

WINUK ADVICE LETTER, NO. I-23-009

QUESTION

Can elected city councilmember continue to operate business and making speeches if more than 50% of income comes from speechmaking?

HONORARIUM BAN

- An elected officer of a state or local government agency shall not accept ANY honorarium. (Section 89502(a))
- An “honorarium” is “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.” (Section 89501(a).)
- Exception: Honorarium does not include earned income for personal services 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 building contracting, **unless the sole or predominant activity of the business, trade, or profession is making speeches.** (Section 89501(b)(1).)

FACTS PROVIDED

- Elected city councilmember, author, consultant and expert on topics related to parenting, race, identity, and youth thriving.
- Continues to engage in activity promoting literary career including developing and writing books, promoting books through book talks and workshops, writing articles, writing book reviews, mentoring other writers, and teaching.
- In 2022, more than 50% of income received from paid book talks and workshops.

GENERAL APPLICATION

- As an elected city councilmember, **requestor cannot accept ANY honorarium** for speeches given, articles published, or attendance at certain events.
- Earned income exception applies only if requestor has bona fide business, but **business cannot be considered bona fide if it's predominate activity is speechmaking.**

PREDOMINATE ACTIVITY

Regulation 18932.3(a):

The “predominant activity” of a business in existence for one year or more is presumed to be speechmaking if during the 12-month period prior to and including the date of the speech, more than 50 percent of the hours spent on the business is devoted to, or more than 50 percent of the gross income of the business is derived from, the preparation and/or delivery of speeches.

PREDOMINATE ACITIVITY

Question generated considerable staff debate regarding statutory standard for “predominate activity” and how Regulation 18932.3(a) applies.

PREDOMINATE ACITIVITY

Alternative 1. Notwithstanding regulation, which only applies a standard based on the 12 months before a specific speech, a business not bona fide by definition, because income comes mostly from speechmaking at time official takes office, does not qualify for earned income exception and official is prohibited moving forward from accepting ANY payments for ANY speeches provided, articles published, or attendance at certain events.

PREDOMINATE ACITIVITY

- Alternative 2. Where official has longstanding and legitimate business, business does not have to qualify as bona fide on date the official takes office so long as the business moves forward as a bona fide business by not violating the rule in Regulation 18932.3(a) and allowing income from speechmaking to exceed 50% in the 12 months prior to a speech. This alternative allows the official's business to continue receiving payments for business related activities including articles published, and attending related events. It even allows business to start receiving income for speechmaking as soon as income from speechmaking falls below 50%.

CONCLUSION

- Letter applied Alternative 2, the more lenient of the two alternatives, but still complying with statutory mandates:
- (1) Elected City Council Member cannot accept honorarium from any source unless the official has a bona fide business.
- (2) A business is not bona fide if it's predominate activity is speechmaking.

ALTERNATIVE APPROACHES

- Could consider redefining “Predominate Activity” in regulation, but defining as something even more than 50% would be questionable. Would have to remember this is the same rule that will apply to anyone with speechmaking activity regardless of how long the activity predated election to office.
- To the extent there is support to establish a new exception specifically for longstanding businesses, would likely need statutory change.

PUBLIC COMMENT

Public comment that rule should apply only to those doing business in jurisdiction.

- Not supported by current statute or history of current statute.
- Statutory scheme bans gifts and honorarium from all sources if the official is elected.
- In contrast, gifts and honorarium prohibition for designated employees generally limited to those sources that may come before official.
- Statute has express provisions limiting gifts and honorarium ban for designated officials, so it is clear that statutory scheme banning gifts and honorarium from any source for purposes of elected officials was intended and our interpretation cannot conflict with this intent.

HISTORY

1990 – Honorarium Ban added to Act by Initiative (Proposition 112).

- ▶ State and local elected officials banned from receiving honorarium from any source.
- ▶ Other designated state employees have limited honorarium ban that only applies to sources that would be reported on SEIs (sources that may appear before official.)

1994 – Honorarium Ban expanded to other local employees.

- ▶ Designated local employees banned from receiving honorarium from any source.

1995 – Harmonized rule for other designated state and local employees.

- ▶ State and local elected official still banned from receiving honorarium from any source.
- ▶ Both designated state and local employees have limited honorarium ban that only applies to sources that would be reported on SEIs.