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NO.
STATE OF NEBRASKA
OFFICIAL
DEC 12 1997
DEPT. OF JUSTICE

DATE: December 12, 1997

SUBJECT: State Holidays Created as a Result of Presidential Proclamation; Additional Compensation for State Employees Who Work on Paid State Holidays

REQUESTED BY: Robert D. Luth, Acting Director
Nebraska Department of Administrative Services

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

On November 25, 1997, President Clinton issued an Executive Order which pertained to "Closing of Government Departments and Agencies on Friday, December 26, 1997." That Executive Order provides:

> By the authority vested in me as President of the United States of America, it is hereby ordered as follows:
>
> **Section 1.** All executive departments and agencies shall be closed and their employees excused from duty on Friday, December 26, 1997, the day following Christmas Day, except as provided in Section 2 below.
>
> **Section 2.** The heads of executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 26, 1997, for reasons of national security or defense or for other public reasons.

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> **Section 3.** Friday, December 26, 1997, shall be considered as falling within the scope of Executive Order 11582 and of 5 U.S.C. 5546 and 6103(b) and other similar statutes as they relate to the pay and leave of employees of the United States.

President Clinton's Order of November 25 apparently continues a custom of creating a holiday for federal employees on the Friday following Christmas in those years when Christmas falls on Thursday which has been observed since the administration of President Truman. You have posed two questions to us regarding the impact of President Clinton's order on state employees.

1. Creation of a Paid State Holiday.

Your first question goes to the effect of the President's order with respect to a paid holiday for state employees. You ask, "[d]oes the President's Executive Order [of November 25, 1997] creating a federal holiday also create a paid state holiday?" We believe that it does.

Three Nebraska statutes are of particular pertinence to your inquiry. First of all, Neb. Rev. Stat. § 84-1001 (1994) provides, as is relevant:

> (1) All state officers and heads of departments and their deputies, assistants, and employees, except permanent part-time employees, temporary employees, and members of any board or commission not required to render full-time service, shall render not less than forty hours of labor each week except any week in which a paid holiday may occur.
>
> (2) Regular work by such employees shall not be performed on paid holidays, Saturdays, or Sundays except in case of an emergency or when otherwise ordered or deemed essential by the Governor.
>
> (3) For purposes of this section, paid holidays shall include all of the days enumerated in section 25-2221 ***and all days declared by law or proclamation of the President or Governor to be holidays.***

(Emphasis added). Neb. Rev. Stat. § 81-113 also states:

> Each department [of State government] shall be open for the transaction of business at least from 8 a.m. until 5 p.m., of each day except Saturdays, Sundays, ***and days declared by statutory enactment or proclamation of the President or Governor to be holidays.***

(Emphasis added). Finally, Neb. Rev. Stat. § 81-117(2) (1996) states, in pertinent part:

> Regular employees working on the hourly basis shall be paid wages equivalent to their regular wages for the usual number of work hours ***for days declared by statutory act or proclamation of the President of the United States or the Governor to be holidays*** . . .

(Emphasis added).

It seems to us that the three statutes cited above are clear and unequivocal. "Paid holidays" for state employees under state law include those holidays specifically enumerated in state statute (e.g., Independence day, Christmas day, Thanksgiving day, Arbor day, etc.), ***and*** those holidays proclaimed as such by the President of the United States or the Governor. The President's Executive Order of November 25, 1997, makes Friday, December 26, 1997, a holiday under federal law.[1] Consequently, we believe that Friday, December 26, 1997, is also a paid holiday for state employees under state law.[2] We would emphasize that a paid state holiday occurs here only because of the President's action this year in the situation where Christmas falls on a Thursday. This action by the President does not create a holiday for state employees on the day following Christmas in every year; nor does it create an automatic holiday for state employees in future years when Christmas falls on a Thursday.

