

## Note from the Field

### Traveling on Someone Else's Dime, But Not Necessarily Toeing the Agency Line: Recent Changes Highlight Differences in Accepting Travel Expenses from a Non-Government Source When Speaking in an Official—Versus an Unofficial—Capacity

Major Ken Wilson  
Reserve Judge Advocate  
151st LSO

#### Introduction

The Department of Defense (DOD) Office of General Counsel, Standards of Conduct Office (SOCO), recently announced that the Joint Federal Travel Regulation (JFTR) and the Joint Travel Regulation (JTR) will no longer be the DOD's implementing authority for the acceptance of gifts of travel, meals, or lodging expenses when employees attend meetings under 31 U.S.C. § 1353 in an *official* capacity. Effective 1 January 2003, the implementing regulations are those issued by the General Services Agency (GSA).<sup>1</sup> The GSA is also amending Chapter 304 of the Federal Travel Regulations (FTR). Finally, the Office of Government Ethics (OGE) recently amended the rules governing the acceptance of travel expenses for government employees to teach, speak, or write about their federal duties in an unofficial capacity. This note discusses these changes and highlights the fundamental differences between accepting travel expenses from non-government sources when speaking in an *official* capacity and in an *unofficial* capacity.

#### Acceptance of Travel Expenses to Speak in an Official Capacity

Effective 1 January 2003, Chapter 7, Part W and Chapter 4, Part Q of the JFTR were deleted in their entirety. These provisions implement a statute, 31 U.S.C. § 1353, which controls the

acceptance of gifts of travel, meals, and lodging expenses government-wide.<sup>2</sup> The new statute permits executive branch employees to accept in-kind payments from non-federal sources on behalf of the government for travel, subsistence, and related expenses to attend meetings and similar functions in an official capacity relating to the employee's official duties.<sup>3</sup> The DOD SOCO concluded that the DOD could use the GSA-issued implementing regulation<sup>4</sup> in lieu of the old JFTR and JTR provisions for two reasons: (1) because 31 U.S.C. § 1353 applies to the entire executive branch; and (2) because the GSA has issued regulations implementing the statutory authority. This announcement coincides with the recent amendment of the GSA's travel regulations. Among other changes, the GSA is revising 41 C.F.R. § 304-3.13 to allow for after-the-fact agency acceptance of *some* payments for travel expenses to meetings from non-federal sources. The final GSA rules apply to payment of expenses from non-federal sources on or after 16 June 2003.<sup>5</sup>

#### Acceptance of Travel Expenses to Speak in an Unofficial Capacity

Over a year ago, the OGE adopted rules permitting certain employees to accept payments for travel expenses incurred in connection with non-official teaching, speaking, and writing activities that relate to official duties.<sup>6</sup> This amendment resulted from the decision of *Sanjour v. Environmental Protection Agency*,<sup>7</sup> in which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), sitting en banc, struck down an OGE regulation barring government employees from receiving compensation, including travel expenses, for their unofficial speeches or writings relating to their official government duties.<sup>8</sup> The following discussion of *Sanjour* and the amended rule illustrates the difference between official versus unofficial travel expenses paid by non-government sources.

1. See 41 C.F.R. pt. 304 (LEXIS 2003).

2. See 31 U.S.C.S. § 1353 (LEXIS 2003); cf. 31 U.S.C. § 1353 (2000).

3. This rule cannot be used in connection with "promotional vendor training." 41 C.F.R. § 302-2.1.

4. See 41 C.F.R. subpt. 304-1.

5. See Federal Travel Regulation; Payment of Travel Expenses from a Non-Federal Source, 68 Fed. Reg. 12,610 (Mar. 17, 2003); cf. 41 C.F.R. § 304-3.13.

6. See Rules and Regulations, Office of Government Ethics, 5 CFR Part 2635, RIN 3209-AAO4, Standards of Ethical Conduct for Employees of the Executive Branch; Definition of Compensation for Purposes of Prohibition on Acceptance of Compensation in Connection With Certain Teaching, Speaking and Writing Activities, 66 Fed. Reg. 59,673 (Nov. 30, 2001); 5 C.F.R. § 2635.807(a)(2)(iii)(D) (LEXIS 2003).

