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DATE: September 3, 1993

SUBJECT: Issuing Arrest Warrants for Non-jailable Offenders

REQUESTED BY: Department of Labor

WRITTEN BY: Don Stenberg, Attorney General
William Howland, Assistant Attorney General

A representative of the Department of Labor (Department) spoke with the Sarpy County Attorney's office regarding a prosecution of a violation of the Wage and Hour Act (Act). ***See*** Neb. Rev. Stat. §§ 48-1201 to 48-1209 (1988). With certain exceptions, the Act requires that "every employer shall pay to each of his or her employees wages at the minimum rate of four dollars and twenty-five cents per hour." Neb. Rev. Stat. § 48-1203(1) (Cum. Supp. 1992). An employer who violates § 48-1203 is guilty of a Class IV misdemeanor. Neb. Rev. Stat. § 48-1206(2) (1988). A Class IV misdemeanor is punishable by a maximum fine of $500, and imprisonment may not be imposed. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1992).

"It ***shall be the duty of the county attorney*** of the county in which any violation of the Wage and Hour Act occurs to prosecute the same ***in the district court*** in the county where the offense occurred." Neb. Rev. Stat. § 48-1206(3) (1988) (emphasis added).

The Sarpy County Attorney's office advised the Department that it was unable to prosecute the case. It was explained to the Department that because a violation of § 48-1203 is not a jailable offense, an arrest warrant could not issue and that the office, therefore, had no method of securing the presence of an accused in court. The Sarpy County Attorney's office also informed the Department that it believes that a district court would not give a Class IV misdemeanor charge the attention it deserves. The Department has asked this office whether an arrest warrant may be issued for one violating the provisions of § 48-1203.

We are confident that the District Court must and would give appropriate attention to a Class IV misdemeanor. District courts have both chancery and common law jurisdiction and such other jurisdiction as the Legislature may provide. Neb. Const. art. V, § 9. Except as otherwise provided, the district courts have general jurisdiction in all matters, both civil and criminal. Neb. Rev. Stat. § 24-302 (1989). The Supreme Court has declared that a district court in the exercise of its original, as distinguished from appellate, jurisdiction is empowered to try and determine misdemeanors. ***Otte v. State***, 172 Neb. 110, 108 N.W.2d 737 (1961). Although the district courts and county courts generally have concurrent original jurisdiction over misdemeanors and infractions, ***see*** Neb. Rev. Stat. § 24-517(5) (Cum. Supp. 1992), the Legislature has chosen to vest jurisdiction over Act violations solely in the district courts. This it may do. The district courts and prosecutors are bound by that legislative decision.

The Nebraska statutes are clear on the question of whether a warrant may be issued for one allegedly a Class IV misdemeanant. "Judges of the district court and judges of the county court shall have power to issue process for the apprehension of any person charged with a criminal offense." Neb. Rev. Stat. § 29-403 (1989). "Whenever a complaint shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed." Neb. Rev. Stat. § 29-404 (1989). The statutes make no distinction between felonies and misdemeanors or jailable and non-jailable misdemeanors. All that is required for the issuance of an arrest warrant is the filing of a complaint and an affidavit setting forth probable cause to believe that the person sought to be arrested committed an offense against the laws of this state.

We are unable to discover any constitutional impediment to arresting persons accused of committing non-jailable offenses. In ***Gladden v. Roach***, 864 F.2d 1196 (5th Cir. 1989), the court held that requiring one to post bond as a condition of release when he or she has been arrested for a non-jailable offense does not offend due process. As the court explained, "The purpose of requiring that a defendant post bail as a pre-condition of release following arrest is to insure the defendant's attendance at trial." ***Id.*** at 1200. In a leading treatise, it was observed:

> As for the notion that the Fourth Amendment's reasonableness requirement is met only when probable cause is present and an actual need for custody exists, . . . the current view is that "where grounds exist to believe a person has committed a crime, the public interest in law enforcement is assumed to outweigh the individual's interest in liberty and to justify an arrest of that person."

1 J. Israel and W. LaFave, ***Criminal Procedure*** § 3.5(a), pp. 245-46 (1984).

The Sarpy County Attorney's office has explained to us that its reluctance to seek arrest warrants where a non-incarcerable misdemeanor is involved stems from ***Pulliam v. Allen***, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). In ***Pulliam***, indigent defendants brought a civil rights action in federal district court, challenging a Virginia magistrate's practice of imposing bail for non-jailable offenses. The federal district court found the practice to be violative of equal protection and due process and enjoined the custom of confining persons prior to trial for non-incarcerable offenses solely because they could not meet bond. It also awarded attorney's fees. The state magistrate appealed only from the order awarding attorney's fees. The U.S. Supreme Court held that judicial immunity was not a bar to prospective injunctive relief and that a judicial official could be ordered to pay attorney's fees under the Civil Rights Attorney's Fees Act of 1976. In no way did the Court express its opinion regarding the constitutionality of jailing prior to trial those accused of committing non-incarcerable offenses.

It is apparently this fear of the award of attorney's fees which has deterred the issuance in Sarpy County of arrest warrants for those purported to have committed a non-jailable misdemeanor. Even assuming as unconstitutional the practice of incarcerating

indigents accused of committing non-incarcerable misdemeanors solely on the basis of their inability to meet bond, the fears expressed by Sarpy County are unfounded. First, there is nothing to indicate that the person alleged to have committed the instant violation is indigent. Secondly, it does not necessarily follow that all arrestees must post bond as a condition of their release. Such a person could be released on his or her own recognizance. ***See*** Neb. Rev. Stat. § 29-901 (Cum. Supp. 1992). Finally, it should be understood that the federal district court in ***Pulliam*** condemned the practice of jailing indigents alleged to have committed non-jailable offenses for the lone reason that they could not meet bond; it did not find that such indigents could not be incarcerated pending trial for other reasons, such as ensuring their presence at trial.

In addition to issuing an arrest warrant for the accused, there is another method to ensure an accused's presence at trial. Pursuant to Neb. Rev. Stat. § 29-422 (1989), any peace officer may issue a citation in lieu of arrest or continued custody for any offense which is a misdemeanor. A citation may be issued whenever the prosecuting officer is convinced that a citation would serve all the purposes of an arrest warrant. Neb. Rev. Stat. § 29-425 (1989). The citation must "include a description of the crime or offense charged, the time and place at which the person cited is to appear, a warning that failure to appear in accordance with the command of the citation is a punishable offense, and such other matter as the court deems appropriate." Neb. Rev. Stat. § 29-423 (1989). One copy of the citation must be delivered to the person cited, and a duplicate shall be signed by the person, giving his or her promise to appear at the time and place stated in the citation. ***Id.*** The person is then released from custody. ***Id.*** If a person fails to appear or otherwise comply with the dictates of a citation, he or she shall be guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not more than $500.00 or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment. Neb. Rev. Stat. § 29-426 (1989).

In conclusion, we believe that an arrest warrant may be issued for one alleged to have committed a non-jailable misdemeanor. That person's appearance at trial could also be ensured by issuing him or her a citation. This latter method has the benefit of alleviating Sarpy County's apprehension concerning arrest of such persons.

Respectfully submitted,

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APPROVED BY:

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