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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 27 1998
DEPT. OF JUSTICE

DATE: October 26, 1998

SUBJECT: Uncashed State Warrants and Application of the Nebraska Uniform Disposition of Unclaimed Property Act in Particular Instances

REQUESTED BY: David Heineman
Nebraska State Treasurer

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

Under the Nebraska Constitution and pertinent provisions of the Nebraska Statutes, no monies can be withdrawn from the Nebraska State Treasury except as pursuant to a specific appropriation and upon presentation of a properly issued state warrant. Neb. Const. art. III, § 25; Neb. Rev. Stat. §§ 77-2201 through 77-2215 (1996). As a result, state expenditures, whether for payroll or other purposes, are generally accomplished through the issuance of state warrants. You have now posed a number of questions to us involving uncashed state warrants. Several of those questions also involve the Uniform Disposition of Unclaimed Property Act (the "Act" or the "Unclaimed Property Act"), Neb. Rev. Stat. §§ 69-1301 through 69-1329 (1996, Supp. 1997).

1. Uncashed warrants in payment of Unclaimed Property Claims.

Your initial question involves uncashed warrants which are prepared for payment of claims under the Unclaimed Property Act. That act generally provides that various forms of property such as

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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 are presumed abandoned and 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.

In your opinion request letter, you state:

> The State Treasurer's Office returns unclaimed property to rightful owners and we utilize a state warrant as the instrument of payment. When the rightful owner is located our office requests the Department of Administrative Services to issue a state warrant. If that warrant is uncashed after one year, it expires and the money is transferred to the State's General Fund. However unclaimed property is not part of the State's General Fund. It is to be transferred to the Permanent School Fund and held in trust until it is returned to the rightful owner. In the case of an uncashed unclaimed property payment, the money has not been returned to the rightful owner and therefore should not be transferred to the General Fund.

You then ask, " . . . should these [unclaimed property] funds [involving uncashed warrants] be transferred to the General Fund or should they remain in the Unclaimed Property Fund and be transferred to the Permanent School Fund as required under the Unclaimed Property Statute?"

Two Nebraska Statutes have a bearing on your initial question. First of all, Neb. Rev. Stat. § 69-1317 (Supp. 1997) provides as is pertinent:

> (a)(1) All funds received under the Uniform Disposition of Unclaimed Property Act . . . shall be deposited by the State Treasurer is a separate trust fund from which he or she shall make prompt payment of claims allowed pursuant to the act . . .
>
> * * *
>
> (b)(1) On or after October 6, 1992, the State Treasurer shall periodically transfer any balance in excess of an amount not to exceed five hundred thousand dollars from the separate trust fund to the General Fund no less frequently than on or

> before November 1 and May 1 of each year, except that the total amount of all such transfers shall not exceed five million dollars.
>
> (2)(i) On the next succeeding November 1 after five million dollars has been transferred to the General fund in the manner described in subdivision (b)(1) of this section or (ii) on November 1, 1996, whichever occurs first, and on or before November 1 of each year thereafter, the State Treasurer shall transfer any balance in excess of an amount not to exceed five hundred thousand dollars from the separate trust fund to the permanent school fund.

In addition, Neb. Rev. Stat. § 77-2205 (1996) provides, as is pertinent:

> The State Treasurer shall not pay any warrant, unless registered for any of the reasons set forth in this section, which is presented to him or her for payment more than two years after the date of its issuance if issued prior to October 1, 1992, or one year after the date of its issuance if issued on or after October 1, 1992, and any such warrant shall cease to be an obligation of the State of Nebraska and shall be charged off upon the books of the State Treasurer. ***Except as otherwise provided by law***, the amount stated on such warrant shall be credited to the General Fund. Such warrant may, however, thereafter by presented to the State Claims Board which may approve a claim pursuant to the State Miscellaneous Claims Act for the amount of the warrant.

(Emphasis added). Consequently, § 77-2205 requires that the amount of a state warrant which remains uncashed for more than one year after issuance shall be transferred to the State's General Fund "unless otherwise provided by law." Section 69-1317 establishes a specific trust fund for unclaimed property, and any amounts in that fund over $500,000 must be transferred to the Permanent School Fund on a yearly basis.

