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STATE OF NEBRASKA
OFFICIAL
NOV 18 1993
DEPT. OF JUSTICE

DATE: November 17, 1993

SUBJECT: Early Release Procedures Under Neb. Rev. Stat. § 83-1,110

REQUESTED BY: Ethel Landrum, Chairperson
Nebraska Board of Parole

WRITTEN BY: Don Stenberg, Attorney General
Marie C. Pawol, Assistant Attorney General

You have inquired about the Nebraska Board of Parole's responsibilities pursuant to Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 1992), which states in pertinent part:

> **83-1,110. Committed offender; eligible for release on parole; when.** (1) Every committed offender shall be eligible for release on parole upon completion of the minimum term less good time. A committed offender shall be eligible for parole prior to the expiration of the minimum term whenever the sentencing judge or the judge's successor in office gives approval for the parole of such offender.

Specifically, the Board poses the following questions:

> Question #1: Can the offender obtain permission from the sentencing judge for parole prior to the expiration of his/her minimum term, or should it be the responsibility of the Board of Parole to write to the judge or his/her successor to explain the circumstances and request permission for "early release" of an offender?

> Question #2: Does the Board of Parole have the authority to release information to the sentencing judge regarding an offender's progress while incarcerated, without a court order?

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With regard to your first question, the statute does not specify who may initiate an early release request to the sentencing court. There is nothing in the statute itself which prevents an offender, the beneficiary of early parole, from initiating such a request. Likewise, the statute does not preclude the Board of Parole from initiating an early parole request to the sentencing court nor does it preclude the court itself, on its own motion, from giving approval for the parole of an offender. On the same hand, the statute does not require that the Nebraska Board of Parole or the sentencing court initiate procedures to obtain approval for early parole on behalf of an offender.

In response to the Board's second question, the confidentiality of inmate records maintained by the Nebraska Department of Correctional Services (DCS) is governed by Neb. Rev. Stat. § 83-178 (1987) which states in relevant part:

> The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department.

This provision was the subject of an informal Attorney General's Opinion issued to former DCS Director Joseph C. Vitek on August 19, 1977. In the opinion written by Assistant Attorney General Paul W. Snyder, it is stated:

> First of all, the word "public" in the context of this statute should be construed to mean an inspection not dealing with some governmental purpose. For instance, a private citizen's desire to look at an inmate's file or an attorney's desire to look at his inmate client's file. These inspections would not be permitted under this statute. On the other hand, should a government agency with some legitimate governmental interest desire to view these records, we believe it would be permissible under this statute.
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> * * *
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> With the above discussion in mind, we believe it quite clear that the Department of Correctional Services is legally within its right when it releases materials in inmates' files to this office, the Governor's office, other correctional facilities, probation departments, mental health facilities, chemical treatment facilities, and other state agencies having a legitimate interest in an inmate file.

Similarly, we believe that Neb. Rev. Stat. § 83-178 does not require the issuance of a court order in order to allow a sentencing court to review DCS records in considering whether an offender should be supported in his or her request for parole.

However, we believe that a more fundamental issue which concerns the constitutionality of Neb. Rev. Stat. § 83-1,110 needs to be addressed. In our view, § 83-1,110 violates Article II, Section 1 of the Nebraska Constitution in that it purports to grant shared authority to the courts and the Nebraska Board of Parole to release offenders on parole, while the authority to parole prisoners is vested by the Nebraska Constitution solely in the Board of Parole pursuant to Article IV, Section 13 of the Nebraska Constitution.

Article II, Section 1 of the Nebraska Constitution provides:

> The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Article IV, Section 13 of the Nebraska Constitution provides in pertinent part:

> The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment.

Section 83-1,110 extends to the judicial branch shared duty and responsibility in the decision-making process in determining whether an offender should be released on parole prior to completion of his or her minimum term. The judiciary is not relegated to a merely advisory role. Rather, the sentencing courts become a co-equal element in the parole decision-making process. Under § 83-1,110, unless both the sentencing court and the Nebraska Board of Parole concur, an offender may not be paroled prior to the expiration of his or her minimum term. Such "sharing" of power is not anticipated nor approved by the Nebraska Constitution. Article II, Section 1 makes provision for shared authority by different branches of government, but only where the Constitution expressly directs or permits it. Although Article IV, Section 13, provides that parole may be granted by the Board of Parole "under such conditions as may be prescribed by law . . .", the Legislature may

not accomplish indirectly by statutory enactment what it is expressly prohibited from doing by the Nebraska Constitution. In ***State ex rel. Wright v. Barney***, 133 Neb. 676, 688, 276 N.W. 676 (1937), the Nebraska Supreme Court stated:

> We are committed to the view that the limits of the constitutional jurisdiction thus conferred may not be increased or extended either by consent of parties or legislative enactment.

See also State v. Hall, 47 Neb. 579, 583, 66 N.W. 642, 643-44 (1896). "The language of Article II prohibits one branch of government from encroaching on the duties and prerogatives of the others . . . ." ***State ex rel. Spire v. Conway***, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991). In our opinion, therefore, § 83-1,110 unconstitutionally encroaches upon the duties and prerogatives of the Nebraska Board of Parole, and reliance upon its provisions to release prisoners of the state on parole prior to the expiration of an offender's minimum term is inappropriate.

Sincerely,

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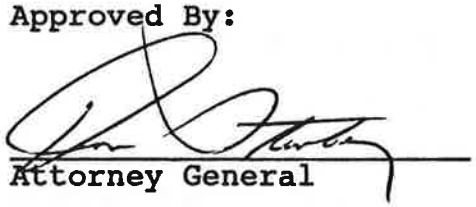
Approved By:



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