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#95088

NO.
STATE OF NEBRASKA
OFFICIAL
NOV 21 1995
DEPT. OF JUSTICE

DATE: November 15, 1995

SUBJECT: Whether the Nebraska Minimum Jail Standards Require State Inspectors to Inspect Local Juvenile Detention Facilities for Compliance with Federal Law

REQUESTED BY: Allen Curtis, Director
Nebraska Commission on Law Enforcement and Criminal Justice

WRITTEN BY: Don Stenberg, Attorney General
Timothy J. Texel, Assistant Attorney General

You have requested the opinion of this office regarding an interpretation of Nebraska's Minimum Jail Standards. You asked if it is our opinion that the Jail Standards Division is responsible for inspecting local juvenile detention facilities to determine whether they comply with federal laws governing such facilities, or whether the language "applicable statutes" which appears in the section of the regulation set out below refers solely to state statutes? In particular, you inquired whether Nebraska's Minimum Jail Standards, as set out in Title 81 NAC 5, para. 003.01B, requires the Jail Standards inspectors to conduct inspections for compliance with federal law. That provision of the Board's regulations states:

> 003.01B Persons under the age of fourteen (14) years should not be admitted to any jail facility except upon order of a judge; inmates under the age of sixteen (16) shall be housed separately from and out of sight of

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> inmates the age of (16) or over; **and the jail facility shall comply with the applicable statutes regarding the housing of juveniles in need of supervision or delinquents.**

81 NAC 5, para. 003.01B (emphasis added). You specifically referred to the highlighted portion of the above regulation in your opinion.

We discussed the issues involved with both you and Brad Alexander, the Chief of the Jail Standards Division. Both of you informed our office that it was your understanding the Jail Standards Board, when promulgating the rules and regulations at issue, did not intend to create a duty for Jail Standards Division inspectors to inspect juvenile detention facilities for compliance with federal requirements. Both of you also informed us that the Jail Standards Board and the Jail Standards Division, in interpreting their own regulations, do not believe the language in 81 NAC 5, para. 003.01B requires inspections for federal compliance.

Case law indicates an agency's interpretation of its own rules and regulations will generally be considered controlling, so long as the interpretation is a reasonable reading of the regulation, and the agency is not acting arbitrarily, capriciously, or outside its statutorily created authority. The Nebraska Supreme Court has repeatedly held that "deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent." ***In re Application of Jantzen***, 245 Neb. 81, 84, 511 N.W.2d 504, 509 (1994) (citations omitted). ***See also Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue***, 248 Neb. 518, ___ N.W.2d ___ (1995); ***Slack Nursing Home v. Department of Social Servs.***, 247 Neb. 452, ___ N.W.2d ___ (1995); ***Department of Health v. Lutheran Hosp. & Homes Soc.***, 227 Neb. 116, 416 N.W.2d 222 (1987); ***Department of Banking, Receiver v. Wilken***, 217 Neb. 796, 352 N.W.2d 145 (1984). In a similar vein, the Nebraska Supreme Court has also stated that when dealing with matters within an agency's particular area of expertise, and in matters that involve a breadth of judgment and policy determination, an agency's decision will not be disturbed without a showing that the agency acted arbitrarily or capriciously. ***Jantzen*** at 100, 511 N.W.2d at 517.

We believe that the Jail Standards Division's interpretation of its regulations is reasonable. We see no evidence that the Division's interpretation is arbitrary or capricious in reading that 81 NAC 5, para. 003.01B does not require state officials to inspect juvenile detention facilities for compliance with federal requirements. In fact, a reading of other pertinent regulations and statutes appear to support the Jail Standards Division's interpretation.

