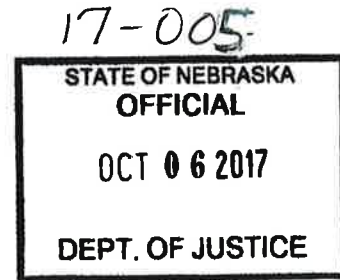




STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: The authority and role of the Chairperson of the Nebraska Board of Parole, whether the members of the Board of Parole are entitled to sick and vacation leave, and whether the Board of Parole is a code or noncode agency.

REQUESTED BY: Board of Parole Vice Chair Rex Richard and members Randall Rehmeier and Virgil Patlan, Sr.

WRITTEN BY: Douglas J. Peterson, Attorney General
Natalee J. Hart, Assistant Attorney General

INTRODUCTION

You have requested our opinion on several questions relating to the authority and responsibilities of the Nebraska Board of Parole (sometimes hereinafter "Board") and its Chairperson, whether members of the Board of Parole are entitled to sick and vacation leave benefits, and whether the Board of Parole is considered a code or noncode agency of the State of Nebraska. The Board of Parole consists of five members and a majority of those members have requested this opinion. After your questions were posed to this office, we received a response to your request from the Chairperson of the Board, Ms. Rosalyn Cotton, who provided additional information and also asked this office to issue an opinion pursuant to your request.

Specifically, you have posed the following questions:

- (1) Is the Chairperson of the Board, or the Board itself, considered the head of the agency as that phrase is found in various statutory schemes?

- (2) Are the overall responsibilities for the administration of the Board of Parole a Board function or the sole responsibility of the Chairperson, e.g., approving the Board budget, personnel decisions, etc.?
- (3) What is the role of the Chairperson in “supervising” the “administration and operation” of the board? See Neb. Rev. Stat. § 83-192(2)(a).
- (4) Under Neb. Rev Stat. § 81-1316(1)(s), which provides that agency heads are exempted from the State Personnel System, and Neb. Rev. Stat. § 81-1328(4), which provides that an agency head that is a board or commission is not included in the definition of “state employee,” does the vacation time accrual schedule and earned vacation and sick leave benefits set forth in Neb. Rev. Stat. §§ 81-1328 and 81-1320 apply to the Board of Parole members? And
- (5) What are the defining characteristics of a “code” versus “noncode” agency and, as a corollary, in which of the two categories does the Board of Parole more properly belong?

ANALYSIS

The “head” of the Board of Parole and the responsibilities and duties of the Board of Parole and its Chairperson

The Nebraska Board of Parole was created as an independent state agency through an amendment to the Nebraska Constitution passed in 1968. In pertinent part, that amendment states:

The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment.

Neb. Const. art. IV, § 13. The Nebraska Legislature has adopted statutes related to the creation and administration of the Board of Parole, which are found in Neb. Rev. Stat. §§ 83-188 through 83-199 (2014, Cum. Supp. 2016). The Board consists of five full-time members, appointed by the governor, whose salary is fixed by the governor. Neb. Rev. Stat. §§ 83-189, 83-191 (2014). One of the Board members is designated as the Chairperson of the Board by the governor. Neb. Rev. Stat. § 83-189 (2014). The Chairperson is not only a member of the Board, but also is to “supervise the administration and operation of the board” and is tasked with additional duties as found

in Neb. Rev. Stat. § 83-192(2) (2014). *Id.* This has led to your questions regarding the division of labor between the Board of Parole and the Chairperson of the Board and what duties are appropriately carried out by the Chairperson.

The duties of the Board are defined in Neb. Rev. Stat. § 83-192 (2014) and primarily concern determinations relating to the parole of a committed offender and the conditions thereof. Neb. Rev. Stat. § 83-192(1)(a) through (1)(f), (1)(h). The sole duty relating to the administration of the Board of Parole in Neb. Rev. Stat. § 83-192(1)(g) states that the Board of Parole shall “[a]ppoint and remove all employees of the board as prescribed by the State Personnel System and delegate appropriate powers and duties to them.”

The duties of the Chairperson of the Board of Parole, in addition to his or her responsibilities as a member of the Board, are defined as follows:

- (2) The chairperson of the board shall:
 - (a) Supervise the administration and operation of the board;
 - (b) Serve in an advisory capacity to the director in administering parole services within any facility and in the community;
 - (c) Interpret the parole program to the public with a view toward developing a broad base of public support;
 - (d) Conduct research for the purpose of evaluating and improving the effectiveness of the parole system;
 - (e) Recommend parole legislation to the Governor;
 - (f) Adopt and promulgate rules and regulations for the administration and operation of the board; and
 - (g) Exercise all other powers and perform all other duties necessary and proper in carrying out his or her responsibilities as chairperson.

