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#95071

NO.
STATE OF NEBRASKA
OFFICIAL
SEP 13 1995
DEPT. OF JUSTICE

DATE: September 13, 1995

SUBJECT: Processing of Payment Requests Submitted by the NEOC

REQUESTED BY: Larry Primeau, Director
Department of Administrative Services

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

You have requested our opinion on the appropriateness of processing two payment requests received from the Nebraska Equal Opportunity Commission (NEOC).

I.

The first question presented is whether a request for payment to Mr. Lawrence S. Myers of two month's additional salary is appropriate. Specifically, you ask for an opinion on "NEOC's contention that Myers is entitled to the two month's salary due to the 'invalid action' taken by the NEOC." You further inquire whether the "support and consultation" allegedly provided by Myers during this two month period is sufficient to legally justify the two month's salary requested.

On June 28, 1995, four of the seven NEOC Commissioners held a meeting by means of a telephone conference call during which they voted to place Mr. Myers on paid suspension pending investigation of certain claims against him. On June 29, 1995, all seven Commissioners met by telephone conference call and voted to offer Myers approximately $40,000 in return for his resignation. Mr. Myers agreed to this arrangement and provided a signed resignation. All seven Commissioners met once again by telephone conference on July 3, 1995, to ratify the agreement with Myers.

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As discussed in Op. Att'y Gen. No. 95063 (August 10, 1995), the Commission's various telephone conference meetings did not comply with Nebraska open meeting laws, and "its actions on those occasions are void under Section 84-1414(1)." Consequently, the Commission's mishandling of Myers' suspension and resignation could have allowed Myers to continue working in his position and receiving a salary until further action was taken to terminate his employment. However, Nebraska law generally requires work be performed in order for payment to be received. *See* Neb. Const. art. III, § 19 (prohibition on payments in the nature of gratuities for past services). ***See also Haman v. Marsh***, 237 Neb. 699, 721-722, 467 N.W.2d 836 (1991) (discussing the constitutional principle of law that public funds cannot be expended for private purposes).

The NEOC does not contend that Mr. Myers showed up for work during the two months in question, but contends only that "Mr. Myers has been providing support and consultation to the Commission" during this period. (Letter of August 31, 1995, from NEOC Chairperson LaVon Stennis to State Accounting Administrator Bob Luth). Whether the "support and consultation" in question is worth $12,314.00 is questionable. It is not unusual for recently departed employees to provide transition advice without charge. However, the validity of the payment may hinge on whether some agreement existed between Mr. Myers and the NEOC for this consultation, and whether the amount requested is so unreasonable as to constitute a gratuity in and of itself. We are aware of no agreement for paid consultation by Myers during this time. Furthermore, the amount requested seems excessive in relation to the work performed. Consequently, the payment request received on August 30, 1995, for $12,314.00 should not be processed by DAS.

II.

The next question presented is "whether the requested $35,000 payment would be considered a legal payment for a settlement agreement or an impermissible severance payment."

In Op. Att'y Gen. No. 95063 (Aug. 10, 1995), this office set forth a detailed discussion of Neb. Const. art. III, § 19 and its prohibition against payment of extra compensation to public employees after services are rendered (gratuities). Among the requirements set forth for valid settlement agreements (as opposed to illegal severance packages) is that "there is at least some potential legal liability for the agency growing out of the termination." As was pointed out in the Attorney General's letter to the NEOC of August 24, 1995, since the Commission could terminate its Executive Director's employment at its discretion and without cause, there is little reason which would justify a settlement.

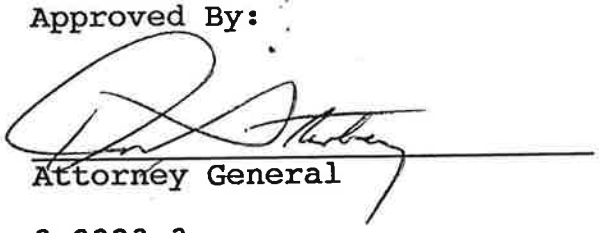
A second requirement of a valid settlement is that the settlement amount not be so clearly unreasonable as to constitute a gratuity in and of itself. A payment of $35,000 to an employee who is terminable at will seems excessive, even in light of recitations in the "Settlement Agreement and Release of Claims" as to vaguely described alleged claims against the NEOC. Consequently, DAS should not process the payment request for $35,000 received from the NEOC on August 30, 1995.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

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