7. 786 F. Supp. 1033, 1035 (D.D.C. 1992), *aff'd*, *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir. 1993), *reh'g granted*, *Sanjour v. EPA*, 997 F.2d 1584 (D.C. Cir. 1993), *rev'd en banc*, 56 F.3d 85 (D.C. Cir. 1995), *clarified on remand*, 7 F. Supp. 2d 14 (D.D.C. 1998).

8. The D.C. Circuit's decision was clarified on remand in a 14 April 1998 decision by the United States District Court for the District of Columbia (District Court). See *Sanjour v. EPA*, 7 F. Supp. 2d 14 (D.D.C. 1998).

William Sanjour and Hugh Kaufman were employees of the EPA who, in their unofficial capacity, traveled extensively throughout the United States speaking about—and often criticizing—EPA policy. Because Sanjour and Kaufman traveled to the speaking engagements at their own expense, they relied on travel reimbursement from the private sources to which they spoke. The controversy arose when Sanjour and Kaufman received an invitation from NC WARN, a non-profit environmental health organization, to speak at a public hearing about plans to build a hazardous waste incinerator in Northampton County, North Carolina. Although Sanjour and Kaufman would speak in their private capacity, they would draw on their experience as EPA employees. The ethics regulation in effect at this time prevented Sanjour and Kaufman from accepting the offered travel expenses; as a result, the two did not attend the event.<sup>9</sup> Sanjour then sued the EPA and the OGE in the U.S. District Court for the District of Columbia (District Court) claiming various constitutional violations. The District Court ultimately construed Sanjour's action as a First Amendment challenge to the OGE regulation.<sup>10</sup>

The District Court weighed Sanjour's First Amendment right to free speech against the government's interest as an employer in promoting efficiency of public services. Applying the balancing test enunciated in *Pickering v. Board of Education*,<sup>11</sup> the court concluded that "the challenged regulation withstands constitutional attack [because] it is narrowly tailored to meet a legitimate government objective and is not designed to limit First Amendment freedoms."<sup>12</sup> On appeal, a panel of the D.C. Circuit affirmed.<sup>13</sup> The full D.C. Circuit later agreed to hear the case en banc, however; the court then vacated the decision and granted a rehearing.<sup>14</sup>

In *Pickering*, a local school board fired a teacher for writing and publishing a letter criticizing the board's allocation of school funds between education and athletic programs.<sup>15</sup> In analyzing the rights of a government employer to regulate the speech of its employees, the Supreme Court established a balancing test in which courts weigh the government employer's interest in efficiency and effectiveness against the public employee's right to comment on matters of public interest. Under the test, a court must weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>16</sup> Because *Pickering* and its progeny involved disciplinary actions against government employees for their public speech, the *Sanjour* court also relied on the Supreme Court's decision in *United States v. National Treasury Employees Union (NTEU)*,<sup>17</sup> which addressed the acceptance of honoraria by government employees.

In *NTEU*, two employee unions and several civil servants challenged provisions in the Ethics in Government Act that barred federal employees from receiving honoraria for speaking, teaching and writing activities.<sup>18</sup> The Court held that the honorarium ban improperly restricted the employees' speech under the First Amendment. In reaching this decision, the Court noted that public employees do not relinquish their First Amendment rights to comment on matters of public interest by virtue of their government employment. However, the Court noted that the state's interest as an employer in regulating the speech of its employees differed from its interest in regulating the speech of the general citizenry.<sup>19</sup>

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9. *Sanjour v. EPA*, 786 F. Supp. 1033, 1035 (D.D.C. 1992) (citing 5 C.F.R. § 2636.202 (1988)); *see also* 5 C.F.R. § 2635.807(a)(2) (1994). Specifically, the regulations prohibited employees from accepting compensation, including travel expenses, from non-government sources for teaching, speaking, or writing relating to the employees official duties. *Id.*

10. *Sanjour*, 785 F. Supp. at 1035-36; *see* U.S. CONST. amend. I.

