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STATE OF NEBRASKA
OFFICIAL
AUG 9 1994
DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: August 9, 1994

SUBJECT: Application of Neb. Rev. Stat. § 47-616 (Supp. 1993)

REQUESTED BY: Harold W. Clarke, Director
Nebraska Department of Correctional Services

WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Assistant Attorney General

You have asked how the provisions of Neb. Rev. Stat. § 47-616 (Supp. 1993) apply to inmates at the Community Correctional Center Omaha (CCC-O) and Community Correctional Center Lincoln (CCC-L). Section 47-616 provides:

> If an offender fails to remain within the limits of his or her confinement or to return within the time prescribed to a community correctional facility to which he or she was assigned or transferred or if any offender who participates in a community correctional program leaves his or her place of employment or, having been recommended by the director or the probation administrator to be returned to a correctional institution, neglects or fails to do so, the offender shall be deemed to have escaped from custody and all reductions in sentence authorized by sections 83-1,107 and 83-1,108 shall be forfeited.

We conclude that the Community Correctional Facilities and Programs Act [hereinafter the "Act"], Neb. Rev. Stat. §§ 47-601 to 47-618 (Supp. 1993), including § 47-616, does not apply to CCC-O and CCC-L and the inmates confined there. The Department of Correctional Services (DCS), may at its option, choose to bring CCC-O and CCC-L under the terms of the Act by applying the Act's provisions to those two facilities.

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A discussion of Nebraska's statutes governing community corrections is needed to explain why we have concluded that the Act, including § 47-616, does not apply to CCC-O and CCC-L at this time.

In 1969, § 83-184 of the Nebraska statutes was adopted to provide for work and educational release programs for inmates committed to DCS. The statute provides conditions for the placement of an inmate in such a program, and also provides:

> (4) The willful failure of a person to remain within the extended limits of his confinement or to return within the time prescribed to a facility designated by the director of correctional services shall be deemed an escape from custody punishable as provided in § 28-912.

In 1975, LB 417 provided for the organization of DCS into four divisions. Among these was the Division of Community-Centered Services, to be headed by the Assistant Director of the Division of Community-Centered Services. Neb. Rev. Stat. §§ 83-931 to 83-934 (1987). Among the responsibilities of the Assistant Director of the Division of Community-Centered Services was the organization and supervision of all adult community release programs and facilities in the state, including all adult work release, educational release, and furlough programs. It was the statutory responsibility of the Division of Community-Centered Services to plan and implement a community-based pilot project in Omaha; to plan new facilities where necessary; and to assist in the future implementation of similar community-based projects on a state-wide basis, to maximize the diversion of inmates from secure DCS facilities into community-based programs.

CCC-O and CCC-L were created under § 83-184 and §§ 83-931 to 83-934 and were in existence and operation for many years prior to the passage of LB 627, which contained the Act, in 1993. Neb. Rev. Stat. § 47-602 (Supp. 1993) states the purpose of the Act:

> It is the purpose of the Community Correctional Facilities and Programs Act to <u>encourage flexibility</u> in the development of community correctional facilities and programs by the department of correctional services, units of local government, and non-

> governmental agencies and to encourage the use of such facilities and programs by sentencing courts. It is the further purpose of the Act to provide a procedure through which units of local government and non-governmental agencies may provide adult correctional services to the department and to sentencing courts. [Emphasis added].

The legislative history of LB 627, including LB 765 which was incorporated into LB 627, shows that the purpose of the Act was to encourage the development of new community correctional centers for non-violent inmates, serving relatively short sentences, who would otherwise be incarcerated in secure DCS facilities. The Act did not repeal § 83-184 or §§ 83-931 to 83-934 or restrict the power of DCS to continue to operate CCC-O and CCC-L under those statutory provisions. Section 47-612 states that the director of DCS "may establish community correctional facilities and programs as alternatives or as supplements to state correctional facilities for the custody, control, care, and treatment of offenders." [Emphasis added]. The term "offender" is defined for purposes of the Act in § 47-603 (6) as "any person who has been convicted of a felony or misdemeanor but shall not include any person who has been found to be an habitual criminal under section 29-2221, has been convicted of a crime of violence, or has been convicted of knowing and intentional manufacture, distribution, delivery, or dispensing of a controlled substance in violation of the Uniform Controlled Substance Act[.]"

