

February 15, 2007

The Honorable Mike Fair  
Senator, District No. 6  
211 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Fair:

In a letter to this office you questioned whether proposed legislation, S. 417, is in compliance with a provision of the National Organ Transplant Act of 1984, 42 U.S.C.A. Section 274(e). That provision states that “[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.” S. 417 states that

[n]otwithstanding another provision of law, a prisoner convicted of an offense against this State and sentenced to the custody of the Department of Corrections, including a prisoner confined in a local facility pursuant to a designated facility agreement authorized in Section 24-3-30, who voluntarily donates bone marrow or blood-forming cells during his period of incarceration is entitled to receive a deduction from the term of his sentence of up to sixty days.

Pursuant to subsection (c)(1) of the federal provision cited above, the term “human organ” includes “bone marrow”. Also, pursuant to subsection (c)(2), the term “valuable consideration”

...does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

By subsection (c)(3), the term “interstate commerce” “...has the meaning prescribed for it by section 321(b) of Title 21.” The provision states

[t]he term “interstate commerce” means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

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Therefore, for purposes of your question, it must be determined whether the donation of bone marrow by an incarcerated prisoner who then would receive a deduction of up to sixty days from his term of incarceration would constitute the unlawful transfer of a human organ for valuable consideration affecting interstate commerce.

As set forth above, the term “human organ” specifically includes bone marrow for purposes of the federal prohibition. As to whether the receipt of a deduction from a period of incarceration constitutes “valuable consideration” for purposes of the federal prohibition, this office in a prior opinion, Op. Atty. Gen. dated January 11, 1996 stated that

[a] commonly-accepted definition of valuable consideration...[is that such] “consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.

An opinion of the Ohio Attorney General dated March 26, 1981 similarly concluded that the term “valuable consideration” means “...the acquisition of some legal right, interest, profit or benefit.” In the situation addressed by you, a prisoner who voluntarily donates bone marrow or blood-forming cells during his period of incarceration is entitled to receive a deduction from the term of his sentence of up to sixty days. In the opinion of this office, such a deduction from the term of a sentence would constitute a benefit accruing to the prisoner with the result that such would constitute “valuable consideration”.

As to whether the donation of bone marrow or blood-forming cells by a prisoner would affect interstate commerce within the prohibition of the federal statute, as set forth in an opinion of the Kansas Attorney General dated March 17, 2000,

Congress’ commerce power derives from the United States Constitution and its scope is not confined to the regulation of commerce between the states but may reach intrastate activities which interfere with or obstruct the exercise of this granted power.

Therefore, intrastate activities are also to be examined with regard to any effect on interstate commerce. See also: Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns and hotels catering to intrastate guests); Wickburn v. Filburn, 317 U.S. 111 (1942) (homegrown wheat).

Arguably, the donation of bone marrow by a prisoner would also implicate intrastate activities involving interstate commerce. In dealing with the donations of organs pursuant to the National Organ Transplant Act, the Kansas Attorney General in the referenced 2000 opinion determined that

[i]nterstate commerce is affected when, upon receipt of a body part...(which would presumably include bone marrow)...an approved hospital or storage facility in the

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state contacts an organ procurement organization through the National Organ Procurement and Transplantation Network established by Congress to assist in the nationwide equitable distribution of organs. The Network was established pursuant to the National Organ Transplant Act...Interstate commerce is affected when body parts for human transplantation enter the Network established by Congress....

It was referenced that “(a)s a condition for receipt of medicare funds, hospitals are required to contact a regional organ procurement organization...and establish protocols for the identification of potential organ donors.” Consistent with the above, in the opinion of this office, as a result of the involvement of such a network, the donation of bone marrow or blood-forming cells by a prisoner would affect interstate commerce.

In light of the conflicts with the National Organ Transplant Act as set forth above, in the opinion of this office, it appears that S. 417 would be inconsistent with such Act. If there are any questions, please advise.

With kind regards, I am,

Very truly yours,

Henry McMaster  
Attorney General

By: Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General