11. 391 U.S. 563 (1968).

12. *Sanjour*, 786 F. Supp. at 1036.

13. *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir. 1993).

14. *Sanjour v. EPA*, 997 F.2d 1584 (D.C. Cir. 1993).

15. *Pickering*, 391 U.S. at 566.

16. *Id.* at 568.

17. 513 U.S. 454 (1995).

18. 5 U.S.C. app. §§ 101, 501(b) (Supp. 1988).

19. *NTEU*, 513 U.S. at 491.

*Applying Pickering and NTEU to the facts in Sanjour*

Circuit Judge Wald, writing for the majority of the D.C. Circuit, applied the *Pickering* and *NTEU* tests to the plaintiffs' claim. The court identified the employees' interest as the reimbursement of travel expenses incurred from speaking engagements on matters relating to their official duties. The court also considered the interest of American society in hearing from government employees in "a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular."<sup>20</sup> The court weighed these interests against those of the government, specifically,

the threat to the integrity of the government occasioned by employees using their public office for private gain[, such as] government employees selling their labor twice—once to the government as employer, and once, in the form of speech about their employment, to private parties willing to provide travel reimbursement in return.<sup>21</sup>

The court determined that the OGE regulation was both "underinclusive" and "overinclusive," that is, the rule did not squarely fit the government's purported interest in curbing the improper behavior of its employees.<sup>22</sup> Specifically, the court found that the government's regulatory scheme did not further its dual compensation concerns, and that the rule burdened more speech than necessary to further the legitimate interests of the government.<sup>23</sup> The court also found that the regulatory scheme restricted anti-government speech. The court reached this conclusion by contrasting the OGE regulation with GSA regulations<sup>24</sup> permitting the government to accept payments from non-federal sources for its employees' travel expenses, when the reimbursed travel was to attend meetings, conferences, or symposia in the employees' *official* capacities.<sup>25</sup>

The court found that the OGE regulatory scheme infringed on "the most fundamental principle of First Amendment jurisprudence that the government may not regulate speech on the ground that it expresses a dissenting viewpoint."<sup>26</sup> The court held that the OGE and the GSA regulations "vest essentially unbridled discretion in the agency" to determine whether to allow employees to give speeches, and that such determinations could hinge on "the basis of the viewpoint expressed by the employee."<sup>27</sup> It appeared to the court that "employees may receive private reimbursement for travel costs necessary to disseminate their views only by toeing the agency line."<sup>28</sup> The court ultimately held that the OGE regulations:

throttle a great deal of speech in the name of curbing government employees' improper enrichment from their public office. Upon careful review, however, we do not think that the government has carried its burden to demonstrate that the regulations advance that interest in a manner justifying the significant burden imposed on First Amendment rights.<sup>29</sup>

*The Amended Rule*

As a result of *Sanjour*, the OGE revised its regulations to permit employees to accept travel expenses incurred in connection with non-official teaching, speaking, and writing activities "related to official duties" from non-governmental sources.<sup>30</sup> It is important to note that certain covered non-career employees, such as presidential appointees and non-career members of the Senior Executive Service, may not take advantage of this exception.<sup>31</sup>

Although federal employees generally may not receive "compensation from any source other than the government for

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20. *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995).

21. *Id.* at 94-95.

22. *Id.* at 95.

23. *Id.* at 97.

24. See 41 C.F.R. subpt. 301-1 (2002).

25. 41 C.F.R. § 304-1.3(a) (1994).

26. *Sanjour*, 56 F.3d. at 96 (citations omitted).

27. *Id.* at 97.

28. *Id.* at 96-97.

29. *Id.* at 99.

30. 5 C.F.R. § 2635.807(a)(2)(iii)(D) (LEXIS 2003).