In those sections dealing with inspections, the Jail Standards Board's regulations consistently refer to the need for Nebraska jail facilities to comply with the Board's Standards. No federal requirements are mentioned in those sections of the regulations. Neither are there provisions authorizing inspections for federal requirements. The provision which provides the authority under which juvenile detention facility inspections are conducted, states:

> 002 Inspection Provision. Personnel of the Jail Standards Division of the Nebraska Commission on Law Enforcement and Criminal Justice shall have the authority to visit and inspect all juvenile detention facilities to assess such facilities' compliance with **these Standards.**

83 NAC 1, para. 002 (emphasis added).

In other similar provisions, the Jail Standards Board's standards are specifically referred to, while there is no such mention of federal requirements or inspections. *See* 83 NAC 1, paras. 002.02, 003, and 004, and 81 NAC 1, para. 003. We believe the language in the regulations specifically providing for inspections to ensure compliance with the Board's requirements, while there is an absence of such language regarding federal requirements, supports the interpretation that the Jail Standards Board did not intend to create an obligation on the Jail Standards Division's inspectors to check Nebraska jail facilities for federal compliance. If the Board had intended to create such a duty, it is reasonable to expect that the Board would have explicitly set out such a duty. The regulations providing for Jail Standards Division personnel to conduct inspections for compliance with the Board's established standards do not appear to be ambiguous.

We also note that a review of the statutes dealing with Criminal Detention Minimum Standards, Neb. Rev. Stat. §§ 83-4,124 to 83-4,134, which create the Jail Standards Board, did not disclose a requirement that state Jail Standards Division personnel review facilities for compliance with federal law. To the contrary, the statutes authorize only inspections for compliance with state standards, as set by the Jail Standards Board. Nebraska Rev. Stat. § 83-4,131 (1994), in pertinent part, states:

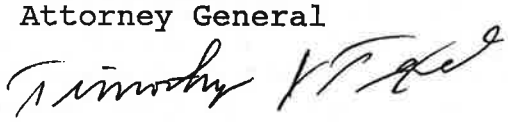
> Personnel of the Nebraska Commission on Law Enforcement and Criminal Justice shall visit and inspect each criminal detention facility and juvenile detention facility in the state for the purpose of determining the conditions of confinement, the treatment of persons confined in the facilities, and whether such facilities comply with the minimum standards established by the Jail Standards Board.

The Jail Standards Division informed us that it does receive grants from the federal government pursuant to the Juvenile Justice and Delinquency Prevention Act (the Act), 42 U.S.C. §§ 5601 to 5785. One condition attached to these funds is that the jail facilities involved must comply with the requirements in the Act. However, our research did not find any requirement within the Act which requires states to perform inspections. The Jail Standards Division personnel confirmed that the Act contains no such requirements. Neither is it a requirement under the terms of the federal grants that the Jail Standards Division conduct inspections to determine compliance with the Act. Therefore, there is no separate federal requirement that the Jail Standards Board promulgate rules and regulations to provide for state-conducted inspections, nor is there a federal requirement that the Jail Standards Division conduct inspections. The fact that Nebraska facilities must comply with federal standards, in and of itself, would not create a duty for the state to conduct inspections to ensure conformity with federal law.

Although the regulations promulgated by the Jail Standards Board and the Nebraska statutes pertaining to minimum jail standards do not prohibit Nebraska Jail Standards Division personnel from inspecting Nebraska juvenile detention facilities for compliance with federal requirements, neither do they impose a duty to do so. In the absence of specific statutory or regulatory authorization or requirements, and in light of the interpretation of the applicable regulations adopted by the Jail Standards Board and the Jail Standards Division, we believe that the Jail Standards Division is not responsible for inspecting local juvenile detention facilities to determine conformity with federal laws.

Sincerely,

DON STENBERG
Attorney General



Timothy J. Texel
Assistant Attorney General

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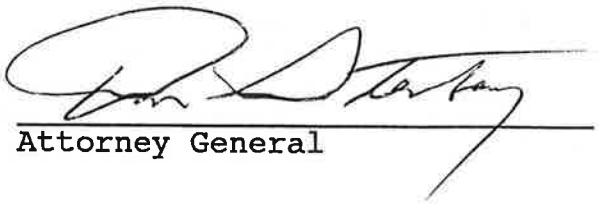

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