STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

91025

APR 4 1991

DATE: April 2, 1991

REQUESTED BY: William H. McCartney, Director
Department of Insurance

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

SUBJECT: Qualification of Physicians as Health Care Providers Under the Nebraska Hospital-Medical Liability Act.

This is in response to your questions concerning qualifications of certain classes of medical staff under the Nebraska Hospital-Medical Liability Act, Neb.Rev.Stat. §44-2801 et seq. Your specific inquiry is whether medical staff employed by the University of Nebraska Medical Center, house officers and clinical faculty members, are physicians as that term is defined in the Act. If the staff members in question are physicians for purposes of the Act, they are separately required to qualify as health care providers for coverage under the provisions of the Act.

You have indicated that the Department of Insurance maintains that the professional staff consisting of house officers and clinical faculty are health care providers and required to separately qualify under the Act. The University of Nebraska questions this interpretation and contends that these staff members are not covered by the Act. The Nebraska Hospital Medical Liability Act, briefly described, is a statutory plan to establish a process for assessing risk and insuring for medical malpractice claims against health care providers. Physicians, as defined in the Act, are required to qualify as health care providers by filing proof of financial responsibility for specified dollar liability amounts and pay surcharges levied for the Excess Liability Fund.

L. Jay Bartel
J. Kirk Brown
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

House Officers are residents, graduates of accredited medical schools, employed by the University of Nebraska Medical Center. A portion of the medical staff classified as house officers hold temporary educational permits. Other house officers are holders of licenses to practice medicine and surgery. Clinical faculty are medical staff employed by the Medical Center and they serve in various medical and health care capacities. Clinical faculty staff are physicians and are holders of licenses to practice medicine and surgery. Both classes of medical staff (house officers and clinical faculty) are engaged in the practice of medicine and surgery.

After review of the relevant statutes and materials accompanying your request letter, it is our opinion that house officers and clinical staff are required to separately qualify as health care providers under the Act. It is clear that the Act contemplates that physicians who are actually engaged in the practice of medicine and surgery shall qualify as health care providers for entitlement to benefits provided under the Act.

The term, physician, is defined in Neb.Rev.Stat. §44-2804 (Reissue 1988) of the Act and in part, states that "Physician shall mean a person with an unlimited license to practice medicine in this state pursuant to sections 71-102 to 71-1,107.14 . . ." The sections referenced are statutes providing for the licensing of physicians by the Nebraska Department of Health. An issue that has been raised is whether medical staff (house officers) holding temporary educational permits are persons with an unlimited license to practice medicine.

Under the licensing statutes, there are various licenses or permits which may be issued. Temporary educational permits are described in Neb.Rev.Stat. §71-1,107.03 (Reissue 1990) which provides that the holder of the permit is entitled to practice medicine and surgery and any of its allied specialties, including prescribing medicine and narcotics, while serving in a supervised educational program or in an approved graduate medical education program. It is our view that house officers are, in fact, persons with an unlimited license to practice medicine for purposes of the Act. The permits, which include certain restrictions, do not limit or circumscribe the scope of medicine and surgery that may be performed by the permit holder. The permit holders are medical doctors and the fact that they hold a temporary educational permit does not essentially change the nature or type of medical services which may be practiced by the permit holder. Further, Neb.Rev.Stat. § 71-1,107.05 (Reissue 1990) provides that the holder of a temporary educational permit is subject to all the rules and

regulations prescribed for physicians regularly licensed in the State of Nebraska.

The second category of medical staff are those serving as clinical faculty. These medical staff members are clearly physicians as defined in the Act and are required to separately qualify as health care providers. The issue has been raised that clinical faculty need not separately qualify as health care providers since they are employees of a state agency, the Board of Regents of the University of Nebraska. The rationale for this position is that negligence or tort claims against state agencies and their employees are required to be brought under the State Tort Claims Act, Neb.Rev.Stat. §81-8,209 et seq. Neb.Rev.Stat. §81-8,229 (Cum. Supp. 1990) of the State Tort Claims Act provides that the remedies of the State Tort Claims Act "for tort claims and suits against the state and employees of the state shall be exclusive."

The better position is that the legislative acts should be read together and the provisions are not in conflict if medical staff are included as health care providers. It is a cardinal principle that statutes pertaining to the same subject matter should be construed together as if they were law and effect given to every provision. State ex rel. Meyer v. County of Banner, 196 Neb. 565, 244 N.W.2d 179 (1976).

Neb.Rev.Stat. §44-2821(2) (Reissue 1988) provides that a patient's remedies under the Act are exclusive unless the patient "shall have elected not to come under the provisions of the act." In construing the remedy provisions of both acts, it is reasonable to conclude that if a patient elected not to proceed under the Nebraska Hospital-Medical Liability Act, the patient-claimant's remedy would be limited to that provided by the State Tort Claims Act. This construction gives effect to both remedy provisions of the acts. Accordingly, we conclude that the medical staff of the University Medical Center are not excluded from qualification under the Nebraska Hospital-Medical Liability Act by virtue of the provisions of the State Tort Claims Act.

Our conclusion, in part, is based on the position and interpretation maintained by the Department of Insurance. The Director of Insurance is the administrator of the Excess Liability Fund created by the Act and the Department is charged with the duty and application or implementation of the qualification requirements in Neb.Rev.Stat. §44-2824 (Cum. Supp. 1990). Generally, great weight is given to administrative interpretation by the agency or officer charged with implementation of the statute. The practical construction of a statute by officers or administrative bodies

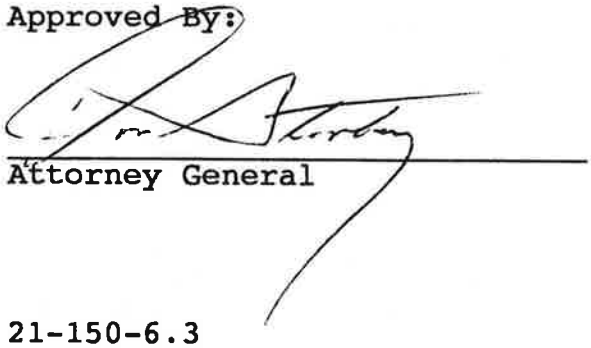
charged by law with its enforcement is entitled to considerable weight in interpreting that law. Belitz v. City of Omaha, 172 Neb. 36, 108 N.W.2d 421 (1961); Vulcraft v. Karnes, 229 Neb. 676, 428 N.W.2d 505 (1988).

In summary, we conclude that the position of the Department of Insurance is a reasonable construction of the relevant statutes. Accordingly, the professional staff in question are required to separately qualify as health care providers for application of the provisions of the Nebraska Hospital-Medical Liability Act.

Sincerely yours,
DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:



Attorney General

21-150-6.3