STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-17

Date issued: October 27, 1992

Requested by: John A. Graham, Executive Director
North Dakota Department of Human Services

- QUESTION PRESENTED -

Whether Section 6 of 1991 Senate Bill No. 2203 became effective on July 10, 1992, or may become effective at any other time.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that Section 6 of 1991 Senate Bill No. 2203 did not become effective on July 10, 1992, and may not become effective at any other time.

- ANALYSIS -

Section 6 of Senate Bill No. 2203 (section 6) provided for the following amendment to N.D.C.C. ' 14-09-09.17:

> **14-09-09.17. Amendment - Termination of income withholding order.** Upon amendment of termination of an income withholding order, the clerk of court shall send appropriate notice to the income payor. An income withholding order is to be amended by the clerk when the total amount of money to be withheld is changed by elimination of arrearages or by court-ordered change in amount of child support. An income withholding order ~~is to~~ may be terminated only when ~~the~~:
>
> 1. The duty to support ceases and all child support arrearages have been paid; or
>
> 2. In the case of an order imposed under section 14-09-09.24, the obligor requests

termination, withholding has not been terminated previously and subsequently initiated, and the obligor meets the conditions for an alternative arrangement for assuring the regular payment of child support required by subsection 4 of section 14-09-09-24.

Section 17 of 1991 Senate Bill No. 2203 (section 17) provided a contingent effective date as follows:

> **SECTION 17. CONTINGENT EFFECTIVE DATE.** Section 6 of this Act becomes effective upon adoption, as a final regulation, of the provisions of 45 CFR 303.100(a)(7)(ii), proposed for adoption in a notice of proposed rulemaking published in the Federal Register on Wednesday, August 15, 1990, at 55 F.R. 33426, but otherwise does not become effective; provided, however, that section 6 of this Act will in no event become effective before August 1, 1991.

The provisions of 45 C.F.R. ' 303.100(a)(7)(ii) proposed for adoption on August 15, 1990, at 55 Fed. Reg. 33414, 33426 (1990), provided:

> (7) The State must have procedures for promptly terminating the withholding when:
>
> . . . .
>
> (ii) The absent parent requests termination and withholding has not been terminated previously and subsequently initiated; and, the absent parent meets the conditions for an alternative arrangement set forth under paragraph (b)(3) of this section.

The final regulation, reflecting consideration of comments to the proposed rule, was issued July 10, 1992:

> (7) The State must have procedures for promptly terminating withholding:
>
> . . . .
>
> (ii) At State option, when the absent parent requests termination and withholding has not been

> terminated previously and subsequently initiated, and the absent parent meets the conditions for an alternative arrangement set forth under paragraph (b)(3) of this section.

(Emphasis added.) 57 Fed. Reg. 30658, 30682 (1992). This final regulation was effective July 10, 1992. 57 Fed. Reg. 30658 (1992). The key difference between the regulation as proposed and as implemented is that the implemented regulation makes the provision for termination of withholding optional. As proposed, the provision was mandatory.

The legislative history concerning 1991 Senate Bill No. 2203 explains the unusual contingent effective date as follows:

> This particular proposed federal regulation is at odds with the general theory which underlies the other federal requirements for income withholding, that income withholding for child support will be the rule, rather than the exception. It is not regarded as a desirable amendment, and the department's [of Human Services] only purpose in including the provision is to avoid a loss of federal funding . . . under section 17, the amendments in section 6 would not become law if the federal regulation is not adopted.

Hearing on S. 2203 Before the House Human Services and Veterans Affairs Comm., 52nd ND Leg. (March 4, 1991) (Statement of Blaine L. Nordwall).

It is apparent that the legislative purpose was to adopt the amendments to N.D.C.C. ' 14-09-09.17 contained in section 6 only if it was obliged to do so in order to obtain federal funds. Under the federal regulation finally adopted, the amendments to N.D.C.C. ' 14-09-09.17 were not necessary in order to avoid a loss of federal funding. Moreover, the federal regulation adopted is different than the federal regulation proposed, and thus the adopted regulation is not the one described in section 17 of 1992 Senate Bill No. 2203.

Federal law generally requires public notice and an opportunity for public comment prior to agency rulemaking. 5 U.S.C. ' 553 (1988). The policy adopted by the United States Department of Health and Human Services requires the application of section 553 to rulemaking concerning the child support program. 36 Fed. Reg. 2532 (Feb. 5, 1971); 42 U.S.C. ' 652 (1988 & Supp. 1990).

5 U.S.C. ' 553(b) (1988) requires a notice of proposed rulemaking to be published in the Federal Register. If the Secretary of the Department of Health and Human Services were to propose an amendment to 45 C.F.R. ' 303.100(a)(7)(ii) (as adopted July 10, 1992) to remove the provision for state option, section 553(b) would require publication of that proposal in the Federal Register. That hypothetical publication could not be the one referred to in section 17. No such proposal would effectuate section 6. Only the adoption of the specific federal rule set forth in the notice to which the legislature referred in section 17 could have effectuated section 6. Consequently, section 6 not only has not become effective, it may not become effective at any time.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

Assisted by: Blaine L. Nordwall
Assistant Attorney General

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