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STATE OF NEBRASKA
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DATE: September 12, 1991

SUBJECT: Department of Social Services; the Community Work Experience Program (CWEP) under the Job Opportunities and Basic Skills Training Program (JOBS), required by section 402(a)(19) of the Social Security Act, as amended by section 201(a) of the Family Support Act of 1988, Pub.L. 100-485, and set forth in title IV, part I of the Social Security Act, as added by section 201(b) of the Family Support Act (codified as amended at 42 U.S.C.A. §§ 602(a) (19), 681-687 (West Supp. 1989)).

REQUESTED BY: Mary Dean Harvey, Director
Department of Social Services

WRITTEN BY: Don Stenberg, Attorney General
Royce N. Harper, Senior Assistant Attorney General

SUMMARY OF ANSWERS TO QUESTIONS ASKED BY DIRECTOR HARVEY

The questions asked raise complex issues as to whether a participant in a CWEP assignment is an employee, and if so, whose employee. There are additional collateral issues as to whether a CWEP assignment might violate existing labor agreements between Nebraska state employees and Nebraska state government, and whether the appeal procedure, prescribed by the federal statute, is an impermissible infringement upon the division of powers between federal and state governments.

Extensive research of federal statutes and regulations, Nebraska statutes and regulations, and case law has provided some answers to the questions asked.

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Question 1: Are Aid to Dependent Children recipients who participate in CWEP entitled to worker's compensation and/or tort claims coverage? If yes, by whom?

Conclusion: Yes. The State of Nebraska Department of Social Services.

Question 2: If the answer to the above coverage question is yes in either respect, are those individuals entitled to coverage for unemployment benefits?

Conclusion: No.

Question 3: Are these individuals part-time temporary employees for purpose of any other benefits including vacation pay or sick pay?

Conclusion: No.

Question 4: Are these individuals employees for purposes of the Fair Labor Standards Act provisions?

Conclusion: No.

Question 5: Is the use of Aid to Dependant Children benefit recipients within state government doing the work of Bargaining Unit covered employees, a violation of any existing labor agreements or might such constitute an unfair labor practice?

Conclusion: As to possible labor agreements, it will be necessary to contact State Personnel.

Question 6: Is the provision for appeals from a Department of Social Services' administrative agency decision to the United States Department of Labor an allowable provision?

Conclusion: Yes.

DETAILED ANALYSIS AND RESPONSE TO DIRECTOR HARVEY'S QUESTIONS

The purpose of the JOBS program under titles IV-A and IV-F of the Social Security Act is to "assure that needy families with children obtain the education, training, and employment that will help them avoid long term welfare dependence." 42 U.S.C.A. § 681 (West Supp. 1989); 45 C.F.R. § 250.0. A state, as a condition of its participation in the Aid to Families with Dependent Children program (AFDC), must operate a JOBS program. 42 U.S.C.A § 682(a)(1)(A); 45 C.F.R. § 250.0(b). A state must make available a broad range of services and activities to carry out the purposes

of the JOBS program. 42 U.S.C.A. § 682(d) (1) (A). A state may include a Community Work Experience Program as a component of its JOBS program. 42 U.S.C.A. § 682(d) (1) (A); 45 C.F.R. § 250.45.

The State of Nebraska Department of Social Services has established a JOBS program as required by federal statute. CWEP is a component of the Nebraska program. 42 U.S.C.A. § 684.

The Department of Social Services defines community work experience as:

> unpaid work experience and training in a public or private, non-profit place of employment. It is intended to provide experience and training for participants not otherwise able to obtain employment. Assignments may not exceed six months and may be provided as a preparation for other education and training activities or as skills enhancement preparatory to better prepare the participant for employment in an unsubsidized job. Job placement in paid employment has priority over the completion of a work experience placement.

468 NAC 2-020.05E4 (Nebraska Department of Social Services Manual).

The Department, pursuant to federal statute and regulations, determines the number of hours each participant works. 468 NAC 2-020.6F2. The Department determines which persons are exempt from participation in the program. 468 NAC 2-020.06E3. The Department further provides oversight of a person's participation at the work site, and apparently controls reassignment or termination of a participant at a particular work site. 468 NAC 2-020.6F2d through 2-020.6F2f.

