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**Date:** November 30, 2004

**From:** Phyllis Johnston, Attorney, Los Angeles Office of Regional Counsel

**To:** S. Lea Lowe, Executive Director, SCIRE

**Subj:** SCIRE Compensation for Work Outside VA Employee's Tour of Duty

**Question Presented:** You have inquired whether Ellis Levin, M.D., Chief of Endocrinology, and Premindra Chandraratna, M.D., Chief of Cardiology at VAMC Long Beach maybe be compensated by SCIRE for administrative research duties performed outside their VA tours of duty.

**Statement of Facts:** It is not entirely clear from facts provided what research-related activities these physicians may be involved in during their VA tours of duty. Therefore, I will describe three potential scenarios that may relate to their ability to receive additional pay from the VA non-profit for after-hours research-related work.

Scenario #1: Physician does some work on an R&D Committee-approved research project during his VA tour of duty and wishes to do administrative tasks on the same approved project after hours, paid by SCIRE.

Scenario #2: Physician does not himself perform research tasks during VA hours but is the Principal Investigator on the project and supervises the work of others on the project. Again, he wishes to perform administrative tasks related to this project after hours for pay by SCIRE.

Scenario #3: Physician, who may or may not work on other VA-approved research projects during his VA tour, wishes to be paid by SCIRE for after-hours work on another Principal Investigator's project with which he has no involvement during his VA tour.

**Legal Analysis:** VA policy set forth in VHA Handbook 1200.17 bears on these questions, as do federal employee ethics regulations and criminal statutes. Paragraph 5(b) of the Handbook states: "Corporation employees, including VA employees hired by the Corporation to do work that is distinct from their official VA duties and performed outside their VA duty hours, may be paid directly by Corporations for carrying out research projects and education activities

approved under paragraph 8.” (Emphasis added). The Handbook replaces VA Manual M-3, Pt. 1, Ch. 17, which at Paragraph 17.04(d)(2) addressed the issue in the following terms: “A VA physician conducting VA research during VA duty hours cannot be compensated by the Corporation for work performed on the same peer reviewed, approved research activity, even if the work is performed during non-VA duty hours.” (Emphasis added). I am informed by VA General Counsel that the change in language does not represent a change in policy.

General Counsel opinion VAOPGCADV 01-91 permitted VA non-profit research corporations to employ and pay full-time VA physicians and other employees for “work the corporation may lawfully assign its employees,” provided the work is done outside VA duty hours. The issue, however, is exactly what work may be done for the corporation. The Handbook requires that it be “distinct” from the employee’s VA duties; the old manual prohibited work on the same peer-reviewed VA research project for both the VA and the corporation. This VA policy ultimately rests on 18 U.S.C. § 209, a federal criminal statute that prohibits a federal employee receiving salary from a non-government entity for doing his government job.

In VAOPGCADV 10-91, General Counsel considered a VA researcher who wished his assistants to be compensated from a grant deposited in an affiliated university account for additional work on his research performed after hours. The assistants’ VA tour work included both research and medical care tasks. Among the “totality of the circumstances” that General Counsel weighed in deciding whether the assistants were being paid by an outside source for their government jobs was the fact that the after-hours work involved VA approved research, used VA resources and patients, and was done for the same supervisor, who was in a position to shift the research portion of the employees’ activities to non-VA hours. General Counsel concluded that the arrangement would violate § 209. In Scenarios #1 and #2, to the extent the physicians would be paid by the non-profit for doing work they might otherwise do on the same project on VA time for VA salary, a § 209 violation may result.

The ability to shift activities into the compensated after-hours period also implicates another criminal statute, 18 U.S.C. § 208, and the employee ethics regulation at 5 C.F.R. § 2635.402. These sections prohibit an employee making decisions in his official capacity that will serve his own financial interests. Clearly, a PI deciding to do his approved VA research project only while on non-VA time for additional pay fits this description, as does shifting his own research tasks to off-duty time, while supervising the work of others on VA time.

Scenario #3 is different in that, by working on another PI’s project while employed by the non-profit, the physician will be doing something entirely

different than what he does on his VA time. Therefore, none of the issues discussed above in the context of Scenarios #1 and #2 would arise.

**Conclusion:** Scenarios #1 and #2 are not permissible under VA policy and employee ethics regulations and may violate federal criminal statutes. Assuming the Scenario #3 physician is not involved with the other PI's research project during his VA duty hours, he may perform the extra work for the non-profit after hours.

If additional facts regarding Dr. Levin's and Dr. Chandraratna's circumstances become available and you wish further assistance in fitting them in to Scenarios #1-3, or some other fact pattern, please feel free to contact me at (310) 268-3772.

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Phyllis Johnston, Attorney