While the answer to your first question is not entirely clear, it seems to us that, when § 77-2205 and § 69-1317 are considered together, the amount of uncashed state warrants for payment of unclaimed property claims should be paid into the Unclaimed Property Trust Fund at the end of a year rather than into the State's General Fund. Section 77-2205 requires payment of uncashed warrants into the General Fund "unless otherwise provided by law." With respect to uncashed state warrants for unclaimed property claims, the law requires "otherwise" because there is an unclaimed

property ***trust*** fund and because § 69-1317(b)(2)(ii) contemplates that excess unclaimed property receipts will ultimately be placed in the Permanent School Fund. On that basis, we believe that the answer to your first question is that those warrants drawn on the Unclaimed Property Trust Fund for payment of unclaimed property claims which remain uncashed after one year should be returned to the Unclaimed Property Trust Fund.

2. **Uncashed warrants representing payments by third party payors as unclaimed property.**

With respect to your second group of questions, you state:

> Certain agencies of state government utilize a state warrant as the instrument of payment to transfer federal or other types of "assistance payments" including child support funds, student grants or other assistance payments. These payments are made by the State of Nebraska to the recipient and issued using a state warrant. The monies being transferred to the payee may not be State funds. The State may be the transferring agent of such funds.

You then ask:

> Should the monies paid by the State on behalf of another political entity, such as the federal government, be transferred to the State's General Fund if the warrant is uncashed after a year or should the funds be transferred to the Unclaimed Property Fund in the name of the payee so that the rightful owner can be located and the payment reissued? Why should the funds from these uncashed warrants become the property of the State, placed in the General Fund and ultimately used for other State expenditures? If these funds should not be placed in the Unclaimed Property Fund or the General Fund, should they be returned to the political entity that provided the funds originally to the State?

A. Unclaimed Property Analysis.

Your first inquiry in this group of questions involves the issue of whether uncashed state warrants representing payments for another governmental entity such as the federal government constitute unclaimed property under the Unclaimed Property Act. As discussed below, the answer to that question appears to depend upon several variables and specific facts which we do not have before us in the context of your general question.

The portion of the Unclaimed Property Act which most specifically applies to unclaimed property held by government officials including state officers is Neb. Rev. Stat. § 69-1307.01 (1996). That section 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.

We discussed the application of that provision to uncashed state warrants in a previous opinion of this office.

In Op. Att'y Gen. No. 95025 (April 3, 1995), we considered the general question of whether uncashed state warrants are unclaimed property under the Unclaimed Property Act, and concluded that they are not. In the course of that opinion, we first determined that uncashed state warrants constitute evidence of indebtedness or causes of action which are intangible personal property held by a "public authority" or "public officer" under § 69-1307.01, and which are presumed abandoned and reportable to the State Treasurer under that statute three years after their date of issuance. We then considered § 77-2205, and noted that those same state warrants cease to be an obligation of the State of Nebraska under the terms of that statute one year after their date of issuance. Because state warrants cease to be an obligation of the state within one year under § 77-2205 and the underlying causes of action for those warrants no longer exist, we concluded that those warrants need not be reported as unclaimed property three years after their issuance under § 69-1307.01. In a similar fashion, we concluded that unclaimed state payroll warrants which are presumed abandoned and reportable as unclaimed property one year after their issuance are not unclaimed property, since they cease to be an obligation of the State within that same time frame under § 77-2205.[1] As a result, we concluded in Opinion # 95025 that uncashed state warrants are generally not presumed abandoned or reportable as unclaimed property.

Your present question presents a different facet of the same issue. In this instance, the state warrants which are the subject of your opinion request do not involve payment of state funds, but

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[1] In both instances, the true owner or payee under the uncashed warrants does have a remedy available under state law to recoup his or her money. Under § 77-2205, that person can file a miscellaneous claim with the State Claims Board for the amount due under the uncashed warrant.

rather payment of federal funds or funds of other governmental entities where the state acts as a transferring agent for the monies in question. As discussed below, the different source of the funds for such warrants may create a somewhat different result with respect to the Unclaimed Property Act.