According to the Director's letter, CWEP assignments which are unpaid are in "public or private, non-profit places of employment." Letter from Mary Dean Harvey to Don Stenberg (May 29, 1991) (requesting Attorney General's Opinion). The Department enters into an agreement with a sponsoring agency. Agreements have been made with federal, state, county, and private non-profit community agencies. Participants have also been placed in the Department's offices. Id.

When a state elects to participate in an AFDC program, it must abide by federal statutes and regulations. Oberschachtsieck v. Iowa Dep't of Social Services, 298 N.W.2d 302 (Iowa 1980). Although Nebraska is required to operate a JOBS program, 42 U.S.C.A. § 682(a) (1) (A); 45 C.F.R. § 250.0(b), it is not required to include a CWEP component in its JOBS program. 42 U.S.C.A. § 682(d) (1) (A) (ii) (iv). However, since it has included CWEP, Nebraska is required to follow the federal statutes applicable to

CWEP. State regulations which contravene the federal regulatory scheme are invalid under the Supremacy Clause. Townsend v. Swank, 404 U.S. 282, 286, 92 S.Ct. 502, ___, 30 L.Ed.2d 448, 453 (1971). The applicable federal statutes and regulations as to CWEP are 42 U.S.C.A. § 602(a) (19); 42 U.S.C.A. §§ 681-687; and 45 C.F.R. §§ 250.0-250-98.

Evaluating the questions asked in relation to the issues inherent in the questions, our opinion is as follows:

Question No. 1: Are Aid to Dependent Children recipients who participate in CWEP entitled to worker's compensation and/or tort claims coverage? If yes, by whom?

Answer: Yes, as to the first part of the question, to the extent that the federal statute requires that: "[a]ppropriate worker's compensation and tort claims protection must be provided to participants on the same basis as they are provided to other individuals in the State in similar employment as determined under regulations of the Secretary. 42 U.S.C.A. § 684(b). Federal regulations require that the state's JOBS plan must contain "[a] JOBS program that meets the requirements of . . . title IV-F of the Act [includes § 684(b)]." 45 C.F.R. § 250.21(a) (i), and further that "[t]he JOBS program will meet all statutory and regulatory requirements." 45 C.F.R. § 250.21(2). The regulations contain no further classification as to persons entitled to worker's compensation or tort claims protections, as the qualifying parenthetical clause, "as determined under regulations of the Secretary," might anticipate. However, it is clear from the regulation that the statutory provisions of 42 U.S.C.A. § 684(b) must be met.

As to tort claims protection and worker's compensation for CWEP participants placed in a state department, agency or bureau, the applicable statutes are the Nebraska State Tort Claims Act, Neb.Rev.Stat. §§ 81-8,209 through 81-8,239 (1990 Supp.) and the Nebraska Workers' Compensation Act, Neb.Rev.Stat. §§ 48-101 through 48-1,112 (1990 Supp.).

The State Tort Claims Act provides for claims against the state "for money only or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his or her office or employment, under circumstances in which the state, if a private person, would be liable to the claimant for such damage, loss injury, or death. . . ." Neb.Rev.Stat. § 81-210(4) (1989 Supp.).

Under the Act, an employee of the state is "any one or more officers or employees of the state or any state agency. . . . State employee shall not be construed to include any contractor

with the State of Nebraska." Neb.Rev.Stat. § 81-210(3) (1989 Supp.).

Seeking a more precise definition of "employee," the statutory definition used by the State Personnel Services for state employees is "any person in the employ of an agency or department who receives a salary or wage." Neb.Rev.Stat. § 81-1302(4) (Reissue 1987). Although this statute does not expressly refer to § 81-8,209 (State Tort Claims Act), it seems reasonable to apply the definition to the term "employee" in the Tort Claims Act.

