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#95097

NO.
STATE OF NEBRASKA
OFFICIAL
DEC 18 1995
DEPT. OF JUSTICE

DATE: December 12, 1995

SUBJECT: Cancellation Procedures for State Warrants; Cancelled State Warrants as Unclaimed Property

REQUESTED BY: John Breslow
Nebraska Auditor of Public Accounts

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

You state that your office "has been studying the process of warrant cancellation by State agencies." As a result, you have requested our opinion with respect to two issues involving that process.

1. <u>Propriety of warrant cancellation when the vendor can't be found.</u>

The procedures for cancellation of an issued state warrant are set out in PROC-130 and PROC-131 of the Nebraska Accounting System Manual (the "System Manual") issued by the Accounting Division of the Nebraska Department of Administrative Services. Under item 1.b.3 of the Record Warrant Cancellations procedure (PROC-130), a state warrant may be cancelled if the "vendor cannot be located."

From your opinion request, it appears that your concern with the warrant cancellation process in instances where there is a failure to locate a vendor involves the fact that funds are restored to the expending fund of the state agency when a state warrant issued through that agency is cancelled. In contrast, under the provisions of *Neb. Rev. Stat.* § 77-2205 (Cum. Supp. 1994), state warrants which are not presented for payment within

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one year of their date of issuance cease to be an obligation of the State of Nebraska, and the amounts of those warrants are credited to the state General Fund. As a result, a state agency can cancel a warrant prior to the expiration of one year from its date of issuance based upon an indication that the vendor for the warrant cannot be located, and thereby have the funds represented by that warrant restored to the agency rather than having those funds go to the state General Fund. You wish to know whether it is "acceptable" for a state agency to engage in a warrant cancellation procedure for that reason, and also whether failure to locate the vendor for a warrant is a "legitimate reason to allow an agency to cancel a warrant?"

Determining the underlying "acceptability" of warrant cancellation procedures and passing on the "legitimacy" of various reasons for cancellation of a state warrant under the System Manual in the manner requested by your opinion request involve policy questions which are inappropriate for consideration in a legal opinion by this office. On the other hand, we can state that, in our view, the provisions of the System Manual pertaining to warrant cancellation clearly allow cancellation when the vendor for the warrant cannot be located. Moreover, ***Neb. Rev. Stat.*** § 81-1170.01 (1994) provides that requests for payment upon the State Treasury shall be presented for payment "with such documentation as required in the Nebraska Accounting System Manual on file with the Clerk of the Legislature," and almost all appropriation bills passed by the Legislature adopt the definitions contained in the System Manual for those appropriations. ***See*** 1995 Neb. Laws LB 889, § 3. Consequently, much of the System Manual has the force of statutory law. For those reasons, we believe that it is legally permissible for a state agency to cancel a state warrant when the vendor cannot be located even if the monies returned to the state as a result are placed in the expending fund of the agency involved rather than in the General Fund.

2. <u>Warrants cancelled for failure to locate the vendor as Unclaimed Property.</u>

Your second question involves the Nebraska Uniform Disposition of Unclaimed Property Act (the "Unclaimed Property Act"), ***Neb. Rev. Stat.*** §§ 69-1301 through 69-1329 (Cum. Supp. 1994). You ask, "if you determine that warrant cancellation of this type [when the vendor can't be located] is acceptable, would the agency canceling (sic) the warrant be obligated to track these funds and remit them to the State Treasurer's Office as unclaimed property . . . after the expiration of three years?" We believe that the answer to that question is "yes."

Generally, the Unclaimed Property Act provides that various forms of property such as bank deposits, monies, stock

certificates, dividends, utility deposits, and other forms of intangible personal property held by entities in Nebraska such as corporations, banks and insurance companies must be reported and remitted to the Nebraska State Treasurer when that property remains unclaimed by its true owner after a set period of time. The Treasurer holds the property in a custodial capacity, and the true owner can come forward at any time to reclaim his or her property. Property which remains unclaimed over time goes to the Permanent School Fund.

Nebraska's original version of the Unclaimed Property Act was passed in 1969. 1969 Neb. Laws LB 642. That Act, in turn, was modeled in great part upon the Uniform Disposition of Unclaimed Property Act promulgated in 1966 by the National Conference of Commissioners on Uniform State Laws. However, the original Nebraska Unclaimed Property Act differed from the Uniform Act in at least one respect. The Uniform Act contained definitional and other provisions which clearly applied the Act to governmental agencies, including the state and its governmental subdivisions. The original Nebraska Unclaimed Property Act was passed without those provisions, so that, from its inception, the Nebraska version of the Unclaimed Property Act did not apply to the state, its counties, municipalities, etc.

During the Third Special Session of the Nebraska Legislature held in 1992, the Unclaimed Property Act was amended so as to reach unclaimed property held by government and governmental and public entities. Introducer's Statement of Intent on LB 26, 92nd Neb. Leg., 3rd Spec. Sess.; Committee Records on LB 26, 92nd Neb. Leg., 3rd Spec. Sess. 3 (Sept. 23, 1992) (Statement of Treasurer Rockey). As a result, Section 69-1307.01 (1994) now provides:

> Except as otherwise provided by law, all intangible personal property held for the owner by any court, ***public corporation, public authority, or public officer of this state or a political subdivision thereof***, that has remained unclaimed by the owner for more than three years is presumed abandoned.

(emphasis added). In addition, the definition of "person" for purposes of the Act, as defined in Section 69-1301 (g), now reads:

> Person means any individual, business association, ***governmental or political subdivision, public corporation, public authority***, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(emphasis added). Therefore, the state is covered by the Unclaimed Property Act, and state agencies must report unclaimed property to

the State Treasurer in those instances where they hold property subject to the provisions of that Act.