Neb. Rev. Stat. § 83-192(2).

These statutes apply specifically to the Board of Parole. You have also asked us to consider the effect of Neb. Rev. Stat. § 81-1311 (2014) on the duties of the Board of Parole. This is a statute of general applicability as to state agencies which provides authority for “agency heads and other management personnel so designated by the agency head,” as follows:

- (1) Decisions concerning the mission of the agency;
- (2) Decisions on how to maintain and improve the efficiency and effectiveness of government operations;
- (3) Decisions on services to be rendered, operations to be performed, technology to be utilized, or matters to be budgeted;
- (4) Decisions concerning the overall methods, processes, means, or personnel by which operations are to be conducted;

- (5) Decisions concerning the processes and acts of hiring, directing, or supervising employees;
- (6) Determining the performance evaluation rating of individual employees on at least an annual basis;
- (7) Employee salary administration decisions;
- (8) Assuring that position titles and job descriptions are accurate;
- (9) Decisions concerning employee job assignments, employee work schedules, promotions of employees, transfers of employees, and discipline of employees including terminations;
- (10) Decisions to reimburse the best qualified job applicants for travel, meals, and lodging expenses incurred in traveling to and from the prospective job site, except that no more than three applicants for any position may be reimbursed under this subdivision;
- (11) Decisions to relieve employees from duties because of lack of work or funds or under conditions when the employer determines continued work would be inefficient or nonproductive including the contracting out for goods and services;
- (12) Decisions concerning development and maintenance of any personnel records necessary for the operation of the agency;
- (13) Decisions to confer with any or all of its employees in the process of developing policies; and
- (14) Decisions to take any other action not otherwise specified in this section.

The term "agency head" is not defined in this statute. This leads us to the first three questions you have posed regarding the Board of Parole.

Your first question is whether the Chairperson of the Board, or the Board itself, is considered the head of the agency. In an independent state agency which is led by a board or commission, the head of the agency is that board or commission.¹ In this case, the head of the agency is the five-member Board of Parole.

Your next questions are whether the overall responsibility for the administration of the Board of Parole is a Board function or the sole responsibility of the Chairperson, e.g., approving the agency budget, personnel decisions, etc.; and what the scope of the duties and responsibilities of the Chairperson are, in addition to his or her duties as a member of the Board. As these two questions are interdependent, we will answer them together.

¹ This conclusion applies only to those independent state agencies ("noncode" as defined herein, *infra*) led by boards or commissions, not agencies under the direct control of the Governor ("code" agencies, as defined herein, *infra*) which may have a board or commission in addition to a director appointed by the Governor, e.g., the Nebraska Department of Environmental Quality or the Department of Natural Resources.

We are guided in the examination of these two questions by certain principles of statutory construction. The language in statutes should be given its plain and ordinary meaning. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Governors of Knights of Ak-Sar-Ben v. Department of Revenue*, 217 Neb. 518, 349 N.W.2d 385 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). A court will not read meaning into a statute that is not warranted by the legislative language, and it will not read anything plain, direct, and unambiguous out of a statute. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980). Effect must be given to every word of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984). Different provisions of a statute must be reconciled to make them logical, harmonious, and sensible. *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952). In determining legislative intent, it is necessary to examine the statute as a whole, in light of its objects and purposes. See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). It is an established rule of statutory construction that specific statutory provisions relating to a particular subject control over general provisions, when those provisions are in conflict. *In re Interest of Murray*, 235 Neb. 430, 455 N.W.2d 185 (1990). See also *Kibbon v. School District of Omaha*, 196 Neb. 293, 242 N.W.2d 634 (1976); *Communication Workers of America, AFL-CIO v. City of Hastings*, 198 Neb. 668, 254 N.W.2d 695 (1977).

Section 83-192 defines both the roles of the Board of Parole and the Chairperson. The Board is given responsibilities concerning decisions related to offender parole and decisions regarding the hiring and firing of Board staff and the assignment of staff duties. Neb. Rev. Stat. § 83-192(1). The Chairperson is tasked with the supervision of the operation and administration of the agency, along with a number of duties, such as advising the Director of Correctional Services in administering parole services, recommending legislation to the governor, and performing "all other duties necessary and proper in carrying out his or her responsibilities as chairperson." Neb. Rev. Stat. § 83-192(2).

