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DATE: May 14, 1991

SUBJECT: Amendment 1279 to LB 577; The Permit Process for Engaging in Sampling With Respect to Smokeless Tobacco Products

REQUESTED BY: Senator Merton L. Dierks, Nebraska State Legislature

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

LB 577 is an act which pertains to smokeless tobacco products and which would regulate the distribution of free smokeless tobacco samples, a process otherwise referred to in the bill as "engaging in sampling." Among other things, the bill provides that smokeless tobacco samples can only be distributed at certain locations, and that smokeless tobacco products cannot be given to minors. The bill also provides for enforcement by the Attorney General through suits for civil penalties and injunctive relief.

AM 1279, which can be found at p. 1883 of the current Legislative Journal, would amend LB 577 in several respects. AM 1279 would require an individual to obtain a permit from the Nebraska Secretary of State before engaging in sampling. That permit would be good for one year, and persons engaging in sampling would be required to have a permit in their possession while participating in that task. Section 8 of AM 1279 specifically provides that:

> If two or more judgments are entered against any manufacturer of smokeless tobacco products, its employees, or its sole agents for a violation of section 2, 3, 4, or 5 of this act, the Attorney General shall notify the Secretary of State that such judgments have been entered. Upon receipt of such notice, the Secretary

> of State shall revoke the permit issued to such manufacturer. Upon the request of such manufacturer, the Secretary of State shall issue a new permit under section 5 of this act if the judgments are overturned on appeal. If the judgments are not overturned on appeal, the Secretary of State may not issue a new permit to such manufacturer until one year has elapsed from the date when the Secretary of State received notice of the entry of the initial judgments against the manufacturer.

You have several concerns with the language of Section 8 of AM 1279 which apparently prompted your Opinion request. Our responses to the questions which you have raised are discussed below.

You first reference that portion of Section 8 which calls for revocation of a sampling permit in the event that two or more judgments are entered against a manufacturer, and you ask, "[a]m I to understand by this language that this is the sole circumstance under which a permit could be revoked?"

Obviously, we cannot speak to the intent of the drafters or sponsors of this legislative language, and questions concerning the intended meaning of that language might better be addressed to them. On the other hand, statutory language, in the absence of anything indicating to the contrary, is to be given its plain and ordinary meaning. State v. Quandt, 234 Neb. 402, 451 N.W.2d 272 (1990). Section 8 provides for the revocation of a permit when the Secretary of State is notified that two judgments have been entered against a particular defendant. Since that is the only event which triggers the revocation process under the express language of Section 8, we assume that it is, indeed, the "sole circumstance under which a permit could be revoked." However, we would note that the judgments referenced in Section 8 could be obtained as a result of a number of different violations of the act.

You next ask whether the provisions of Section 8 would bring about a result where a manufacturer having two judgments against it for violations of the act and another manufacturer having twenty judgments against it would have the same period of suspension.

Again, we can only look at the language of Section 8 with a view towards its plain and ordinary meaning. On that basis, it appears to us that once a manufacturer has two judgments entered against it for violations of the act, there is a one year suspension of the permit for engaging in sampling. This same result would obtain whether there are two judgments or twenty judgments against the particular manufacturer.

Finally, you state that you find the parameters set for the Secretary of State in Section 8 to be "rather confusing." You

request an analysis of their standing within the due process clauses of the United States and Nebraska Constitutions.

We assume that your final question involves the "void for vagueness doctrine." That concept is based on the due process guarantees of the Fifth and Fourteenth Amendments to the federal Constitution and Article I, Section 3, of our Nebraska Constitution. U.S. v. Articles of Drug, 825 F.2d 1238 (8th Cir. 1987); State v. A. H., 198 Neb. 444, 253 N.W.2d 283 (1987). In order to pass constitutional muster, a statute must be sufficiently specific so that persons of ordinary intelligence must not have to guess at its meaning, and the statute must contain ascertainable standards by which it may be applied. State v. A. H., supra. The void for vagueness doctrine does apply to civil statutes. Id. Even though this is the case, greater vagueness is generally tolerated in civil statutes than in criminal statutes. U.S. v. Articles of Drug, supra. A statute which is otherwise valid will not be held void for vagueness unless it is so deficient in its terms as to render it impossible to enforce. Neeman v. Nebraska Natural Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974). The constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Fulmer v. Jensen, 221 Neb. 582, 379 N.W.2d 736 (1986).

In our view, the provisions of Section 8 generally use ordinary terms which find adequate interpretation in common usage and understanding. Consequently, we do not believe that Section 8 is sufficiently vague so as to involve a violation of due process. However, if you believe that Section 8 is confusing and unclear, you may wish to introduce further amendatory language to deal with the interpretation problems which you perceive.

Sincerely yours,

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05-07-14.91
cc: Patrick J. O'Donnell
Clerk of the Legislature
APPROVED BY:

Attorney General