CWEP participants do not receive a salary or wage. 45 C.F.R. § 250.63(e). Arguably, they do not meet the statutory requirement to be classified as state employees. Further, the Tort Claims Act expressly excludes contractors with the State of Nebraska from the definition of employee. Arguably, agreements or contracts with CWEP participants and sponsoring agencies would exclude both from coverage as state employees. See Neb.Rev.Stat. § 81-8,210(3) (1989 Supp.). Extending the State Tort Claims Act to CWEP participants placed in state departments or agencies and to CWEP participants in non-state placements would be stretching the scope of the statute too thinly. An argument based upon principles of agency as applied to participant recipients or sponsoring agencies would be tenuous and ill-advised.

As to workers' compensation coverage, Nebraska provides:

> The Nebraska Workers' Compensation Act shall apply to the State of Nebraska and every governmental agency created by it, and to every employer in this state . . . employing one or more employee in the regular trade, business, profession, or vocation of such employee, . . .

Neb.Rev.Stat. § 48-106(1) (Reissue 1988).

The Act defines employers as:

> (1) The state and every governmental agency created by it; and
>
> (2) every person, firm, or corporation, including any public services corporation, who is engaged in any trade, occupation, business, or profession . . . and who has any person in service under any contract of hire, express or implied, oral or written.

Neb.Rev.Stat. § 48-114 (Reissue 1988).

The Act defines employee as:

> (1) Every person in the service of the state or any governmental agency created by it . . . under any appointment or contract of hire, expressed or implied, oral or written. . . .
>
> (2) Every person in the service of an employer who is engaged in any trade, occupation, business, or profession . . . under any contract of his, expressed or implied, oral or written. . . .

Neb.Rev.Stat. § 48-115 (Reissue 1988).

The Worker's Compensation Act, similar to the State Tort Claims Act, appears to envision coverage for those persons usually considered as employees, e.g., receiving a wage or salary, or under a "contract of hire." CWEP participants do not receive a wage or salary, and according to the Department of Social Services Cooperative Worksite Agreement:

> Participants are not considered employees of the Sponsor or the Department, but are recipients of public assistance and are not compensated for the work performed.

Since CWEP participants are not considered employees by the Nebraska Department of Social Services, and do not appear to meet the statutory criteria to be classified as Nebraska state employees, the Nebraska State Tort Claims Act and the Worker's Compensation Act do not provide coverage for those CWEP participants placed in Nebraska state departments or agencies. For those participants placed in non-state agencies, these "non-employees' are likely not to meet the coverage requirements of those agencies' insurers.

Therefore, in order to provide, in a fair manner, equal coverage to all CWEP participants whether in state or non-state placements, the State Agency IV-A, in this case, the Nebraska Department of Social Services, should assume financial responsibility for coverage. Since the CWEP participants are not covered under the State Workers' Compensation Law or the State Tort Claims Act, coverage may be provided by appropriate insurance purchased through the State Risk Manager.

CWEP participants can be distinguished from "relief" recipients addressed in the Attorney General's opinion (Sept. 16, 1982). That opinion related to Neb.Rev.Stat. § 68-110 which required a person to work as a condition for receiving "relief" from a county. There was a compensatory element in the

relationship between "relief" payments and the work. Arguably, a "relief" recipient could be considered an "employee" because of this compensatory element. Section 63-110 was repealed in 1983. The current situation involves federal requirements for a federal program. However, the federal statute makes clear there is no compensation for work performed. Therefore, the argument that CWEP participants are "employees" is tenuous, and the 1982 Attorney General Opinion is inapplicable to the CWEP program.

Question No. 2: If the answer to the above coverage question is yes in either respect are those individuals entitled to coverage for unemployment benefits?

Answer: No. The Nebraska Employment Security Law, Neb.Rev.Stat. §§ 48-601 through 48-671, providing for unemployment compensation, excludes from coverage employment that is "part of an unemployment work relief or work-training program that is assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training." Neb.Rev.Stat. § 48-604(6)(a)(5).

