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DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

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DEPUTY ATTORNEYS GENERAL

DATE: January 17, 1992

SUBJECT: Attachment of Inmate Pay for Child Support

REQUESTED BY: Harold W. Clarke, Director, Nebraska Department of Correctional Services

WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Assistant Attorney General

You have asked whether inmate pay can be attached to meet an inmate's child support obligations. You acknowledged that there is no question that inmates who are earning at least minimum wage may have their wages attached to satisfy such obligations. So, your question concerns only inmate compensation at a rate less than minimum wage, as described in Neb. Rev. Stat. § 83-183(2) (Reissue 1987). The answer to your question is yes.

Section 83-183 permits you, as the Director of the Department of Correctional Services, to determine the rates of compensation for inmates who are engaged in work programs other than private venture/minimum wage programs. Subsection (3) of 83-183 notes that such payments made to an inmate are to "enable the offender to contribute to the support of his dependents, if any, to make necessary purchases from the commissary and to set aside sums to be paid to him at the time of his release from the facility." (Emphasis added).

Nebraska's Income Withholding for Child Support Act, Neb. Rev. Stat. §§ 43-1701 through 43-1743, was amended during the 1991 legislative session to authorize the attachment of compensation in situations other than the traditional employee/employer relationship.

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Legislative Bill 447, effective on September 6, 1991, changed the definition of "employee" under the Act. Section 43-1708 now provides that an employee shall mean "any person who is compensated by an employer or other payor for services performed, regardless of how such compensation is denominated." (Emphasis on new language). LB 477 also added the language "or other payor" where the Act previously used only the term "employer." Section 43-1709 provides that an "employer or other payor shall mean any . . . department or agency of the state . . . in possession of income . . . ." (Emphasis on new language).

Section 43-1702 sets forth the purpose of the Act: "It is the intent of the Legislature to encourage the use of all proven techniques for the collection of child and spousal support." It is apparent that the legislature intended, through LB 457, to broaden the scope of the Act to facilitate the collection of additional child support.

Three other issues merit a brief discussion within the context of this opinion.

First, are the inmates in question being compensated for "services performed" as provided in § 43-1708? Section 83-183 provides for the compensation of inmates who are engaged in "constructive and diversified activities in the production of goods, services and food stuffs to maintain the facilities for state use and for other purposes authorized by law." So, it appears clear that inmate pay is designed to compensate inmates for services performed. If an inmate were to receive pay for some other reason, such as an indigence stipend to allow the inmate to purchase certain necessities while confined in segregation, then the payment would not be for "services" and would not be subject to attachment under the Act.

Second, is the Department of Correctional Services a payor in possession of "income" as provided in § 43-1709? Nebraska's statutes concerning income tax cross-reference federal law. See Neb. Rev. Stat. § 77-2714) (Reissue 1990). The federal statute, 26 U.S.C. § 61, defines income very broadly, including compensation for services, from whatever source derived.

Third, if the Department is under no legal obligation to pay any compensation to inmates for services performed, are such payments still considered income? Yes, cases interpreting income tax law clearly conclude that voluntary payments, such as tips, gratuities, and bonuses, are income as long as they are related to services rendered.

In summary, the attachment of inmate wages for the payment of child support obligations is authorized under the Nebraska

statutes, even when such inmates are not earning minimum wage or employed in private venture enterprises.

Laurie Smith Camp
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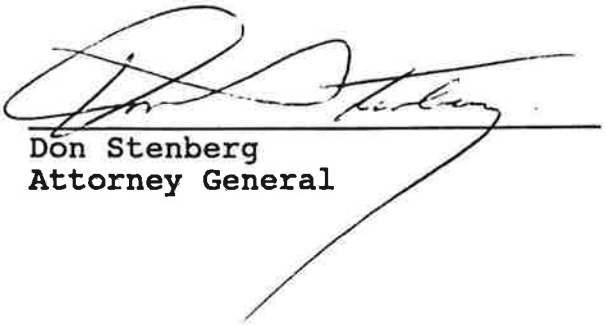
APPROVED BY:



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