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NO.
STATE OF NEBRASKA
OFFICIAL
DEC 3 1996
DEPT. OF JUSTICE

DATE: December 2, 1996

SUBJECT: Impact of the Nebraska Partnership for Health and Human Services Act upon membership in local Foster Care Review Boards by employees of Partnership agencies

REQUESTED BY: Joan E. Schwan
State Foster Care Review Board

WRITTEN BY: Don Stenberg, Attorney General
David Tarvin, Assistant Attorney General

The State Foster Care Review Board ("Board") currently does not allow employees of the Department of Social Services ("DSS") to serve on any local review boards. This is pursuant to the Board's interpretation of Neb. Rev. Stat. § 43-1304 (1993), which states in part that, "[a] person employed by the state board, a child-caring agency, a child-placing agency, or a court shall not be appointed to a local board." The Board has operated under the belief that DSS falls under the definition of "child-caring agency." Employees of other state agencies, however, including the Department of Public Institutions ("DPI"), the Office of Juvenile Services of the Department of Correctional Services ("OJS"), and the Department of Health ("Health"), do serve on local boards.

This year, the Nebraska Legislature enacted LB 1044, known as the Nebraska Partnership for Health and Human Services Act ("Act"). The Act merges the Department of Aging, Health, DSS, DPI, and OJS into three new Departments. LB 1044, Sec. 6. The Board is now concerned that those members of local boards who are employees of DPI, OJS, and Health will now be unable to serve on those boards because they will be employed under the same umbrella agency as

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employees of DSS. Thus, you have requested our opinion on two issues:

(1) Does the definition of employment in the context of Neb. Rev. Stat. § 43-1304 include regular salary employees only, or does it extend to contract employees or consultants of child-caring or child-placing agencies?

(2) Will § 43-1304 prohibit current employees of DPI, OJS, and Health from serving on local boards once those agencies are merged with DSS?

We conclude that § 43-1304 will prohibit employees of those agencies merging with DSS from serving on local boards. We also conclude that the term "employee" in § 43-1304 includes contract employees and consultants of child-caring and child-placing agencies.

DISCUSSION

The statute in question, Section 43-1304, is part of the Foster Care Review Act ("FCRA"), Neb. Rev. Stat. §§ 43-1301 through 43-1318 (1993). The terms used in the FCRA are defined in Neb. Rev. Stat. § 43-1301. That statute states:

> For purposes of the [FCRA], unless the context otherwise requires:
> ***
> (8) Child-caring agency shall have the definition found in section 71-1902; and
> (9) Child-placing agency shall have the definition found in section 71-1902.

Neb. Rev. Stat. § 43-1301(8)&(9) (1993).

Neb. Rev. Stat. § 71-1902(3) (1990) defines child-caring agency as "an organization which is incorporated for the purpose of providing care for children in buildings maintained by the organization for that purpose." Neb. Rev. Stat. § 71-1902(4) defines child-placing agency as "an organization which is authorized by its articles of incorporation and by its license to place children in foster family homes."

At first glance, it appears that DSS is neither a child-caring agency nor a child-placing agency as those terms are defined in § 71-1902 because DSS does not fall under the plain language of the statute. First, the definitional language of § 71-1902(3) & (4) states that only organizations which are incorporated meet the definitions of child-caring and child-placing agencies. DSS,

however, is not incorporated. Rather, it is a governmental agency created by statute. Neb. Rev. Stat. §§ 68-701 (1990) & 81-101 (1994). Second, DSS is not "licensed" to place children in foster family homes. Rather, under § 71-1902, DSS issues the licenses to other organizations to place children in foster homes. That section states (in relevant part):

> No person shall furnish or offer to furnish child care for two or more children from different families without having in full force and effect a written license issued by the department [DSS] upon such terms and conditions as may be prescribed by general rules and regulations adopted and promulgated by the department....For the issuance and renewal of each license, the department shall charge a fee of twenty-five dollars for group homes, twenty-five dollars for child-caring agencies, and twenty-five dollars for child-placing agencies.