31. *Id.* § 2636.303(a).

teaching, speaking or writing that relates to the employee's official duties,"<sup>32</sup> the *Sanjour* exception defines "compensation" as *not* including "travel expenses, consisting of transportation, lodgings or meals, incurred in connection with the teaching, speaking or writing activity."<sup>33</sup> The amended rule provides four examples illustrating the scope and applicability of the exception.

Of these examples, Example 3 most closely resembles the facts of *Sanjour* because it involves a government employee speaking about his official duties in his private capacity. In this hypothetical, a Federal Trade Commission (FTC) GS-14 attorney, who participated in a merger case as part of his official duties, is invited to speak about the case in his *private* capacity at a conference in New York. The conference sponsors offer to: (1) reimburse the attorney for his travel expenses to New York; and (2) provide him a free trip to San Francisco to compensate him for his time and effort. The subject matter of the lecture clearly relates to the employee's official duties because he is speaking on a matter "assigned [to him] during the previous one-year period."<sup>34</sup> Under the amended rule, the attorney may accept the travel expenses to give the speech in New York. The travel expenses to San Francisco, however, are a prohibited form of compensation because they are not connected with any speaking activity. The example notes that if the attorney is a "covered noncareer employee," he would be barred from accepting the travel expenses to both New York and San Francisco.<sup>35</sup>

Unlike Example 3, the hypothetical in Example 4 deals with an employee speaking at an event in her *official* capacity. In Example 4, an advocacy group dedicated to improving treatments for severe pain asks the National Institutes of Health (NIH) to provide a conference speaker who can discuss recent advances in the agency's research on pain. The group also offers to pay the employee's travel expenses to attend the conference. Because the NIH employee will speak in her official capacity, the NIH may accept the travel expenses—assuming that the payment satisfies the requirements of the GSA regulations governing acceptance of travel.<sup>36</sup>

Example 1, like Example 3, illustrates how speaking at a function in a private capacity might relate to official duties. In this example, a GS-15 Forest Service employee is invited to speak in her personal capacity about a speed-reading technique she developed in her off-duty time. The organization inviting the employee will be affected by land-management regulation the employee is drafting for the Forest Service. Accordingly, the invitation is related to the employee's official duties because it is extended by an entity having interests "that may be affected substantially by performance or nonperformance of the employee's official duties."<sup>37</sup> Thus, the employee may accept travel expenses relating to the speech on speed-reading, but not a speaking fee.

Example 2 is an illustration designed to distinguish between covered and non-covered employees. In this example, a recently appointed cabinet-level official is invited to speak in Aspen, Colorado solely because of her position. The official may not accept an offer to speak because for a "covered noncareer employee," the travel expenses are prohibited compensation.<sup>38</sup>

#### *Simplified Framework for Analyzing Gifts of Travel*

The ethics practitioner may find the following framework helpful in analyzing gifts of travel expenses from non-government sources. First, one must determine whether the employee is a "covered noncareer employee" under 5 C.F.R. § 2636.303(a).<sup>39</sup> Next, one must determine whether the employee is speaking in an official capacity, that is, on behalf of the agency. If so, one must then determine whether the employee may accept the gift under 41 C.F.R. § 304-1.<sup>40</sup> If the employee is speaking in a private or unofficial capacity that is not on behalf of the agency, and the speaking engagement "relates" to the employee's official duties in one of the ways set forth in 5 C.F.R. § 2635.807(a)(2)(i)(A)-(E), the employee may only accept travel related expenses.<sup>41</sup>

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32. *Id.* § 2635.807(a).

33. *Id.* § 2635.807(a)(2)(iii)(D).

34. *Id.* § 2635.807(a)(2)(i)(E)(1).

35. *Id.*

36. 41 C.F.R. pt. 304 (LEXIS 2003).

37. 5 C.F.R. § 2635.807(a)(2)(i)(C).

38. *Id.* § 2636.303(a).

39. *Id.*

40. 41 C.F.R. § 304-1.

41. 5 C.F.R. § 2635.807(a)(2)(i).