



FAIR POLITICAL PRACTICES COMMISSION

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September 25, 2008

Ben Russell
Democratic Floor Unit
Office of the Speaker of the Assembly
1020 N Street, Room 390
Sacramento, California 95814

Re: Your Request for Advice
Our File No. A-08-161

Dear Mr. Russell:

This letter responds to your request for advice regarding the honorarium provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application of any incompatible activities restrictions your agency may impose or other provisions of law such as Government Code Section 8920.

QUESTION

May you receive payments for an article you wrote as a free lance writer for the *Sacramento News and Review*?

CONCLUSION

Yes. So long as you meet the record keeping requirements provided in Regulation 18932.1, the payments are reportable income and not prohibited honoraria.

FACTS

You are currently employed as a consultant in the Democratic Floor Unit in the Office of the Speaker of the Assembly, which produces a packet of floor analyses that is

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

distributed to each Democratic Assembly Member whenever the Assembly meets for floor session. You write analyses of Health and Human Services bills. You have been employed by the Legislature since April 23, 2008.²

Since 2005, you have published a blog at <http://dinnerology.wordpress.com>. You do not receive income for writing these articles. While in graduate school, you published a few articles on linguistics in academic journals. As a result of writing your blog, you were contacted by Nick Miller, the Arts Editor at the *Sacramento News and Review*, and asked if you would like to “do some writing for [him].” The News and Review is a local weekly for which a significant portion (roughly 60 percent, according to an editor at the paper) of content is provided by freelance writers.

When Mr. Miller made his offer, he did not know that you were working for the State Assembly. In the ensuing e-mail exchange, Mr. Miller pitched a number of story ideas to you, and you agreed to write an article. He offered you \$200, (plus \$60 in expenses). You later discovered that this may be considered an honorarium, so you informed Mr. Miller that you would write the story as a volunteer. The story was published as the cover story on July 31, 2008. You have not received any reimbursement.

You would like to know if you may receive payment for the article that you wrote and if you may receive reimbursement for expenses incurred in developing the article.

ANALYSIS

Section 89502(c) provides that “no designated employee of a state or local government agency shall accept an honorarium from any source if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.” As a designated employee of the California Senate, you are required to disclose all sources of income and gifts; therefore, you are prohibited under Section 89502(c) from accepting any honoraria.

Section 89501 defines the term “honorarium,” in pertinent part, as follows:

“(a) For purposes of this chapter, ‘honorarium’ means, except as provided in subdivision (b), any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.

“(b) The term ‘honorarium’ does not include:

“(1) Earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or

² We assume for purposes of our analysis that your position is designated or should be designated in your agency’s conflict-of-interest code.

building contracting, unless the sole or predominant activity of the business, trade, or profession is making speeches. The Commission shall adopt regulations to implement this subdivision.”

Interpreting Section 89501(b)(1), Regulation 18932 provides:

“(a) ‘Honorarium’ does not include income earned from personal services if:

“(1) The services are provided in connection with an individual’s business or the individual’s practice of or employment in a bona fide business, trade, or profession, such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting, pursuant to [Regulations 18932.1 through 18932.3]; and

“(2) The services are customarily provided in connection with the business, trade, or profession.”

Regulation 18932.1 provides the rule for determining when an individual’s business or practice of, or employment in, a field is a “bona fide” business. Subdivision (b) thereof addresses business that has been in existence for fewer than two years. It states as follows:

“(b) For purposes of Government Code Sections 89501 through 89506, a business that has been in existence for less than two calendar years is presumed to be “bona fide” if:

“(1) Its owner has maintained records of income and expenses, consistent with the operation of a business, from the date of inception of the claimed business; and,

“(2) Any three of the following are maintained:

“(A) Copies of tax returns filed in connection with the operation of the claimed business for one year;

“(B) Records of bank accounts or lines of credit in the name of the business;

“(C) Records of purchase, lease, or rental of equipment and supplies for use solely by the business;

“(D) Records of expenditures for rent, wages, business or professional insurance, or other similar, customary costs of doing business;

“(E) Records of efforts to market goods or services provided by the business; or

“(F) Documentation of expertise by the business operator in connection with the service.”

Because the language under subdivision (b)(1) "requires that the owner *has maintained* records of income and expenses" (emphasis added) it raises the question of whether this exception only applies to a business that has already been in operation, since someone about to start a new businesses would not have any records to maintain until after the inception of the business. If that were the case, any income for writing articles received before the record of that income could be created would be prohibited honoraria, but starting with the first record of that income/prohibited honoraria, any income received after that would meet the exception, provided the owner "maintained" three of the five additional records provided for under subdivision (b)(1)(2).

However, we do not have to reach this conclusion if we read the "has maintained" language in subdivision (b)(1) to mean "has maintained or maintains," so that the subdivision will apply to new/start up business that have not yet produced any records to otherwise meet the exception. In other words, so long as a new business follows the procedures outlined in this subdivision after it starts operation, the exception applies. This reading is supported by the staff memorandum filed with the Commission at the time the regulation was adopted, explaining the intent of the new regulation.

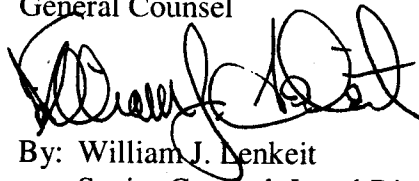
"Subdivision (b) applies to new businesses. The subdivision states that a new entity is presumed to be 'bona fide' if the owner has (1) maintained records of income and expenses from the date of inception of the business . . ."³

Consequently, under the exceptions provided in Regulation 18932.1, you may accept both the payments of \$200 and \$60 as income, and neither payment is a prohibited honorarium if you maintain the records as provided therein.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: William J. Denkeit
Senior Counsel, Legal Division

WJL:jgl

³ Staff Memorandum to Commission, "Discussion of Honoraria Regulations," dated January 3, 1992.