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DATE: August 9, 1995

SUBJECT: Legality of the Resignation Arrangement Entered Into Between the Nebraska Equal Opportunity Commission and Lawrence R. Myers

REQUESTED BY: Larry S. Primeau, Director
Department of Administrative Services

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Recently, Lawrence R. Myers, the Executive Director of the Nebraska Equal Opportunity Commission (the "NEOC" or the "Commission"), resigned from that position. His resignation apparently came about as a result of an understanding with the NEOC by which that agency agreed to pay Mr. Myers one half of his yearly salary, one half of the State's annual share of his health insurance package, and the value of the vacation time which he had accrued, in return for Mr. Myers' resignation as Executive Director.[1] Several State officials have now questioned the legality of the arrangement between Mr. Myers and the NEOC, and those concerns precipitated an opinion request from you in which you raised a number of questions for us to consider. In addition, State Treasurer David Heineman has also posed several questions to us in connection with the same matter. This opinion will deal with both your opinion requests. We will begin by stating the facts as we understand them.

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[1] The total value of that offer was approximately $48,640. Of that amount, approximately $9,240 involved accrued vacation time. Apart from any controversy surrounding this matter, Mr. Myers was clearly entitled to the value of his accrued vacation time, and he has been paid for that time.

FACTS

Earlier this spring, several NEOC employees were disciplined by the agency, in part, on the basis of statements made by the employees' female co-worker. Those actions resulted in a federal lawsuit against officials of the Commission and Mr. Myers which alleged that the disciplinary actions were improper. In the course of pre-discovery disclosures in the federal lawsuit, a letter surfaced which, on its face, appeared to suggest that Mr. Myers had engaged in a romantic relationship with the female co-worker and which, therefore, raised questions regarding the credibility of that individual. As a result, our office sent a copy of that letter to the NEOC Commissioners at the end of June.

On June 28, 1995, after receipt of a copy of the letter in question, four of the seven NEOC Commissioners held a meeting by means of a telephone conference call in which they discussed the letter and its import. At that time, the Commissioners voted to place Mr. Myers on paid suspension pending an investigation of the claims against him. Mr. Myers was informed of that decision.

After a number of discussions regarding the situation by NEOC staff, the Chair of the Commission and other individuals on June 29, all seven of the NEOC Commissioners met again by telephone conference call on June 30, 1995, to discuss the situation further. At that time, the Commissioners discussed the ongoing turmoil at the agency and the continuing public debate on the matter, and determined that it might be advisable to ask Mr. Myers to resign. A resignation offer was discussed at that meeting, and LaVon Stennis, the Chair of the NEOC, was authorized to present that offer to Mr. Myers. She did so later in the day, and Mr. Myers agreed to a resignation package substantially in the form stated above. Mr. Myers then provided Ms. Stennis with a signed resignation.

The NEOC held one additional meeting by telephone conference call on July 3, 1995, to ratify the agreement with Mr. Myers. All seven of the Commissioners participated in that telephone conference and voted in favor of ratification of the agreement.

As best we can determine, there was no notice to the media in connection with the telephone conference meetings described above, nor were any minutes of the meetings taken, prepared or made available to the public the day after each meeting.

PUBLIC MEETINGS MATTERS

The initial question presented to us by State Treasurer Heineman involves the legality of an alleged executive or closed session meeting of the NEOC during which the resignation

arrangement with Mr. Myers was approved. Mr. Heineman questions whether such an executive session violated the Nebraska Public Meetings Statutes, *Neb. Rev. Stat. §§* 84-1408 through 84-1414 (1994). From information provided to us, it appears that the NEOC did not take formal action in executive session during any of its telephone meetings involving the situation with Mr. Myers. However, while the situation with the NEOC thus does not appear to involve an improper closed session, other portions of the Public Meetings Statutes are pertinent. Therefore, for reasons that will become obvious, we will begin our analysis of this entire matter with a discussion of the Public Meetings Statutes and their impact on the events which are the subject of your opinion request.

The Public Meetings Statutes essentially require that all governmental bodies in Nebraska must conduct their business in public, and that they may not engage in public business in secret. Those statutes variously provide for notice of public meetings, for preparation of a current agenda for public meetings, for public attendance and participation in public meetings, and for the preparation of accurate minutes of public meetings. A "meeting" is defined under those statutes as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." The Public Meetings Statutes also contain provisions for closed or executive sessions in certain limited instances, and for emergency meetings of public bodies.

