



North Carolina General Assembly Legislative Ethics Committee

PUBLISHED EDITED ADVISORY OPINION OF THE LEGISLATIVE ETHICS COMMITTEE

AO-E-07-0011

Acceptance of Honoraria for Graduation Speech - G.S. 138A-32(h)

Approved by the Legislative Ethics Committee October 4, 2007

Question:

May a legislator accept an honorarium from a community college in connection with a speech made at the college's graduation ceremony when the legislator was asked to speak because the legislator was a member of the General Assembly?

Opinion:

No.

A. Definition of Honorarium

The first issue to be considered is whether the payment received from the community college is an honorarium governed by G.S. 138A-32(h). G.S. 138A-3(16) defines honorarium as a "payment for services for which fees are not legally or traditionally required."

(1) Applying the first prong of the definition of honorarium, there is no basis for concluding that the college was legally obligated to pay the legislator for this speech. There was no agreement, written or otherwise, that the legislator would be paid for speaking at the graduation ceremony. In fact, the legislator had no expectation that the legislator would be paid for that speech.

(2) With respect to the second prong of the honorarium definition, the Ethics Act does not define payments that "are traditionally required." It appears that the practice of paying honoraria to community college graduation speakers varies widely and is not the type of personal service provided in connection with the practice of a business, trade, or profession for which fees are routinely charged.¹ Therefore, the Committee has

¹ California specifically excludes from the definition of honorarium income received "in connection with the practice of a bona fide business, trade, or profession, such as

concluded that the payment of the honorarium was not a payment that was “traditionally required.”

Accordingly, since the payment received is an honorarium, the three criteria established in G.S. 138A-32(h) must be applied to determine whether the legislator may accept the honorarium from the college.

B. Application of Honorarium Criteria

G.S. 138A-32(h) prohibits the acceptance of an honorarium by a covered person (which includes legislators) or legislative employee from any source, other than the employing entity (not just lobbyists and lobbyist principals), if any one of the following circumstances exist:

- (1) The employing entity reimburses the covered person or legislative employee for travel, subsistence, and registration expenses.
- (2) The employing entity’s work time or resources are used.
- (3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person’s or legislative employee’s official duties.²

The first criterion is inapplicable, because the legislator was not reimbursed by the General Assembly for travel or subsistence expenses incurred in attending the graduation ceremonies.

Applying the second criterion, given the broad nature of a legislator’s duties, it is unclear what constitutes a legislator’s “work time or resources.” Members of the General Assembly are part-time legislators and the manner of fulfilling their legislative role varies widely. However, a legislator’s customary “work time” includes attending daily legislative sessions³ and committee meetings. Therefore, since the legislator attended the graduation event in the evening, at a time when there was no scheduled legislative session or committee meetings, the Committee has concluded that the graduation ceremonies took place outside legislative “work-time.”

teaching, practicing law, medicine, ... unless the sole or predominant activity of the business, trade, or profession is making speeches.” Ca. Govt. Code 89501(b)(1).

² This provision permits an “outside source” to reimburse the employing entity of the covered person or legislative employee for “actual expenses incurred ... in conducting an activity within the duties of the covered person or legislative employee,” or to pay a “fee” to the employing entity “for the services of the covered person or legislative employee.”

³ Both the Senate and House Rules require that members obtain leave when unable to attend daily legislative sessions. Senate Rule 70 and House Rule 54.

The application of the second prong of the second criterion would depend upon whether the legislator used his or her legislative resources in connection with the speech. This would include the use of his or her legislative office to schedule the speech, and the use of computer or staff resources to prepare the speech. The legislator confirmed that no legislative resources were used in scheduling or preparing the speech.

The remaining, and most difficult, question is whether the speech at the graduation ceremonies would be considered “official duty or would bear a reasonably close relationship” to the legislator's official duties as a legislator. This standard is particularly difficult to apply to legislators, given the wide variety of activities in which legislators are engaged.⁴

The North Carolina Office of State Budget and Management (“OSBM”) has adopted an honoraria policy that is very similar to the honorarium provision in the Ethics Act. Although OSBM’s policy does not apply to legislators, that policy provides guidance in determining what constitutes a legislator’s official duty in this context. That policy provides that an employee may not accept an honorarium if State work time or resources are used, or if “the activity can be construed as having a relationship to the employee’s state position . . .,” to be contrasted with the Ethics Act’s requirement that the honorarium have a “reasonably close relationship” to the person’s “official duties.” The policy further states that “a relationship exists between the activity and the employee’s state position if ‘but for’ that employee’s state position, the employee would not participate in the activity in the same manner or capacity.”

As with North Carolina, other states that permit legislators to accept honoraria require that the honorarium be unrelated to the legislator’s duties as a member of the state legislature. For example, Arkansas prohibits acceptance of payments by public officials for performing duties associated with one’s job or official position.⁵ “A public official is acting in his official capacity when he is asked to participate because of his official status.” A “but for” test is applied in making this determination. “If the official would not have been asked to speak but for his official status, the appearance is an ‘official’ one and a payment for appearance is inappropriate.” Application of this test is fact-based. Relevant factors include whether the public official has been asked to speak on a subject in which he or she has gained expertise outside his or her public responsibilities or whether the subject relates to his or her public duties. Arkansas Advisory Opinion No. 97-EC-10 (1997).

⁴ The definition of “legislative action” set forth in G.S. 120C-100(a)(5) could be relied upon to define a legislator’s official duties. However, that definition does not comprehensively describe legislative duties, nor was it intended to do so.

⁵ In addition, legislators are statutorily prohibited from accepting compensation for speeches and appearances “unless the appearance is made as part of the normal course of business in the legislative member’s private occupation.” Ark. Code Ann. § 5-52-108.

Pennsylvania also prohibits the acceptance of an honorarium by public employees. 65 P.S. § 1103(d). “Honorarium” is defined as a payment for services “which are nonpublic occupational or professional in nature.” 65 P.S. § 1102. In making this determination, Pennsylvania applied a multi-factor test in determining whether a legislator may accept a fee for speaking about “legislative priorities for local government.” Those factors included the occupation of the legislator, any particular expertise the legislator had in a particular area, the legislator’s involvement in the activity prior to public service, the capacity in which the legislator is invited, and the subject matter of the speech. Pennsylvania Advisory Opinion No. 91-004 (1991).

Connecticut prohibits a public official (defined to include legislators) from accepting an honorarium for participating in an event in his or her “official capacity.” Connecticut General Statutes 1-84(k). “Official capacity” includes those activities in which the “public official’s or state employee’s official position or authority was a significant factor in the decision to extend the invitation.” Reg., Conn. State Agencies Sec. 1-81-22(b). That is to be contrasted with payments received in connection with the public official’s outside professional pursuits and where “there is no indication that the individual’s official position was a significant, i.e., determinative factor in the decision to offer the honorarium...” Connecticut Advisory Opinion 2006-5 (citing Advisory Opinion No. 92-12). See also Maryland Advisory Opinion No. 80-8 (concluding that a payment is unrelated to official duties, in part, because there was no indication that the “prestige of office” was used to obtain the fee). Ethics laws in Kentucky and Texas impose similar statutory standards on legislators’ acceptance of honoraria. Kentucky Ethics Code, Section 6.747(1); Texas Penal Code, Section 36.07.

The Committee has concluded that the “but for” test established in the OSBM policy and adopted by other states should be applied to the determination of whether the legislator’s speech was connected with the legislator’s “official duties” as a legislator. Since it appears that the legislator would not have been invited to speak at the college graduation ceremonies if the legislator had not been member of the General Assembly, the legislator may not accept the honorarium.