We understand that the current practice of the agency is that the Board, in its entirety, performs only those duties specifically laid out in § 83-192(1) relating to offender parole decisions and agency personnel decisions. The Chairperson has been responsible for all other agency operations. The current Chairperson states that the "Chair has historically been the final authority of all operations of the agency,"² and it appears that the practice of the Board has been for the Chairperson to undertake these responsibilities for at least the last 13 years.

² Letter from Chairperson in response to request for opinion.

Your questions regarding the division of labor between the Board and the Chairperson would suggest that you believe that the current practice conflicts with the language of the Board's statutes. The answer to these questions, however, is not entirely clear. We understand how the provisions of Neb. Rev. Stat. § 83-192(1) and (2) could be interpreted in differing ways, creating differing opinions as to the responsibilities of the Board and the Chairperson. This is compounded by the fact that the Board is unique in its construct and its statutory designation of a Chairperson and the duties assigned to that Chairperson. The role of the Chairperson in "supervising" the "administration and operation" of the agency, as those functions are found in § 83-192(2)(a), is unique to the Board of Parole. Other independent state agencies have been granted the statutory authority to hire an executive director who reports to the board or commission and who carries out the duties prescribed by the board or commission.³ The Board of Parole has not been given such authority. See Neb. Rev. Stat. § 83-188 (Cum. Supp. 2016). Instead, the Chairperson has been statutorily tasked with the responsibilities of supervising the administration and operation of the agency.

In 1994 Neb. Laws LB 677, the Legislature created the position of Board Chairperson and assigned specific duties to that position. At that time, the duties now found in § 83-192(2)(b) through (2)(f) were transferred from the Board as a whole to the Chairperson, with the duties found in § 83-192(2)(a)⁴ and (2)(g),⁵ which are the duties primarily at issue in your questions, newly created and assigned to the Chairperson. In this way, the Legislature chose to set the Chairperson apart from the remainder of the Board. In construing § 83-192, we must give effect to each word the Legislature chose to use in defining the role of the Chairperson. The Chairperson's duties are to "supervise" ("to oversee during execution or performance" or to "have the oversight and direction of")⁶ the "administration" ("the management of any office, business, or organization")⁷ and "operation" ("a course of procedure of productive or industrial activity")⁸ of the agency. The Chairperson is also to "[e]xercise all other powers and perform all other duties necessary and proper in carrying out his or her responsibilities as chairperson." Neb. Rev. Stat. § 83-192(2)(a), (2)(g). Since 1994, the Chairperson has been responsible for most agency operations. In reading the entirety of § 83-192(1) and (2) together, we believe that the current practice of the Chairperson having broad authority over the day-to-day operations of the agency appears consistent with the separate grants of authority to the Board and to the Chairperson as found in § 83-192, and the definitions of "supervise," "administration," and "operation" of the agency.

³ See, e.g., §§ 37-106 (Game and Parks Commission); 49-14,121 (Accountability and Disclosure Commission); 51-403 (Library Commission); 76-2224 (Real Property Appraiser Board); 79-301 (Department of Education); 82-101.02(3) (Historical Society).

⁴ "Supervise the administration and operation of the board."

⁵ "Exercise all other powers and perform all other duties necessary and proper in carrying out his or her responsibilities as chairperson."

⁶ *Dictionary.com Unabridged Random House Dictionary*, 2017.

⁷ *Id.*

⁸ *Id.*

If the Legislature had not intended for this to be the case, it could have taken action to rectify the Board's interpretation. By not acting to change how § 83-192 has been interpreted and acted upon by the agency since the passage of 1994 Neb. Laws LB 677, the Legislature has, at least implicitly, approved that the day-to-day operations of the Board of Parole should be vested in the Chairperson. An administrative agency's interpretation or construction of statutes it is responsible for enforcing is not controlling but will be given considerable weight by a court, particularly when the Legislature fails to change or correct the agency's interpretation. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 529, 537 N.W.2d 312, 319 (1995); *McCaul v. American Savings Co.*, 213 Neb. 841, 846, 331 N.W.2d 795, 798 (1983); see also *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

You have also asked us to consider the effect of § 81-1311 on the Board's operations. Reading § 81-1311 with § 83-192 creates a potential conflict, as many of the duties found in § 81-1311 have been specifically addressed as to the Board of Parole in § 83-192. Because there is a specific statute which applies to the operations of the agency, as found in § 83-192, the provisions of this specific statute control over the general; as to the Board of Parole, § 81-1311 does not apply.