In our Op. Att'y Gen. No. 92019 (February 11, 1992), we concluded that the Public Meetings Statutes do not authorize or allow the use of telephone conference calls for non-emergency meetings of a public body.[2] As a result, since the meetings of the NEOC Commissioners on June 28, June 30 and July 3 detailed above were conducted by telephone conference calls, we believe that those meetings should have been emergency meetings conducted in conformance with the statutory requirements for an emergency meeting of a public body. Otherwise, those meetings were not properly convened, and action was not properly taken by the Commission.

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[2] Subsequent to the issuance of our Opinion No. 92019, Section 84-1411 (2) was amended in 1993 to allow meetings of public bodies by videoconferencing in certain circumstances. 1993 Neb. Laws LB 635. However, under Section 84-1409, as amended, videoconferencing is defined as meeting by use of audio-video equipment which allows participants at each location to hear and see each other. Meetings by telephone conference call which do not include video interaction are still only allowed for emergency meetings under Section 84-1411 (4).

With respect to emergency meetings of a public body, Section 84-1411(4) provides:

> When it is necessary to hold an emergency meeting without reasonable advance public notice, the nature of the emergency shall be stated in the minutes and any formal action taken in such meeting shall pertain only to the emergency. Such emergency meetings may be held by means of electronic or telecommunication equipment. The provisions of subsection (3) of this section [which require notice to those news media which have previously requested notification of meetings of the public body] shall be complied with in conducting emergency meetings. Complete minutes of such emergency meetings specifying the nature of the emergency and any formal action taken at the meeting shall be made available to the public by no later than the end of the next regular business day.

As best we can tell from the information provided to us, the actions of the Commission in connection with its meetings on June 28, June 30 and July 3, 1995, failed to comport with the requirements of Section 84-1411(4) for emergency meetings in several respects. First, no complete minutes of those meetings were prepared and available for the public by the end of the next business day in each instance. Second, since no minutes of the meetings were prepared, the nature of the emergency which necessitated each meeting was not stated in the minutes. Third, no notice to the news media was apparently given in connection with each of those meetings. Moreover, we have at least some question as to whether this whole situation even involved items of an emergency nature which would warrant an emergency meeting since we have indicated that, in our view, such emergency items are those which require immediate resolution by the public body and those which have arisen in circumstances impossible to anticipate at a time sufficient to place on the agenda of a regular, called or special meeting of the body. 1975-76 Rep. Att'y Gen. 150 (Opinion No. 116, dated August 29, 1975). As a result, we do not believe that the meetings of the Commission with respect to the Myers suspension and resignation were conducted properly under the Public Meetings Statutes.

Section 84-1414(1) provides, in pertinent part, that:

> Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of sections 79-327, 84-1408 to 84-1414, and 85-104 shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body at which the alleged violation occurred.

Since the Commission's various telephone conference meetings on June 28, June 30 and July 3 did not comply with the requirements for an emergency meeting under Section 84-1411(4), we believe that its actions on those occasions are void under Section 84-1414(1). Consequently, the Myers suspension and the resignation package negotiated with Mr. Myers are a nullity, and must be reconsidered by the Commission in a properly constituted public session in order to be given effect.[3]

ADDITIONAL QUESTIONS

Since we have concluded that the Myers resignation agreement, the terms of which were the subject of the opinion requests from you and from Treasurer Heineman, is ineffective under the Public Meetings Statutes, there is no need for us to address the numerous additional questions which you directed to us regarding the specific provisions of that agreement. However, for your guidance and for the guidance of the Commission and the other public officials involved in this controversy, we will offer some general observations regarding the settlement process in this case.

1. In your opinion request, you asked whether the Commission has the statutory authority to enter into settlement agreements such as the arrangement with Mr. Myers. As a general rule, administrative bodies have only that authority specifically conferred upon them by statute or by a construction of the statute necessary to achieve the purpose of the relevant act. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). However, agencies do have the incidental powers implied by the second part of the general rule, especially in the field of internal administration. *Coffman v. State Board of Examiners*, 331 Mich 582, 50 N.W.2d 322 (1951); 2 Am.Jur.2d *Administrative Law* § 62.

Neb. Rev. Stat. § 48-1116 (1993) provides, in pertinent part:

> The [Nebraska Equal Opportunity] commission shall appoint an executive director who shall be directly responsible to the commission. The executive director may appoint such assistants, clerks, agents and other employees as such executive director may deem necessary, fix their compensation within the limitations provided by law, and prescribe duties of such employees.

