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STATE OF NEBRASKA
OFFICIAL
DEC 19 1991
DEPT. OF JUSTICE

DATE: December 19, 1991

SUBJECT: Grievance procedures for Correctional Services employees under collective bargaining contracts.

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

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Various employees of the Nebraska Department of Correctional Services are covered by the provisions of labor contracts negotiated through collective bargaining procedures between the State and the Nebraska Association of Correctional Employees/American Federation of State, County, and Municipal Employees (NACE/AFSCME). Those labor contracts contain provisions detailing the duration of the particular contract, and provisions establishing grievance procedures for covered State employees.

Two such labor contracts are at issue in your opinion request. One contract, by its terms, was effective and in force from July 1, 1989, through June 30, 1991. The other contract is the current contract effective and in force, again by its own terms, from July 1, 1991, to June 30, 1993. The two contracts contain grievance procedures which differ in several ways with respect to how employee grievances are heard and processed.

In light of these two contracts and their differing grievance provisions, you have now asked which grievance procedure should be followed for a grievance filed under the old contract prior to June 30, 1991, when the hearing on that grievance is scheduled after

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July 1, 1991, the effective date of the new contract. We believe the old grievance procedures should be followed for grievances filed under the old contract regardless of when the hearing on the grievance is conducted.

We have been able to find little law which specifically deals with the issue you presented. However, questions with respect to the duration and termination of collective bargaining agreements are generally subject to the same rules of construction as other contracts. 51 C.J.S. Labor Relations, § 257. In that regard, while a contract ceases to exist upon expiration of the contractual agreement, and its provisions ordinarily have no force and effect in the future, rights and obligations which have accrued under the contract are not affected by its expiration. 17A C.J.S. Contracts, § 385(1). It seems to us that an individual who filed a grievance under the old contract exercised accrued rights including the right to particular grievance procedures. Those accrued rights would not be affected by the expiration of the old contract and the implementation of the new.

It also seems to us that the grievance process here is somewhat analogous to arbitration procedures generally. Indeed, arbitration is discussed as a potential method for resolving employee grievances under both labor contracts at issue. With respect to arbitration, grievances which arise during the term of a collective bargaining agreement but are not raised until after the collective bargaining agreement expires may generally be arbitrated. Golder, Labor and Employment Law, Compliance and Litigation (1986). The United States Supreme Court has also indicated that termination of a collective bargaining agreement does not extinguish a party's duty to arbitrate grievances which arose during the life of the labor contract but for which the arbitration process was not completed at the time of contract expiration. Nolde Brothers Inc. v. Local No. 358 Bakery and Confectionery Workers Union AFL-CIO, 430 U.S. 243 (1977). Much as arbitration rights carry over after the expiration of a labor contract, we believe that rights to a particular grievance procedure carry over in the situation which you described.

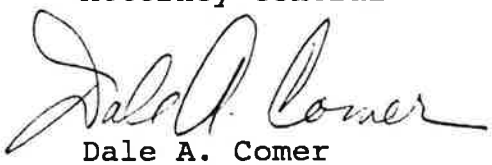
We understand that there is some law which suggests that a lawsuit is generally governed by a change in procedural rules made during its pendency. 1A C.J.S. Actions, § 229. However, we are not convinced that the differing grievance procedures set out in the two labor contracts here merely involve procedural processes rather than substantive provisions. In any event, for the reasons outlined above, we believe that the procedure which must be followed for grievances which arise out of the old contract is the procedure set out in that contract.

We also understand that the employee involved in the specific case which precipitated your opinion request was given a hearing under the old grievance procedures sometime subsequent to July 1, 1991. Since that individual has now had a hearing, no further hearing under the new grievance procedures in that specific case would be appropriate even if we had come to a different conclusion with respect to the issue discussed above. Neither collective bargaining contract at issue contemplates that an individual grievant will receive two hearings on a particular grievance.

Finally, we would note that the issue raised in your opinion request could be resolved by the parties in the future through a specific provision in the collective bargaining agreement itself. In other words, the parties could include provisions in any future labor contract which specifically set out the grievance process applicable to grievances which arise before expiration of the contract but which are not heard or considered until after its termination. In that way, any uncertainty in this area could be avoided.

Sincerely,

DON STENBERG
Attorney General



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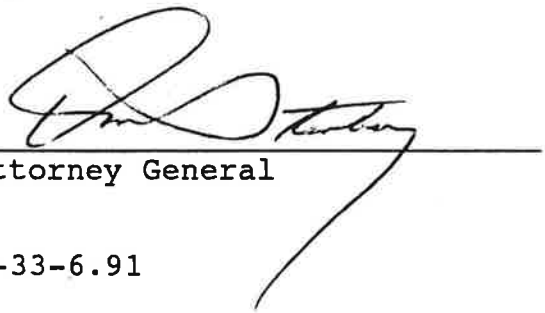

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