As we noted in Opinion # 95025, state warrants usually represent evidence of indebtedness or causes of action against the state which could be considered intangible personal property subject to § 69-1307.01. However, because § 77-2205 provides that such warrants "cease to be an obligation of the state," the underlying evidence of indebtedness or cause of action against the state represented by the warrant is extinguished after one year under that statute. For that reason, state warrants representing payments by the state of state funds are not presumed abandoned and reportable as unclaimed property under § 69-1307.01, since that statute contains a dormancy period of three years.

Your opinion request involves a different situation in which the state warrants at issue represent payment of federal funds or funds of other governmental entities where the state acts as a transferring agent for the monies in question. You have not specified precisely what funds from other government entities are included in your opinion request except to state that they might be '"assistance payments" including child support funds, student grants or other assistance payments.' Consequently, we have no way of knowing whether there are statutes, contractual provisions, grant provisions or other documents which create continuing underlying obligations, claims or causes of action against the other governmental entities involved to pay the payees on the warrants in question.[2] However, if there are such continuing underlying obligations on the part of the other governmental entities with respect to the funds at issue, then those obligations may not be extinguished by § 77-2205, since that statute, by its terms, applies to obligations of the state. Consequently, it appears to us that causes of action against other governmental entities may survive the application of § 77-2205 and the resultant cancellation of state warrants if there are continuing causes of action against the other governmental entities which are sufficiently certain under the terms of the applicable grants, statutes or contracts. Those continuing obligations and the funds

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[2] Nor do we know if the underlying causes of action are sufficiently certain so as to avoid the effect of those cases which hold that unliquidated or contingent choses in action are not property "held and owing" which must be remitted under the Unclaimed Property Act. ***See Employers Insurance of Wausau v. Smith***, 154 Wis.2d 199, 453 N.W.2d 856 (1990); Op. Att'y Gen. No. 95097 (December 18, 1995) at 5.

they represent may then be presumed abandoned and become reportable as unclaimed property in three years under § 69-1307.01. Since we have concluded that some of the funds at issue in your opinion request may constitute unclaimed property in certain circumstances, it becomes necessary to determine what should be done with any such funds from the time the state warrants for their payment become stale to the end of the three-year dormancy period.

B. Transfer of funds represented by uncashed state warrants back to the originating governmental entity.

In your second group of questions, you also asked us whether funds from uncashed state warrants which originated from other governmental entities should "be returned to the political entity that provided the funds originally to the State?" It seems to us that the answer to that question helps resolve the issue of where such funds should be placed during the three-year dormancy period described above.

We believe that the necessity for return of funds from other governmental entities to those entities after state warrants become stale depends entirely upon the requirements of the governmental entity which originated the funds and the language of any statutes or any agreements between the state and that entity pertaining to the funds at issue. For example, if the state is acting as a transfer agent for certain federal "assistance" funds, then there very likely may be federal statutes which pertain to those monies and which require return of the amounts of uncashed warrants or unused funds to the federal government. Alternatively, there very well may be agreements between the state agency and the source of the federal funds pertaining to the return of such monies. Such statutes or agreements would prevail over the requirements of § 69-1307.01 and § 77-2205, since the provisions of both of those statutes pertaining to disposition of funds only become operative in instances where there is nothing "otherwise provided by law." Therefore, if the other governmental entity which originated the funds for the uncashed warrant at issue requires return of those funds, those monies should be returned to that governmental entity. That determination, in turn, will have to be made on a case-by-case basis based upon the particulars of the agency and funds involved.

On the other hand, in the event that the other governmental entity which provided the funds for a stale warrant does not require those funds to be returned, then it appears that you may hold those funds as State Treasurer and ultimately take possession of them as unclaimed property. Neb. Rev. Stat. § 69-1321(b) (1996) provides:

> A holder [of unclaimed property] may pay or deliver property before the property is presumed abandoned with written consent of the State Treasurer and upon conditions and terms prescribed by the State Treasurer. Property paid or delivered under this subsection shall be held by the State Treasurer and is not presumed abandoned until such time as it otherwise would be presumed abandoned under the act.

On the basis of that statute, we believe that you may hold the amount of funds from other governmental entities underlying uncashed warrants when those funds will constitute unclaimed property in the circumstances described above, and when the other governmental entities do not require their return. At the end of the three-year dormancy period prescribed by § 69-1321(b) you may then consider those funds as unclaimed property.