The language of the statute seems to indicate that DSS is a separate entity from the child-caring and child-placing agencies which are defined by that statute. However, this situation is particularly complicated by the Legislature's reasons for enacting § 43-1304. The legislative history of that statute shows that it was meant to apply to DSS. Section 43-1304 was enacted to prevent a readily apparent conflict of interest which would occur should an employee of DSS obtain a position on a local board. Since the local boards review decisions of DSS, employee/board members would appear to be biased in their reviews of DSS placements. In fact, when Senator Don Wesley first introduced § 43-1304 as LB 239, he stated very clearly:

> LB 239 was heard by the Health and Human Services Committee. It deals with two subject areas, one dealing with a conflict of interest concern regarding the Department of Social Services employees that were appointed to the board last year. The broad language in the bill would preclude that from happening in the future.

Floor Debate on LB 239, 90th Neb. Leg., First Sess. 534 (Feb. 4, 1987) (Statement of Sen. Wesely.)

The problem is that while the Legislature intended DSS to be included in the provisions of § 43-1304, it applied to the statute definitions which appear to exclude DSS. However, in construing a statute, a court must look to the statute's purpose and give to that statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it. ***Solar***

Motors, Inc. v. First Nat. Bank of Chadron, 249 Neb. 758, 545 N.W.2d 714 (1996). When the words of a statute are plain, direct and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. ***State v. Bainbridge***, 249 Neb. 260, 543 N.W.2d 154 (1996). However, a statute is open for construction when language used requires interpretation or may reasonably be considered ambiguous. ***Omaha Public Power Dist. v. Nebraska Dept. of Revenue***, 248 Neb. 518, 537 N.W.2d 312 (1995).

In this case, the language of the statute may reasonably be considered ambiguous due to the apparent conflict between the general intent of the Legislature in enacting the law and the language in which the law in expressed. However, this ambiguity can be resolved by reference to both the legislative history of the statute and the Board's interpretation of the statute. To ascertain the intent of the legislature, a court may examine the legislative history of the act in question. ***Southern Nebraska Rural Public Power Dist. v. Nebraska Elec. Generation and Transmission Co-op., Inc.***, 249 Neb. 913, 546 N.W.2d 315 (1996). Also, the interpretation of a statute given by an administrative agency to which the statute is directed is entitled to weight. ***Vulcraft, a Div. of Nucor Corp. v. Karnes***, 229 Neb. 676, 428 N.W.2d 505 (1988). Since both the legislative history and the Board's interpretation of the statute are clear that DSS employees are prohibited from serving on local boards, that interpretation should be upheld.

We next turn to the issue of whether employees of other agencies merging with DSS are prohibited from serving on the local boards. Those employees' jobs currently have little or nothing to do with child care or child placement, and it is presumed that when the agencies merge, those employees will perform those same jobs. However, there are many current employees of DSS whose jobs have little to do with child care or placement. Yet the legislative history of § 43-1304 does not show an intent that only some DSS employees would be excluded from local board membership. Rather, all employees appear to be excluded. Even if a DSS employee is not actually engaged in the placement of children in foster care, conflicts may arise, such as pressure from the agency on the member. Because the same possible conflicts would exist with employees from merged agencies, and in the absence of any legislation to the contrary, this office believes that employees of those agencies merging with DSS will also be prohibited from serving on local foster care review boards.

You also asked whether the term "employee" in § 43-1304 would include contract employees or consultants of child-care and child-placing agencies, or whether it would only apply to regular-

salaried employees. The term "employee" is not defined by the FCRA. However, in construing a statute, a court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. ***Baker's Supermarkets, Inc. v. State, Dept. of Agriculture***, 248 Neb. 984, 540 N.W.2d 574 (1995). In this case, contract employees and consultants involved in child-care and placement are just as susceptible to a conflict-of-interest as the regularly salaried DSS employees. It would be unjust to tell the regular employees that they cannot belong to the local boards because they might be biased in reviewing placements, while at the same time allowing contract employees subject to the same biases to belong. Thus, we conclude that contract employees are subject to § 43-1304 as well.

We understand that many valuable board members may have to resign their positions based on the Partnership Act. Our suggestion is for the Board to ask the Legislature to clarify its position on this matter.

Sincerely,

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Approved By:

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