



OCT - 1 2015

VIA EMAIL AND FACSIMILE

The Honorable Alan Clark  
Senate Co-Chair  
Joint Performance Review Committee  
Arkansas Senate  
State Capitol, Room 315  
Little Rock, Arkansas 72201

The Honorable Kim D. Hammer  
House of Representatives Co-Chair  
Joint Performance Review Committee  
Arkansas General Assembly  
State Capitol, Room 315  
Little Rock, Arkansas 72201

Re: Request for testimony of Jessica Kahn, Centers for Medicare & Medicaid Services, before the Joint Performance Review Committee

Dear Senator Clark and Representative Hammer:

I am responding on behalf of Jessica Kahn, Centers for Medicare & Medicaid Services, concerning the letter and subpoena from the Arkansas Joint Performance Review Committee, sent via email on September 21, 2015, and received by certified mail on September 25, 2015, commanding her to appear and give testimony for a hearing on October 2, 2015.

Under federal law, a party seeking testimony from an employee of an executive agency of the United States must comply with any applicable agency *Touhy* regulations. 5 U.S.C. § 301; see *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 469-70 (1951). Your request is subject to regulations published by the Department of Health and Human Services (the Department or DHHS) at 45 C.F.R. Part 2. These regulations govern the availability of the Department's employees and former employees to testify in proceedings, including state legislative proceedings, in which the federal government is not a party. See 45 C.F.R. § 2.1(c). These regulations prohibit any Departmental employee or former employee from providing testimony or producing documents concerning information acquired in the course of performing official duties unless "the Agency head, after consultation with the Office of the General Counsel, [determines] that compliance with the request would promote the objectives of the Department." *Id.* § 2.3. Further, the Department's *Touhy* regulations state:

All requests for testimony by an employee or former employee of the DHHS in his or her official capacity and not subject to the exceptions set forth in § 2.1(d) of this part must be addressed to the Agency head in writing and must state the nature of the requested testimony, why the information sought is unavailable by any other means, and the reasons why the testimony would be in the interest of the DHHS or the federal government.

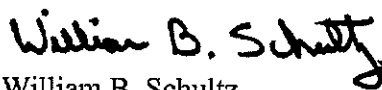
*Id.* § 2.4(a).

The subpoena issued by the Arkansas Joint Performance Review Committee does not comply with the Department's *Touhy* regulations. It does not explain why it is in the agency's interest to provide the information and why the Joint Performance Review Committee cannot obtain the information sought through alternative means. *See id.* If the Joint Performance Review Committee still seeks Ms. Kahn's testimony, the Committee must submit a request that complies with the Department's *Touhy* regulations before the agency will determine whether to authorize the requested testimony.

Finally, under the Department's *Touhy* regulations, § 2.3, Ms. Kahn is prohibited from testifying before your Committee unless she obtains permission from the Department. Although the subpoena states that failure to comply with the subpoena and attend the hearing could subject Ms. Kahn to a finding of contempt by the state legislature, the doctrine of sovereign immunity precludes enforcement of the subpoena against an employee of the United States acting in her official capacity. *See In re Elko Cty. Grand Jury v. Siminoe*, 109 F.3d 554 (9th Cir. 1997); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989). Accordingly, Ms. Kahn, who has not been authorized to attend the hearing before the Joint Performance Review Committee on Friday, October 2, 2015, cannot be penalized for her non-appearance.

If you have any further questions concerning this matter, please feel free to contact Brett Bierer of my staff at (410) 786-1473.

Sincerely,



William B. Schultz  
General Counsel