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#94093

NO.
STATE OF NEBRASKA
OFFICIAL
DEC 2 1994
DEPT. OF JUSTICE

DATE: November 21, 1994

SUBJECT: Whether The Requirements Of Neb. Rev. Stat. § 25-1640 Pertaining To Jury Service Apply To An Independent Contractor Retained By The Nebraska Department of Education

REQUESTED BY: Joe E. Lutjeharms, Commissioner
Nebraska Department of Education

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

One of the Nebraska Department of Education's ["Department"] contract employees has been called to jury duty. Since the Department deems the individual to be an independent contractor and not a permanent state employee, the individual is not accorded other benefits provided to state employees. The Department assumes, therefore, that the contractor is not eligible for jury duty leave with pay under the provisions of Neb. Rev. Stat. § 25-1640 (1989). You have requested an opinion from this office as to whether the Department should pay the contractor under the terms of his contract for the time which he is required to serve as a juror. A copy of the Department's contract with the individual has been provided to us.

The applicable statute provides as follows:

> Any person who is summoned to serve on jury duty shall not be subject to discharge from employment, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty, as a result of his or her absence from

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> employment due to such jury duty, upon giving reasonable notice to his or her employer of such summons. . . . No employer shall subject an employee to discharge, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty on account of his or her absence from employment by reason of jury duty, except that an employer may reduce the pay of an employee by an amount equal to any compensation, other than expenses, paid by a court for jury duty. Any person violating the provisions of this subsection shall be guilty of a Class IV misdemeanor.

Neb. Rev. Stat. § 25-1640 (1989).

On three separate occasions, this office has reviewed aspects of Neb. Rev. Stat. § 25-1640; in none of those opinions, however, was your question directly addressed. ***See*** 1979-80 Rep. Att'y Gen. 243 (Opinion No. 172, dated November 27, 1979); 1979-80 Rep. Att'y Gen. 340 (Opinion No. 235, dated February 26, 1980); 1979-80 Rep. Att'y Gen. 489 (Opinion No. 334, dated November 7, 1980). In two of our opinions, it was emphasized that the Legislature's intent in enacting the jury system statutes was to ensure that "[a]ll qualified citizens fulfill their obligation to serve as jurors when summoned for that purpose." Neb. Rev. Stat. § 25-1601.03(3)(1989); ***See also*** 1979-80 Rep. Att'y Gen. 340; 1979-80 Rep. Att'y Gen. 489. "Therefore, the statutory language at issue should be construed to effectuate the legislative intent of encouraging all qualified persons to serve as jurors." 1979-80 Rep. Att'y Gen. at 341.

With regard to the question you have presented, we note that neither the terms "employee," "employer," nor "employment" are defined in the civil procedure statutes within which Neb. Rev. Stat. § 25-1640 is found. While these terms are defined within other Nebraska statutes, those definitions are not applicable to analysis of the jury duty statute. We turn, therefore, to precedent established by the Nebraska Supreme Court for authority on this issue .

Employee v. Independent Contractor

The Nebraska Supreme Court has established that "[a]n independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used." ***McCurry v. School Dist. of Valley***, 242 Neb. 504, 512, 496 N.W.2d 433, 439 (1993). "The determination of whether one is an independent contractor or an agent is one of fact." ***Id.*** "Moreover, whether an [employment] relationship exists between two

parties depends on the facts underlying the association, irrespective of how the parties describe or characterize their connection." *Id.* at 513, 496 N.W.2d at 439; ***See also Gottsch v. Bank of Stapleton***, 235 Neb. 816, 458 N.W.2d 443 (1990).

In ***Erspamer Advertising Co. v. Dep't of Labor***, 214 Neb. 68, 333 N.W.2d 646 (1983), the court determined that "the common-law test for independent contractor [status] includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive." *Id.* at 71, 333 N.W.2d at 648. The court then adopted the following ten factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work . . .; (b) whether or not the one employed is engaged in a distinct occupation or business . . .; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer...; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id. at 72, 333 N.W.2d at 648-49 (quoting Restatement (Second) of Agency § 220 (1958)).

"In addition to the considerations suggested in ***Erspamer***, [the court has] repeatedly said that . . . "[t]he deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication." ***Eden v. Spaulding***, 218 Neb. 799, 806-07, 359 N.W.2d 758, 763 (1984)(citing ***Stephens v. Celeryvale Transport, Inc.***, 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979)).

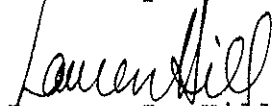
Our review of the contract which you have provided reveals that the individual works under the daily supervision of a Department staff member; that office space within the Department, clerical support, and other materials are provided by the Department; that the Department may establish additional duties under the terms of the contract; that the Department currently withholds required income taxes; and that specific work times are required by the Department. With regard to the last finding, the contract provides: "Normal work days will run Monday through

Friday, ... Work schedule is to be approved by the supervisor on a monthly basis. Normal starting times are between 7:30 and 9:00 a.m. with ending times between 4 and 5:30 p.m."

We find, given the general control imposed upon the individual by the Department, that for purposes of Neb. Rev. Stat. § 25-1640, the Department should consider itself an "employer" of this contractor. Essential to our determination is the Department's requirement that this individual complete the work for which he contracted with the Department between 7:30 a.m. and 5:30 p.m. each Monday through Friday. As indicated earlier in our opinion, the Legislature clearly intended that any person required to serve as a juror not be penalized by leaving his or her employment during daytime hours in order to complete jury duty service. Therefore, the Department may not subject the individual "to discharge, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty on account of his . . . absence from employment by reason of jury duty, except [as provided by the statute]." Neb. Rev. Stat. § 25-1640.

Sincerely,

DON STENBERG
Attorney General



Lauren L. Hill
Assistant Attorney General

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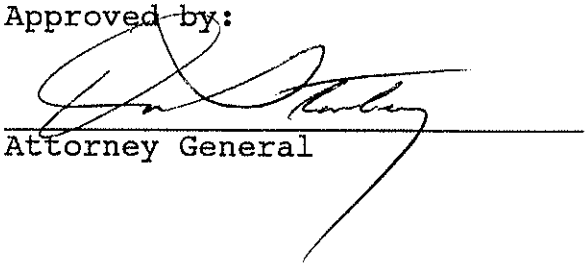

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