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[3] In that regard, we would note that discussion of Mr. Myers' situation might well be a personnel matter which would justify a closed or executive session under the Public Meetings Statutes. However, the final vote on any suspension or settlement package involving Mr. Myers must be conducted in open session.

It seems to us that if the NEOC has the authority to appoint an executive director who is directly responsible to it, it necessarily has the authority to terminate that executive director. It also seems to us that the authority to appoint and to terminate an executive director carries with it the incidental authority to settle a dispute and potential legal action involving the termination of that director prior to actual litigation. Our conclusions in this regard in this context are only intended to supplement our earlier conclusions regarding authorization of settlement payments set out in our Op. Att'y Gen. No. 94101 (December 21, 1994) directed to you.

2. There has been a great deal of debate throughout this controversy as to whether the payment contemplated for Mr. Myers is a permissible "settlement" or an impermissible "severance." While we do not need to consider that question directly given our conclusions under the Public Meetings Statutes stated above, we will generally discuss the issue for the direction of the parties involved in the dispute.

Art. III, § 19 of the Nebraska Constitution provides, as is pertinent here:

> The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, except that retirement benefits of retired public officers and employees may be adjusted to reflect changes in the cost of living and wage levels that have occurred subsequent to the date of retirement, . . .

As we stated in Op. Att'y Gen. No. 94064 (August 22, 1994), the purpose of state constitutional provisions such as Art. III, § 19 which prohibit extra compensation to public employees after services are rendered is to prevent payments in the nature of gratuities for past services. 67 C.J.S. ***Officers*** § 236. As stated by the Nebraska Supreme Court in ***Wilson v. Marsh***, 162 Neb. 237, 75 N.W.2d 723 (1956), a case which, in part, involved the application of Art. III, § 19 to judicial pensions:

> It could hardly be made clearer or more positive that retirement benefits are either earned compensation for services rendered after the grant of them and that they are therefore valid or that they are a gratuity and not a part of compensation and therefore invalid.

Id. at 253, 75 N.W.2d at 733. Therefore, Art. III, § 19 is intended to prohibit the payment of gratuities by the State.

With this rule in mind, it becomes apparent that a payment to a state employee upon his or her termination for which the state receives nothing would constitute a gratuity forbidden by Art. III, § 19. For example, if a state employee voluntarily retires after 50 years of service and receives a payment of $25,000 solely for his long and faithful service, such a payment could be characterized as a gratuity and would clearly be improper. Similarly, if an employee voluntarily resigns in a situation where there is no controversy and receives a payment from the State which is actually a "severance," such a payment would be improper. On the other hand, a payment to a state employee upon termination as a result of the legitimate "settlement" of a personnel matter which includes the resolution of potential litigation and/or the resolution of difficult personnel problems involving actual legal disputes is not a gratuity since the State would receive something for its money, e.g., a release from potential liability and closure of legal disputes which impaired the ability of the state agency to function. The determination of "severance" versus "settlement" must be made on a case-by-case basis based upon the facts surrounding each situation. Indicia of a "settlement" would presumably include at least the following factors:

a. There is at least some potential legal liability for the agency growing out of the termination. This could be based upon the employee's contract rights, upon federal or state statutory rights or upon so-called "liberty interests."

b. There is a settlement agreement between the parties which includes some recitals as to the reasons for the state's determination to settle. For example, the agreement might state that the agency has decided to settle "to avoid the additional disruption to the agency occasioned by a lengthy investigation and the uncertainty and costs of litigation."

c. The settlement amount is not so clearly unreasonable as to constitute a gratuity in and of itself. However, we would caution here that it is very difficult for even experienced attorneys to evaluate the monetary value of a case for settlement purposes under many circumstances.

d. In each case of a legitimate settlement, the state should receive an unconditional release from the employee wherein the employee releases the State from any liability arising out of the actions surrounding his or her termination in exchange for the settlement payment.

Payments after termination which involve legitimate settlements on this basis are, therefore, not a gratuity, and would not violate Art. III, § 19 of the Nebraska Constitution.

3. Finally, State Treasurer Heineman has inquired as to whether state agencies may enter into employment contracts with their executive directors, or whether those individuals always serve at the pleasure of the agency board. Based upon the information available to us, it appears that the Commission did not have any form of written employment contract with Mr. Myers. Therefore, we need not reach Treasurer Heineman's question in the context of this controversy.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

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Approved by:

Attorney General