agency] determinations, presumably including [Type 1] cases.

You initially sought advice on this question from your Headquarters, which concluded that under section 2635.807, you may not receive compensation for the proposed work. In reaching this conclusion, [the agency] reasoned that the work will necessarily focus on the policies, programs, and operations of the agency. For the reasons explained below, we agree with that conclusion.

ANALYSIS

The Standards of Ethical Conduct for Executive Branch Employees (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). 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).

You believe the issue here is whether the work will deal generally with your professional expertise, which is permitted notwithstanding its connection with [agency] programs, or whether it is instead a focused discussion of [agency] programs, which is prohibited. In addressing this issue, you have focused on the note to section 2635.807. That note states:

Section 2635.807(a) (2) (i) (E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for

teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

It has been the long-held view of this Office that an employee may receive compensation for writings that discuss a general area of expertise. In the preamble that accompanied the publication of the Standards of Conduct as a final rule, we illustrated this principle by means of an example in which we stated that it is 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. 57 *Fed. Reg.* 35036 (1992). We recognize that, in some sense, the proposed subject matter in this case is the professional expertise of an ALJ who presides over [Type 1] cases. However, we do not believe that the 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's anticipated involvement in future programs in which NASA will be involved. In contrast, [the agency] was created by [a certain law]¹ for the express purpose of administering the [law], including claims.² An individual seeking review of an [agency] adverse reconsideration determination must file an appeal with [the Office] within 60 days of receipt of notice of the determination.³ The [Type 1] adjudicatory process thus inherently involves [the Office], and your proposed writing will deal directly with a highly specific subject matter that [the Office] is integral to. It will be, in effect, a manual for handling cases in which [agency] components, and more specifically [the Office], will necessarily be involved.

Not only is the subject matter integral to the agency's mission, it is integral to the job of an [agency] ALJ. Your role is defined by the [agency's] adjudicatory process, and is to apply

¹[Citation deleted.]

²[Citation deleted.]

³[Citation deleted.] *C.F.*, expedited appeals directly to Federal court, [Citation deleted.] (constitutional issues only).

the rules that will be the focus of the book. Most, if indeed not all, of the content of the work will be explicit [agency] policy. Thus, it appears that, rather than a general topic of professional expertise, the proposed work will necessarily involve close examination of specific policies, programs, and operations of [the agency].

We believe that Example 5 of section 2635.807(a)(2) is more relevant to your situation than the note you have cited. That example 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 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 labor relations cases handled by Commerce or its labor relations policies, she would be subject to the compensation ban. The example goes on to note that an FLRA employee may not present the lecture series because it would deal with decisions issued by his employing agency. Since your proposed work is devoted entirely to a discussion of an [agency] program, it would appear to be analogous to the situation faced by the FLRA employee in the above example, rather than the Commerce employee.⁴

You have also argued that your personal history of publication needs to be considered in assessing your personal circumstances and qualifications as part of the section 2635.807 analysis. However, that is not relevant. A work that, on its face, would not comply with the rule cannot be made compliant by the mere fact that you have published similar articles in the past. Compensation for some of your past works appears to have been permissible. For example, a discussion of effective courtroom layout does not appear, from the title, to have an inherent focus on [agency] programs. On the other hand, your past writings on [agency] practice and procedures do not appear to be works for which you could have received compensation, and, whether you did so or not, certainly would not provide justification for your doing so in the future.

We believe that our conclusion is in harmony with the note you have cited, as well as the underlying principle. Put simply, the note does not apply because, rather than being a general discussion

⁴Also relevant is Example 2 to section 2635.807(a)(3), which prohibits an Equal Employment Opportunity Commission 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.

of your professional expertise, the proposed work focuses specifically on a core mission of [the agency].

CONCLUSION

In light of these considerations, we believe that the proposed book "deals in significant part with . . .[an] ongoing or announced policy, program, or operation of the agency," and thus you are barred from receipt of compensation for writing it.

Sincerely,

Marilyn L. Glynn
General Counsel