In our Op. Att'y Gen. No. 95025 (April 3, 1995), we considered whether uncashed state warrants should be reported to the State Treasurer as unclaimed property under the Unclaimed Property Act. In that instance, we concluded that, while state warrants are intangible personal property subject to the Unclaimed Property Act, state agencies are not required to report uncashed warrants to the State Treasurer as unclaimed property after three years because of the provisions of ***Neb. Rev. Stat.*** § 77-2205 (1994) which state that state warrants which are not presented to the State Treasurer for payment within one year of their date of issuance "cease to be an obligation of the State". Since the state has no obligation to pay a warrant which is not presented for payment within one year, nothing exists to report to the State Treasurer after three years. However, for the reasons discussed below, the situation is different with respect to warrants which are cancelled for a failure to locate the vendor.

We also indicated in our Opinion No. 95025 that state warrants constitute evidence of indebtedness and causes of action. As stated by the Supreme Court of Florida in ***State v. Family Bank of Hallandale***, 623 So.2d 474 (1993):

> Warrants are devices, prescribed by law, for drawing money from the state treasury. They are orders issued by the official whose duty it is to pass on claims to the treasurer to pay a specified sum from the treasury for the persons and purposes specified. A warrant is not an order to pay absolutely, rather it is generally prima facie evidence of indebtedness payable out of a particular fund or appropriation. . . .

Consequently, a warrant is best characterized as a chose in action or a cause of action against the State, payable when funds are available for that purpose. ***Id.*** at 476.

Warrants which are not presented for payment within one year of their date of issuance "cease to be an obligation of the State" under § 77-2205. However, that section does not appear to apply to cancelled warrants, and it seems to us that the underlying obligation which formed the basis for issuance of the warrant in the first place may remain, even after the warrant is cancelled. For example, if the state purchases paper products and a warrant is properly issued for payment of that bill, the vendor of the paper is still entitled to payment for the sale even when that vendor cannot be located and the warrant is cancelled. Therefore, the payee on a warrant which is cancelled after the vendor cannot be located still has a chose in action or a cause of action against

the state for payment of the underlying obligation with respect to that cancelled warrant. We believe that cause of action is unclaimed property which should be tracked and ultimately reported to the State Treasurer under the Unclaimed Property Act.

As we noted in our Op. Att'y Gen. No. 94097 (December 7, 1994), there are cases such as ***Employers Insurance of Wausau v. Smith***, 154 Wis.2d 199, 453 N.W.2d 856 (1990), which indicate that unliquidated or contingent choses in action are not property "held and owing" which must be remitted under the Unclaimed Property Act. It, therefore, would be possible to argue, based upon such cases, that state warrants do not represent liquidated claims subject to the Unclaimed Property Act, since the state could raise defenses to payment of the warrants upon presentment.[1] However, ***Neb. Rev. Stat. §*** 81-1170.01 (1994) provides, as is pertinent:

> All requests of whatever nature upon the treasury of this state, before any warrant is drawn for the payment of the same, shall be examined, adjusted, and approved by the Department of Administrative Services. All such requests shall be presented to the Director of Administrative Services with such documentation as required in the Nebraska Accounting System Manual on file with the Clerk of the Legislature.

Given the language of § 81-1170.01 and the other procedures surrounding the issuance of state warrants, we believe that the causes of action represented by warrants which are cancelled for failure to locate the vendor are sufficiently certain so as to constitute unclaimed property.

We are also aware of ***Neb. Rev. Stat. §*** 25-218 (1989) which states that "[e]very claim and demand against the state shall be forever barred, unless action be brought thereon within two years after the claim arose." On the basis of that statute, it might be possible to argue that payees on the cancelled warrants under consideration would have no cause of action against the state at the end of the three year accrual period for unclaimed property, and that it would, therefore, be unnecessary to report those cancelled warrants. However, ***Neb. Rev. Stat. §*** 69-1315 (Cum. Supp. 1994) also provides that:

> The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for

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[1] We have generally taken the position that state warrants are not negotiable instruments, and that indorsees or assignees of such warrants take subject to any defenses available to the state.

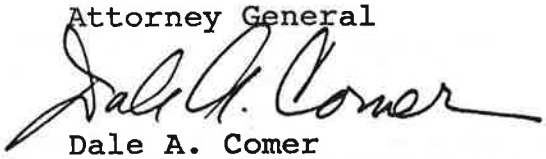
> money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by the Uniform Disposition of Unclaimed Property Act or to pay or deliver abandoned property to the State Treasurer.

As a result, under the latter statute, the state agency would still have an obligation to report and deliver the unclaimed property represented by the state warrants cancelled for failure to locate the vendor to the State Treasurer, even if the payee could no longer sue to enforce the terms of the underlying obligation after two years.

For the reasons discussed above, we therefore believe that the state obligation underlying a state warrant cancelled for failure to locate the vendor should be tracked by the state agency, and in the event that a replacement state warrant is not issued to the payee on that warrant within the relevant time period, that sum should be reported and delivered to the State Treasurer after three years for placement in the Unclaimed Property Fund.

Sincerely yours,

DON STENBERG
Attorney General



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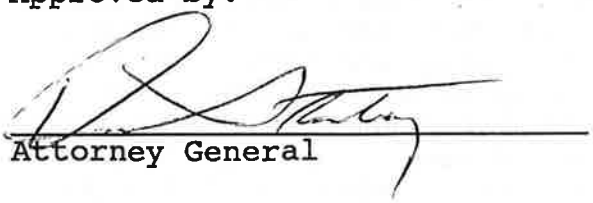

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