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DATE: June 25, 1992

SUBJECT: Oversight of Speaking Engagements and Activities of State Employees

REQUESTED BY: Dan Dolan, Commissioner of Labor, State of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

Through counsel, you have asked our opinion regarding whether individual employees may be precluded from accepting outside speaking engagements, whether compensated or not, which relate to the subject matter of their employment. We believe that a state agency may supervise employee participation in seminars and programs related to the subject matter of their employment and thereby limit or restrict employee acceptance of speaking engagements related to their employment activities.

The information and materials submitted reflect that the employee is employed by the Department of Labor to provide consulting services, advice, training and education for compliance with and implementation of Occupation Safety and Health Administration (OSHA) Regulations. The Department of Labor has entered into a Cooperative Agreement with OSHA to provide consulting services to employers regarding work place safety and health hazards. Reportedly, the individual employee receives frequent requests to speak at seminars and to participate in other training activities whose topics are related to official duties and responsibilities of the employee.

We point out that questions regarding employee conduct are highly factual and all circumstances must necessarily be ascertained to determine whether the conduct in question may be restricted in some fashion. Consistent with the scope of your question, our conclusion is based solely on the consideration that the speaking activity occurred, or would occur, during working hours. It is cautioned that if the activity would occur outside of working hours, a different conclusion may be reached.

The Rules of the Classified Personnel System of the State of Nebraska are applicable to the Department of Labor. Management authority of agency heads and other management personnel is addressed in Title 273, Chapter 2 of the Classified System Personnel Rules and Regulations. In Chapter 2, management responsibility and authority is described to include making decisions regarding the mission of the agency, services to be rendered, processes or personnel by which operations are to be conducted, and the processes and acts of hiring, directing, or supervising employees. The rules in sufficient detail establish the management authority of the Department to supervise employees and to determine how duties, responsibilities, and operations of the agency, shall be carried out. Necessarily, employee supervision during working hours may include restricting an employee's participation in seminars and programs as well as speaking engagements related to employment duties.

The Cooperative Agreement between the Department of Labor and OSHA with attached Assurances (OMB Standard Form 424B) and Lobbying Certification have been reviewed. The agreement does not change the relationship between the employee and the employer. The Assurances for the most part require that employees comply with certain Federal Acts and policies concerning nondiscrimination, political activities, and drug-free environments. The only Assurance provision we note that directly relates to the conduct in question requires that the Applicant (Department of Labor) establish guidelines to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organization conflict of interest, or personal gain. We believe this provision is consistent with personnel rules and regulations as well as Nebraska statutes regarding conflict of interest and prohibited acts. See Neb. Rev. Stat. § 49-14,101 (Reissue 1988).

It has been pointed out that the employee is covered by the NAPE/AFSCME labor contract. We do not believe that the contract would have any bearing on the question unless the contract expressly addresses the subject of speaking engagements and related activities of employees during working hours. If the terms of the

contract would address this question, the question would be resolved by these express provisions.

The question that has been raised is in part due to a recent federal district court decision involving regulation of employee conduct. In National Treasury Employees Union v. U.S., 788 F.Supp. 4 (D.C. 1992), certain provisions of the Ethics Reform Act of 1989, 5 U.S.C. app. §§ 501 et seq., prohibiting receipt of honoria by federal employees were found to violate the First Amendment of the U.S. Constitution. Section 501(b) of the Act prohibited the receipt on honoria by virtually anyone in federal service. The central issue in the case was whether the provision prohibiting the acceptance of payment for lawful outside activities imposed unconstitutional inhibitions on fundamental rights protected by the U.S. Constitution. The court concluded that the provision regarding honoraria was overly-broad because it prohibited all speech for profit by federal employees, no matter where or when, or the medium employed.

In the circumstance you have described, similar broad prohibitions regarding lawful outside activities would not be imposed. Rather the prohibition, if any, would constitute supervision of employee duties and responsibilities during working hours. Accordingly, policies or decisions limiting or permitting acceptance of speaking engagements by state employees during working hours would not abridge fundamental rights if lawful outside activities are not restricted.

Sincerely yours,

DON STENBERG
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Approved By:

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