If the Act were applied to CCC-O and CCC-L, the very purpose of the Act could be thwarted. CCC-O and CCC-L have long been used for housing inmates who have been convicted of offenses which place them outside the definition of "offender" under the Act, but who are in transition to parole or discharge. If the Act were applied to CCC-O and CCC-L, inmates falling outside the Act's definition of "offender" would either have to be removed from the facilities, or would receive favorable treatment within the facilities under § 83-184 as compared to "offenders" confined there and made subject to the Act. Section 47-612 requires DCS to obtain approval of the city, village, or county in which a state community correctional facility will be located, and § 47-614 requires that DCS obtain local government approval before spending funds to place an offender in a community correctional facility. If the provisions of §§ 47-603 (6), 47-612, and 47-614 were applied to CCC-O and CCC-L, the department's flexibility in the development of community

correctional facilities and programs could be severely restricted rather than enhanced.

When construing a statute, we must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose. When reviewing a series or collection of statutes pertaining to a certain subject matter, the statutes may be considered conjunctively and construed to determine the intent of the legislature so that different provisions of an act are consistent, harmonious, and sensible. When construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as adduced from the whole will prevail over that of a particular part considered separately. *See, e.g., State v. Joubert*, 246 Neb. 287, 292-93 (1994).

Because we conclude that the Act does not apply to CCC-O and CCC-L, unless DCS elects to bring CCC-O and CCC-L under the terms of the Act by applying its provisions to those facilities, it follows that § 47-616 regarding escapes from custody is inapplicable to inmates currently at CCC-O and CCC-L. Of course, § 83-184 contains a similar provision, but without the mandatory forfeiture of all good time.

Sincerely,

DON STENBERG
Attorney General

Laurie Smith Camp
Assistant Attorney General

Approved By:

Attorney General

44-896-8.15

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES
Harold W. Clarke
Director

E. Benjamin Nelson
Governor

July 11, 1994

Donald B. Stenberg
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

RE: Request for Attorney General's Opinion

Dear Attorney General Stenberg:

I am requesting a formal opinion regarding the appropriate application of §47-616, R.S. Supp., 1993, to Department of Correctional Services inmates in community corrections. This language was adopted by the 1993 Legislature as Section 20 of Legislative Bill 627. It reads:

> "If an offender fails to remain within the limits of his or her confinement or to return within the time prescribed to a community correctional facility to which he or she was assigned or transferred, or if any offender who participates in a community correctional program leaves his or her place of employment, or having been recommended by the Director or the probation administrator to be returned to a correctional institution, neglects or fails to do so, the offender shall be deemed to have escaped from custody and all reductions in sentence authorized by §§83-1,107 and 83-1,108 shall be forfeited."

The Department of Correctional Services has had several questions regarding the application of this language to inmates who are incarcerated at the Community Correctional Center Omaha ("CCCO") or Community Correctional Center Lincoln ("CCCL").

Assume the following scenarios:

A. An inmate at CCCO has a pass to go to the Henry Doorley Zoo from 1:00 p.m. to 6:00 p.m. The inmate arrives at the Zoo at 1:30 p.m., and leaves the Zoo shortly thereafter, although this does not become known to the Department until the following day. He returns to CCCO in accordance with the 6:00 p.m. designated time. Is he guilty of escape under 47-616?

B. An inmate is scheduled to report to a job at 8:00 a.m. At 11:00 a.m. his employer notifies the Department that he has not reported for work. His scheduled time of return to CCCO is 5:00 p.m., and he returns prior to that time; however, he has never reported to work on that date. Is he guilty of escape, and if so, when does he become guilty of the offense?

C. An inmate has a shopping pass to Westroads from 1:00 p.m. to 5:00 p.m. He goes to Westroads, but does not return to CCCO until 7:00 p.m. Is he guilty of escape? What if he had a verified transportation problem?

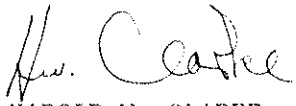
D. An inmate is on education release and is to be at the Lincoln School of Commerce from 8:00 a.m. to 4:00 p.m. However, an off duty staff person observes him at Gateway at 1:30 p.m. The inmate returns to CCCL prior to the appointed 4:00 p.m. time. Is he guilty of escape? What if he doesn't return until 6:00 p.m.?

A strict reading of §47-616 would seem to indicate that in all of the above instances, the inmate would be guilty of escape and would lose all good-time.

A related question is whether such forfeited good-time is restorable. Under existing rules, only good-time forfeited for violations involving assault or injury to a person is non-restorable. However, §47-616 does not address restoration.

To date ten inmates have been charged with escape because of the kinds of scenarios noted above, and as a result, have had all good-time forfeited ranging up to 7 years 1 month in one case. The Department wants to avoid potential litigation pertaining to this issue if, in fact, we are interpreting the statute incorrectly. Therefore, there is some urgency in securing a response to these questions.

Sincerely,



HAROLD W. CLARKE
Director

HWC:jcl