C. Summary.

Based upon the lengthy discussion above, it appears to us that you should engage in the following analysis to determine whether money from another governmental entity that forms the basis for a particular state warrant may be considered as unclaimed property and ultimately placed in the Unclaimed Property Trust Fund when that warrant remains uncashed:

1. Are there any applicable statutes, regulations, grant provisions or agreements which require that the funds be returned to the originating governmental entity? If so, then they should be returned. If not, then continue with this analysis.

2. Is there is a statute, contract, grant provision or other document which creates a continuing underlying obligation, claim or cause of action against the other governmental entity involved to pay the payee on the warrant in question? That obligation must be sufficiently clear and certain so that it is not considered an "unliquidated" claim. If there is such a continuing obligation, then you may hold the money for three years until it becomes unclaimed property under § 69-1307.01. If there is no such continuing obligation, then we do not believe that the funds can be considered as

> unclaimed property, and the monies should be placed in the General Fund.[3]

As is obvious from the discussion above, the interaction of the Unclaimed Property Act and the statutes pertaining to state warrants is complicated and not entirely clear. For that reason, we suggest that you might wish to consider proposing remedial legislation which would clearly define uncashed state warrants as unclaimed property. The policy reasons for that statutory change are much the same as the policy considerations set out at length on page 2 of your opinion request letter. We would also note that the statutes and other materials which you provided us from other states, while not of great assistance in assessing the requirements of our particular statutes, could provide prototypes for such remedial legislation.

3. Propriety of classifications which result from failure to treat uncashed warrants as Unclaimed Property.

Your next question regarding uncashed state warrants and the Unclaimed Property Act involves a classification which you perceive as growing out of failure to treat uncashed warrants as unclaimed property. You state:

> By treating stale dated payment instruments (state warrants) differently under the Unclaimed Property statutes I am concerned that we have created a separate class that derives no benefit from the Unclaimed Property Statutes. Nebraska residents that are employed by private business receive the benefit of the services and protection of the Unclaimed Property Statutes. If their paycheck or expense reimbursement check is lost and remains uncashed for one year, the funds are remitted to the Unclaimed Property Division of the State Treasurer's Office. As required by law, the State Treasurer's Office

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[3] The presumption of abandonment under the Unclaimed Property Act is statutory and independent of common law principles of abandonment. ***Presley v. City of Memphis***, 769 S.W.2d 221 (Tenn. Ct. App. 1988). Statutory abandonment occurs when the conditions set out in the Unclaimed Property Act exist, and the Act's provisions govern only those specific circumstances set out in the statute. ***Id***. Only statutorily abandoned property is disposed of under the Unclaimed Property Act. ***Id***. For those reasons, the Act only applies when there is a specific provision in it which reaches particular property and creates a presumption of abandonment. Apart from § 69-1307.01 it is not clear that any other provision of the Unclaimed Property Act reaches the uncashed warrants in question.

> makes every effort to locate them. However, if your employer is the State of Nebraska and your paycheck or expense reimbursement check is lost and remains uncashed for one year, no attempt is made to locate you because the money is not currently remitted to the State Treasurer's Office as unclaimed property. Your money is transferred to the State's General Fund. If you learn of this situation, you are then required to apply for your money with the State's Claims Board

You then ask, "[w]as it the intent of the Legislature to create a separate class of people, a class that receives no benefit from the Unclaimed Property Statutes because they are being paid by the State of Nebraska via a state warrant or was it presumed that employees of the State would be afforded the same benefits of the Unclaimed Property Statutes as Nebraska residents who are employed by private businesses?"

As noted above, we have previously provided you with an opinion on the issue of whether uncashed state payroll warrants are presumed abandoned and reportable as unclaimed property. In Op. Att'y Gen. No. 95025 (April 3, 1995), we stated:

> You also inquire as to whether uncashed state warrants which are payroll checks must be reported to your office as unclaimed property after one year under Section 69-1307.02. That section provides:
>
> > Unpaid wages, including wages represented by payroll checks owing in the ordinary course of the holder's business which remain unclaimed by the owner for more than one year after becoming payable, are presumed abandoned.
>
> While Section 69-1307.02 appears to cover uncashed payroll warrants issued by the State, Section 77-2205 again prevents application of that statute for the reasons discussed above. Under Section 77-2205, the obligation inherent in the payroll warrant issued by the state would cease to exist one year after its issuance, at the same time as the duty to report it under the Act would arise. Under those circumstances, we do not believe that uncashed state payroll warrants need be reported to your office.

