

SUBJECT: RECEIPT OF CONSULTANT FEE BY PUBLIC EMPLOYEE

SUMMARY:

A public employee may not receive a consultant fee for engaging in a work group in her official capacity.

QUESTION:

The Director of the Bureau of Personnel Services at the Department of Health and Environmental Control (DHEC) requests advice concerning an employee who was invited to participate in a work group regarding HIV/AIDS services on behalf of a Bureau in the Federal Department of Health and Human Services. She performed those duties on agency time. The employee was provided a \$400 consultant's fee. She requests that she be allowed to submit outside employment and annual leave forms in order that she be allowed to keep the consultant fee.

DISCUSSION:

This opinion is rendered in response to a letter dated May 11, 1992 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

Section 8-13-715 provides in part as follows:

A public official, public member, or public employee acting in an official capacity may not receive anything of value for speaking before a public or private group...

The Commission notes that the definition of "anything of value" includes an "honorarium or compensation for services". See Section 8-13-100(1)(a)(xii).

The Commission notes that "official capacity" is not defined in the Ethics Reform Act. In Advisory Opinion SEC AO92-023, the Commission, for the purposes of the Ethics Reform Act, defined speaking engagements by public employees "in an official capacity" as those which (1) arise because of the position held by the employee, (2) involve matters which fall within the responsibility of the agency or employee, and (3) are services the agency would normally provide and for which the employee would be subject to expense reimbursement by the public employee's agency. Official capacity also means those duties that are attached to a public office or employment by the Constitution, statutes, executive order, promulgated rules and regulations, published job description or agency directive.

The State Ethics Commission notes for clarification that "speaking before a public or private group"

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encompasses not only a traditional breakfast or luncheon speech but also more extended participation as speaker at a workshop, seminar, or training session or as a panel participant.

In Advisory Opinion SEC AO92-023, the State Ethics Commission determined that the payment of honoraria to the agency would not be prohibited by the above-quoted sections. The Commission further advised that any requests for expense reimbursement to the agency be channeled through the agency in advance.

A public employee may make presentations or speeches and receive an honorarium on matters outside the employee's official capacity as defined above when (1) such are accomplished on the employee's own time, (2) no public materials or equipment are utilized, except as provided in Section 8-13-700(A), (3) it is not a part of the employee's position responsibilities, and (4) it does not interfere with the needs of the agency.

The Commission has also advised that a group inviting a public employee could contract with the employee's agency to reimburse the employee's agency for the travel expenses. The employee could then be reimbursed by the agency in accordance with agency travel reimbursement policies and procedures.

Based upon the facts as submitted, it appears that the employee's attendance at the work group session meets the three criteria mentioned above.

The State Ethics Commission, therefore, advises that the consultant fee may not be accepted by the employee since she was acting in her official capacity. The fee, if already presented to her, should either be returned to the sponsoring organization or endorsed over to the agency.