Question No. 3: Are these individuals part-time temporary employees for purpose of any other benefits including vacation pay or sick pay?

Answer: No. Neb.Rev.Stat. §§ 81-1320 to 81-1327 provide for sick leave for persons employed by the State of Nebraska. Section 81-1328 provides for vacation leave for persons employed by the State. Construing these statutes with section 81-1302(4), defining employee for State Personnel Service, CWEP participants are not persons in the employ of a state agency or department because they do not receive a salary or wage. See Neb.Rev.Stat. § 81-1320(4) (Reissue 1987). Vacation benefits and sick leave are not available to non-employees. Equal protection requires the same application to participants placed in non-state agencies.

Question No. 4: Are these individuals employees for purposes of the Fair Labor Standards Act provisions?

Answer: No. The purpose of the Fair Labor Standards Act, 29 U.S.C.A. 201 (West 1978 and Supp. 1990) (FLSA), is to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers. The Family Support Act of 1988, with its stated purpose to assist needy families with children to obtain education, training, and employment to avoid long-term welfare dependence, is specific as to work and compensation conditions of CWEP, matters generally covered by FLSA. 42 U.S.C.A. §§ 681-687 (West Supp. 1989). Absent express direction from

Congress that FLSA applies, and in consideration of the many express requirements of the Family Support Act, it is suggested that the Family Support Act provides the protection for CWEP participants rather than FLSA.

Question No. 5: Is the use of Aid to Dependent Children benefit recipients within State government doing the work of Bargaining Unit covered employees, a violation of any existing labor agreements or might such constitute an unfair labor practice?

Answer: A review of policy with the Acting Labor Relations Administrator and/or General Counsel of the Department of Personnel has indicated that the existing labor contracts do not cover temporary employees. The work contemplated by CWEP is of a temporary nature, usually as a training component, and does not require the "full functions" that are performed by members of a bargaining unit. The Department of Social Services should contact the Labor Relations Division Head, Department of Personnel, for further review of this program as to potential violations of existing labor agreements and unfair labor practices.

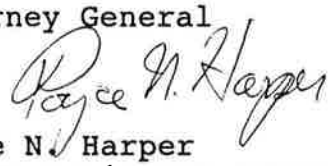
Question No. 6: Is the provision for appeals from a Department of Social Services' administrative agency decision to the U.S. Department of Labor an allowable provision?

Answer: Yes. It is clear that the permitted appeals to the Department of Labor involve issues of labor relations as provided for in 42 U.S.C.A. § 684(c)(d). As to federal preemption in this area, "[w]hen Congress has unmistakably entered a field and has enacted regulations to govern a field, state laws regulating that aspect of commerce must fall. This result is required whether Congress specifically directs such a result in the legislation or such a result is required by reason of the purpose of the act." ATS Mobile Telephone, Inc. v. General Communications Co., Inc., 204 Neb. 141, 146, 282 N.W.2d 16, 19 (1979). "The purpose of the [National Labor Relations] Act is to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 92 S.Ct. 373, ___, 30 L.Ed.2d 328, 333 (1971) quoting Garner v. Teamsters Union, 346 U.S. 485, 490, 74 S.Ct. 161, ___, 16 L.Ed.2d 228, 239 (1953).

We trust that this opinion will provide direction to the Department in meeting the requirements of the Family Support Act of 1988.

Respectfully submitted,

DON STENBERG
Attorney General



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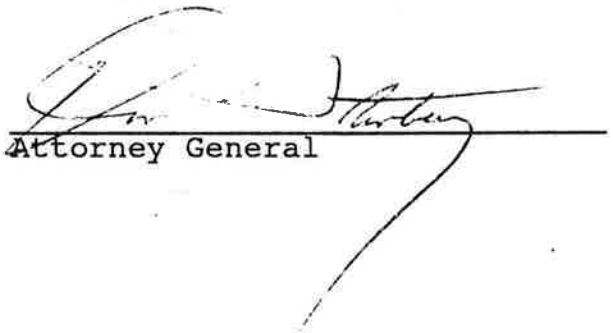

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