Id. at p. 5. We continue to believe that our analysis set out in Opinion # 95025 is correct. However, we have again reviewed the legislative history of § 69-1307.02 in response to your most recent question noted above.

Section 69-1307.02 was added to the Unclaimed Property Act in 1992 as a part of LB 26 which was passed by the Legislature during its Third Special Session that year. ***See*** 1992 Neb. Laws Third Special Session LB 26, § 11. Part of the clear purpose of that bill was to apply the unclaimed property law to governmental and public entities, and to reduce the dormancy period for unpaid wages to one year. ***Committee Records on LB 26***, 92 Neb. Leg., 3rd Spec. Sess. 1 (September 23, 1992) (Introducer's Statement of Intent). Apart from that general statement of purpose, however, we found no specific discussion of applicability of the act to payment of wages to state employees by state warrant.

On the other hand, § 77-2205 was also amended during the regular session in 1992 to provide that state warrants should cease to be an obligation of the state after one year from the date of issuance and to provide that the amounts of such warrants should be placed in the general fund. ***See*** 1992 Neb. Laws LB 982, § 1. When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation. ***White v. State***, 248 Neb. 977, 540 N.W.2d 354 (1995). Therefore, it must be presumed that the Legislature amended the Unclaimed Property Act in 1992 with full knowledge of what it had done previously that year in § 77-2205. Under those circumstances, had the Legislature intended to remove state payroll warrants from the requirements of § 77-2205 and consider those state warrants separately as unclaimed property, it could easily have done so by adding language clearly requiring that result into § 69-1307.02. It did not do so, and for that reason, we believe that the language of § 77-2205 controls as stated in Opinion # 95025. Again, however, you may wish to propose remedial legislation in this area which would specifically provide that uncashed state payroll warrants should be placed in the Unclaimed Property Trust Fund.

4. Application of the Federal Labor Laws to uncashed state warrants.

Your final question with respect to uncashed state warrants involves the federal labor laws. You ask, "[d]oes the State's current practice [of placing the amount of uncashed state payroll warrants in the General Fund under § 77-2205] violate any Federal Labor Laws regarding an employer's obligation to pay wages and expenses of employees even if the payment instrument is stale dated?"

You did not specify precisely what "Federal Labor Laws" are the focus of your concern in your opinion request. In that regard, we have previously indicated that a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. Op. Att'y Gen. No. 94012

(March 8, 1994). In a similar fashion, our response to this portion of your opinion request must be in general terms, absent some specific articulation of what portions of the Federal Labor Laws you believe are at issue.

It seems to us that one portion of the Federal Labor Laws which might apply to the situation at issue in your opinion request is the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219, 251-262 ("FLSA"). That Act, which applies to state government, deals generally with the federal minimum wage and the federal work week including requirements for overtime or compensatory time compensation. The FLSA implicitly requires that wages must be paid promptly when due. ***Biggs V. Wilson***, 828 F.Supp. 774 (E.D. Cal 1991). It also requires that wages must be paid in cash or its equivalent. 29 C.F.R. § 531.27. However, it is clear that the rules contained in the FLSA are intended only to insure that employees are compensated for their labors at not less than the minimum wage. They are not designed generally to interfere with the methods and practices by which the compensation is paid. ***Southern Railroad Company v. Black***, 127 F.2d 280 (4th Cir. 1942); 48A Am. Jur. 2d ***Labor and Labor Relations***, § 4196.

Based upon the authorities discussed above, we do not believe that the State's current practice of placing the amount of uncashed state payroll warrants in the General Fund after one year under § 77-2205 violates the FSLA. The State promptly issues payroll warrants to its employees, so it is in compliance with the payment provisions of that Act. Beyond that, we could find no portion of the FSLA which would prohibit an employer from subsequently taking possession of payroll funds in a situation where a payroll check or warrant is properly issued but remains unnegotiated for a lengthy period of time. Therefore, we do not believe that the application of § 77-2205 to payroll warrants violates the FSLA.

Sincerely yours,

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Approved by:

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