2. Payment of Additional Compensation to State Employees.

Your second question involves compensation for state employees should they be required to work on Friday, December 26, 1997. You ask, "[i]n the event state employees are required to work on December 26th, would the state be required to pay additional compensation to state employees, (i.e. time and one-half compensation)?"

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[1] While there is no mention of the word "holiday" in President Clinton's Executive Order of November 25, the other statutes and authorities referenced in that Order make it clear that federal holidays are created by such Executive Orders.

[2] This conclusion is consistent with our oral advice to the State Department of Personnel in December, 1986. In 1986, President Reagan declared Friday, December 26, to be a paid federal holiday, and the State of Nebraska observed the day as a formal paid holiday for state employees for the reasons discussed in this opinion.

Subsection (5) of Neb. Rev. Stat. § 84-1001 (1994) states, as is pertinent:

> [State] ***Employees who are required to work on any holiday shall be granted either a workday of compensatory time off or be paid for the time worked in accordance with existing state and federal statutes***, except that temporary employees shall not be eligible for paid holidays and if required to work on a holiday shall be paid for the time worked at their normal hourly rate. . . . The Director of Personnel shall adopt and promulgate such rules and regulations as are necessary to administer this section.

(Emphasis added). Obviously, § 84-1001(5) requires that State employees as defined in the context of that statute who are required to work on a holiday must at least receive compensatory time off from work. In addition, under that statute, it must also be determined if there are "existing state and federal statutes" which require that those state employees be paid additional compensation for holiday work as an alternative to or replacement for compensatory time off from work.

The federal Fair Labor Standards Act, 29 U.S.C. §§ 201 through 219, deals generally with wage and hour matters and the payment of overtime. That Act does not require that employees be paid overtime compensation for hours worked on Saturdays, Sundays, or holidays, if no more that the maximum forty hours prescribed in the Act are worked during the workweek in question. 29 C.F.R. § 778.102 (1997). Moreover, our research has disclosed no other state or federal statutes which specifically require that all state employees must be paid at an overtime rate of pay if they are required to work on a holiday. However, the collective bargaining agreement or labor contract between the State and the various collective bargaining units for state employees states that:

> In addition to normal holiday pay, hours worked by an overtime eligible employee on the employee's designated holiday shall be compensated as overtime hours.

NAPE/AFSCME and State of Nebraska Labor Contract at 28. In addition, Section 003.02 of Chapter 9 in the Nebraska Classified System Personnel Rules (the "Personnel Rules") states, in part, that:

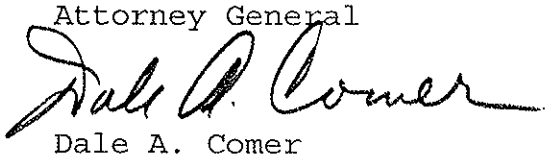
> Full-time or part-time employees eligible for time and one-half overtime, other than temporary, who work on a holiday (observed or actual) shall receive time and one-half compensation either in the form of pay or time off within the next twelve month period, for hours actually

worked on the holiday, in addition to their holiday leave pay for hours scheduled to work that day.

Presumably, both the State Labor Contract and the Personnel Rules were entered into and created based upon adequate statutory authority. As a result, we believe that both of those documents require the payment of overtime as specified therein to those employees who are within their purview and who might be required to work on a paid state holiday.[3]

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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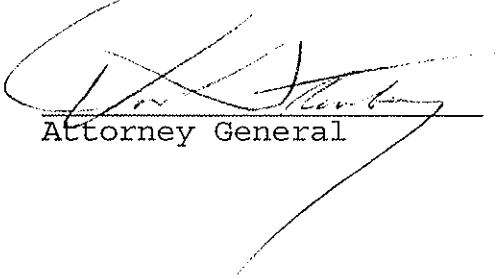

Attorney General

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[3] You provided us with copies of the NAPE/AFSCME State Labor Contract. If there are other collective bargaining agreements for specified state employees, those labor contracts may well contain additional provisions pertaining to payment of extra compensation for work on a holiday.