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#93039
NO. STATE OF NEBRASKA
OFFICIAL
MAY 17 1993
DEPT. OF JUSTICE

DATE: May 14, 1993

SUBJECT: LB 564; Can fees for retrieval of driver's licenses impounded after conviction of certain traffic infractions constitutionally be placed in a Youth Alcohol Prevention Education Cash Fund?

REQUESTED BY: Senator Connie J. Day
Nebraska State Legislature

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

You have introduced amendments to LB 564 which would amend that legislation so as to require the impoundment of the motor vehicle operator's licenses of those persons under 21 years of age who are found to have operated a motor vehicle with a percentage of .02 per cent or more of alcohol in their bloodstream. The impoundment would be for a period of thirty days, and would be imposed by a court after the person involved had been found guilty of a traffic infraction based upon driving with the prohibited percentages of alcohol present. After impoundment for thirty days, the offender could retrieve his or her driver's license from the court upon payment of a fee of $50 to the Clerk of the County Court.

Your amendments to LB 564 also propose the creation of the Youth Alcohol Prevention Education Cash Fund, a fund to be administered by the Division on Alcoholism and Drug Abuse of the Department of Public Institutions, and used for regional alcohol education grant programs. The $50 fee paid by offenders for retrieval of their driver's licenses after impoundment would be placed in the Youth Alcohol Prevention Education Cash Fund. In that regard, you have now asked, "[w]ill the deposit of these reinstatement fees [for reinstatement of motor vehicle operator's

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licenses] to the [Youth Alcohol Prevention Education] cash fund violate Constitutional provisions?" For the reasons stated below, we believe that there are constitutional problems with the amendments you have proposed.

At the outset, we must point out, as we have done previously, that a question on the general constitutionality of a legislative bill will necessarily result in a general response from this office. *See* Op. Att'y Gen. No. 89028 (April 4, 1989); Op. Att'y Gen. No. 85177 (December 20, 1985). If we are to address specific questions or concerns with a bill, they must be set out in the opinion request. Otherwise, we can only offer our overall observations on the legislation. You have asked for our opinion as to whether your amendments to LB 564 "violate Constitutional provisions" with no indication as to what specific state or federal constitutional provisions you believe might be at issue. We must, therefore, offer a general response to your question in the absence of any description of your specific concerns.

Your proposed amendments to LB 564 would require that a "fee" generated as a part of a criminal prosecution be placed in a fund for youth alcohol prevention education. This situation raises obvious questions under Article VII Section 5 of the Nebraska Constitution which requires that fines, penalties and license monies arising under the general laws of the State must be appropriated exclusively for the use and support of the common schools. Our analysis of the applicable law in this area indicates that there is a problem with your proposal under that constitutional provision.

Article VII, Section 5 of the Nebraska Constitution provides, as is pertinent here:

> Except as provided in subsections (2) and (3) of this section, all fines, penalties, and license money arising under the general laws of the state, . . . shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, . . .

Several decisions by the Nebraska Supreme Court have set out rules for the application of Article VII, Section 5. This constitutional provision is self-executing, and punitive

assessments such as fines and penalties under penal statutes together with license monies must be used for the schools. ***School District of the City of Omaha v. Adams***, 147 Neb. 1060, 26 N.W.2d 24 (1947). On the other hand, compensatory damages or assessments under remedial statutes are not subject to Article VII, Section 5. *Id.* If money exacted is punitive in character, and not remedial or compensatory, that money is a penalty within the meaning of Article VII, Section 5. ***School District of McCook v. City of McCook***, 163 Neb. 817, 81 N.W.2d 224 (1957). A penal statute is prosecuted for the purpose of punishment, and to also deter others from offending in the same way, while a remedial statute is for the purpose of adjusting the rights of the parties involved as between themselves with respect to the wrong alleged. ***School District of the City of Omaha v. Adams, supra.*** It is also clear that court costs which are legitimately compensatory are not penalties within Article VII, Section 5. ***DeCamp v. City of Lincoln***, 202 Neb. 727, 277 N.W.2d 83 (1979). In addition, liquidated damages in favor of a private person, although in the form of a penalty, are not violative of Article VII, Section 5 if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible to measurement by ordinary pecuniary standards. ***Abel v. Conover***, 170 Neb. 926, 104 N.W.2d 684 (1960).

The factual settings of various Nebraska cases also offer additional guidance as to the application of Article VII, Section 5. For example, in the ***Adams*** case cited above, an amount was collected from the estate of certain deceased persons as a statutory penalty for failure to list particular property for taxation. The Court held that the penalty in question did not fall under Article VII, Section 5, because it was remedial and compensatory to the taxing bodies involved. This was true even though the penalty was punitive as to the wrongdoer. In ***DeCamp v. City of Lincoln, supra***, the Court held that court costs collected for parking violations were not fines or penalties under Article VII, Section 5 because the costs were collected by an administrative arm of the municipal court, because the costs were uniform throughout the entire range of offenses, and because the costs actually appeared to be compensatory.

This office has also issued previous opinions dealing with the application of Article VII, Section 5. Most recently, in Op. Att'y Gen. No. 93018 (March 19, 1993), we indicated that a surcharge to be assessed against all convicted criminal defendants could constitutionally be placed into the Victims' Compensation Fund and into the Crime Victim and Witness Assistance Fund. We concluded that the surcharge payments could be characterized as liquidated damages which were compensatory to the victims of uncompensated injury by criminals. In Op. Att'y Gen. No. 21 (February 10, 1981), we stated that a $1 additional court cost assessed against convicted criminal defendants could be placed in a special Law

Enforcement Improvement Fund because there was a reasonable relationship between the cost and the maintenance of the law enforcement and criminal justice system. On the other hand, we indicated in the same opinion that placing a portion of certain increased court costs in the state's general fund would likely violate Article VII, Section 5 since those increases could be considered a fine or penalty rather than compensation. Placing court costs in the state's general fund under those circumstances could also violate the separation of powers provision of the state Constitution in that the courts would be acting as tax collectors.

On balance, and in light of the various authorities cited above, we believe that the fee for retrieval of impounded driver's licenses proposed by your amendments to LB 564 involves a penalty which must be used for school purposes. It is clear that the fee would not be compensatory to any governmental bodies or to any victims of criminal violations, nor would it go directly to maintenance of the criminal justice and law enforcement system. On the other hand, it could be fairly stated that the purpose of the retrieval fee, when considered together with the impoundment process, would be to punish improper conduct and to deter others from acting in the same manner. Consequently, we believe that placement of the retrieval fees in the Youth Alcohol Prevention Education Cash Fund, however meritorious, would likely violate Article VII, Section 5 of the Nebraska Constitution.

Sincerely yours,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:

Attorney General

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