STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#94101

NO.
STATE OF NEBRASKA
OFFICIAL
DEC 21 1994
DEPT. OF JUSTICE

DATE: December 21, 1994

SUBJECT: Authorization of Settlement Payments

REQUESTED BY: Lawrence Primeau
Director, Department of Administrative Services

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested clarification of the necessity of the Attorney General authorizing "settlement" payments. You have also indicated the Department of Administrative Services' (DAS) current policy is not to process settlement payment requests from state agencies without authorization from the Attorney General's Office.[1]

It is correct, as your letter points out, that agencies may only expend state funds for statutorily authorized purposes. However, not all agency pre-litigation settlements are within the ambit of litigation, and a decision as to whether such settlements are authorized does not necessarily require the Attorney General's review.

---

[1]It should be noted that, historically, Justice Department "approval" of settlements by agency directors has merely addressed whether there was legal authority for settlement by the agency, not whether the settlement was advisable, whether settlement was a wise policy decision or whether the Justice Department would have settled the case for the amount agreed upon by the agency director.

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Lauren Lee Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Alan E. Pedersen
Paul N. Potadle
James D. Smith
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

Printed with soy ink on recycled paper

Nebraska law provides:

> The Department of Justice shall have the general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested, and shall have charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interests of the state.

Neb. Rev. Stat. § 84-202 (emphasis added). Thus, the Attorney General has authority to control and supervise all "actions" and "legal proceedings" involving state agencies, and also has charge and control of all the "legal business" of state agencies.

In Opinion No. 89033, Attorney General Spire stated the Attorney General has "inherent power and authority" to "initiate and defend actions, to make decisions regarding strategy, and to negotiate and enter settlements." (emphasis added). ***See also State v. State Board of Equalization and Assessment***, 123 Neb. 259, 242 N.W. 609 (1932), in which the court stated "ordinarily the Attorney General . . . is empowered to make any disposition of the State's litigation which he deems for its best interest." Id. at 262. (emphasis added). ***Accord State v. F.E. & M.V.R.R.***, 22 Neb. 313, 35 N.W. 178 (1887) (AG may settle litigation notwithstanding desires of the agency).

In Opinion No. 92106, Dave Frohnmayer concluded, "by Nebraska law the attorney general - not the governor or other agency official - controls the conduct of litigation, the legal policy of the State, the settlement of claims. . . ." (emphasis added).

This leads to the real question, which is what constitutes "litigation", "legal business", "actions", and "legal proceedings?" The Attorney General controls all of these. On the other hand, what constitutes administrative policy? The agency heads control this. Obviously, there is an interrelationship between the two. At some point, personnel decisions may become "legal business."

Arguably, whenever a payment is made in settlement of a dispute, it is legal business under the control of the Attorney General. However, some settlements are negotiated solely by agencies based on internal policy decisions and preferences. For example, a director may feel it is in the best interest of his or her agency to get rid of a disagreeable employee. The Attorney General has little real interest in personality conflicts within a state agency. Thus, the matter is not solely a legal matter and

not solely an administrative matter. In such situations, the Attorney General has often allowed the agency to negotiate the settlement.

After careful consideration, we believe the following is an accurate statement of the Nebraska law concerning "settlements":

> All legal matters which are before a court or other tribunal beyond the administrative level may be settled only by the Attorney General. The agency has no legal authority to settle these matters. All legal matters in which an agency requests representation by the Office of the Attorney General are also deemed to be within Neb. Rev. Stat. § 84-202, and thus are within the exclusive settlement authority of the Attorney General. Other matters, where the agency has clear statutory authority to act, are considered agency or administrative matters and may be settled by the agency within the agency's statutory authority. The Attorney General's authorization is not required for payment of such "settlements." Agencies may still seek legal advice from the Attorney General regarding issues on which representation has not been requested. Such advice does not constitute approval by the Attorney General of any "settlement" by the agency. Examples of "settlements" at the agency level would include such things as resolution of pre-litigation road construction and related minor contract disputes; resolution of personnel disputes which have gone no further than the grievance process; resolution of disputes with vendors, etc. prior to litigation or request for representation by the Attorney General.[2]

Several corollaries follow from this policy and are supported by the laws of the State of Nebraska. The first is that once an agency director requests legal representation on a matter (as distinguished from advice) or once a matter is in litigation as described herein, the agency head has **no** authority to enter into

---

[2]It should be noted that this policy is intended to cover situations where the State is making payment, rather than where the State is seeking recovery of funds.

any settlement agreement concerning the matter. Only the Attorney General may settle the matter.[3]

Where a matter is not in litigation and where the Attorney General has not been requested to provide representation, the settlement will be signed by the agency head. It will not be signed, approved or authorized by the Attorney General because, until the matter involves litigation, legal business, actions or legal proceedings, it is a policy matter for the department head over which the Attorney General has no control. This policy should not, however, be interpreted as a blanket authorization for agencies to settle cases. They must act within their legal authority.

Obviously, the question may sometimes arise as to whether an agency director, in fact, has the legal authority to enter into some type of agreement. Certainly the Attorney General's Office, if requested, will provide advice as to whether authority exists on a case by case basis. However, if agency settlement authority exists, the amount to be paid is a policy decision for the agency or the Governor and is not one which is either approved or disapproved by the Attorney General.

For example, if the Director of Agriculture has the authority to settle a personnel dispute at all, then there is no legal difference between settling the matter for one dollar or $100,000.[4] The ultimate responsibility for making sure that this authority is not abused is upon the Governor who appoints and may remove his agency head or, in the case of independent boards and commissions, the board or commission itself.

We are very concerned that a state agency head could use large sums of the taxpayers' funds to settle sexual harassment, hostile

---

[3]Agencies should be aware that certain types of claims, such as Tort Claims and Workers' Compensation, are governed by specific statutes and must be handled by the Attorney General even where representation is not specifically requested. *See, e.g.*, Neb. Rev. Stat. §§ 81-8,211-212; 48-194; 48-196, and 48-1,102.

[4]Agencies should be aware, however, that there may be statutory restrictions which require special treatment of claims over certain amounts (*e.g.* legislative approval). Furthermore, agency settlements must come from properly authorized and appropriated agency funds. Only the Attorney General can approve settlement payments from Risk Management Indemnification Funds pursuant to Neb. Rev. Stat. § 81-8,239.06.

work environment, and similar claims that are made against the agency director himself or herself. In the case of state code agencies, we would recommend that, as a matter of administrative policy, the Governor direct that no state agency director is authorized to settle a claim against the director without written authorization from the Governor's Office. With respect to independent agencies, we would recommend that DAS institute a policy of not paying agency settlements of matters involving agency directors unless accompanied by proof that the settlement had been approved by a majority of the board or commission overseeing the agency.

In the case of a code agency, the agency head or the Governor could specifically request representation by the Attorney General. At that point, we would, of course, provide the representation as previously indicated in this opinion, consistent with Nebraska statutes. The agency head would then have no authority to conduct settlement negotiations or sign any settlement agreement. That authority would, by statute, rest exclusively with the Attorney General at that point.

Please feel free to contact this office if you have any further questions concerning this issue.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved by:

Attorney General

3-1815-3