In conclusion, we think the better answer to your questions is that, while the Board as a whole is the "head" of the agency, it has been treated differently by the Legislature than other heads of agencies through the delegation of specific powers of the Chairperson. The Board has full authority over decisions related to offender parole and all agency decisions relating to the hiring and firing of employees. However, the Chairperson has full administrative oversight over the agency and its employees. The Chairperson has been granted certain statutory duties, the execution of which he or she is authorized to carry out without consulting the Board. See Neb. Rev. Stat. § 83-192(2)(a) through (2)(g). We would advise the Board that if it desires certainty as to the duties of the Board and of the Chairperson, it may seek clarification from the Legislature.

Whether the members of the Board of Parole are entitled to sick and vacation leave

Your next question is whether the members of the Board of Parole are entitled to accrue sick leave and vacation time under Neb. Rev. Stat. §§ 81-1320 and 81-1328. We do not believe they are so entitled, for the following reasons. Provisions regarding the accrual of sick and vacation leave are found in Neb. Rev. Stat. §§ 81-1320 and 81-1328. Neb. Rev. Stat. § 81-1320 provides that "[p]ermanent employees of the State of Nebraska shall be entitled to sick leave." Neb. Rev. Stat. § 81-1321 defines "state employee" for purposes of this statute as "any person or officer employed by the state including the head of any department or agency, *except when such head is a board or commission*, and who works a full-time or part-time schedule on an ongoing basis." (emphasis added). Similarly, "[s]tate employees shall, during each year of continuous employment, be entitled to . . . vacation leave with full pay" with the definition of state

employee duplicating that found in § 81-1321, specifically excluding members of a board or commission from the definition of employee. Neb. Rev. Stat. § 81-1328(1), (4).

The language in statutes should be given its plain and ordinary meaning. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). From the plain language in the statutes defining who in the employ of the State of Nebraska earns sick and vacation leave, we conclude that the members of the Nebraska Board of Parole are not entitled to accrue either type of leave, as they are specifically excluded from the definition of “state employee.”

We have previously addressed whether members of the Board of Parole were entitled to a payout of accumulated sick leave upon retirement, concluding they were not. In Op. Att’y. Gen. No. 99047 (November 15, 1999), we stated that “members of boards and commissions are not subject to the provisions of Neb. Rev. Stat. §§ 81-1320 through 81-1326” and that a member of a state board or commission is not entitled to “retire’ from state employment and receive a payout of unused sick leave benefits.” We now extend that conclusion to the accrual of vacation leave and conclude that members of board or commissions, including the Nebraska Board of Parole, are not entitled to accrue sick or vacation time and are not entitled to a payout of unused vacation or sick time upon the conclusion of their time on the board or commission.

Whether the Board of Parole is a code or noncode agency

Your final question, whether the Board is a “code” or “noncode” agency of the State, is not of a legal nature. The terms “code” and “noncode” as they apply to agencies of the State of Nebraska are not found in statute. It is a manner in which agencies are classified based on whether such agencies are subject to direct control by the governor. The definitions of code and noncode, along with a listing of all state agencies in each category, can be found in The Nebraska Blue Book published by the Nebraska Legislature each year. The most recent version of the Blue Book is found at: http://uniweb.legislature.ne.gov/pdf/bluebook/bluebook_2016.pdf. Per that publication:

Code agencies are state government departments and agencies subject to the governor’s direct control. The directors of these agencies serve at the pleasure of the governor and are directly accountable to him or her. These entities are full-fledged agencies, meaning they have their own staff, are affiliated with no other agency and appear as distinct items within the state budget. . . . Appointees to boards, commissions, councils, committees and other state governmental bodies serve until they resign or are replaced after their terms expire.

The Nebraska Blue Book, 2016-2017 ed., p. 439. Code agencies include such state agencies as the Department of Administrative Services, the Department of Banking and Finance, the Department of Correctional Services, the Department of Health and

Human Services, and the Department of Transportation, among a number of other state agencies. *Id.*, pp. 439-582; *See also* Neb. Rev. Stat. § 81-101 (2014, amended by 2017 Neb. Laws LB 339, § 272).

In contrast,

[n]oncode agencies are state government agencies not subject to the governor's direct control. All are full-fledged agencies, meaning they have their own staff, are affiliated with no other agency and appear as a distinct item in the state budget. . . . Appointees to boards, commissions, councils, committees and other state governmental bodies serve until they resign or are replaced after their terms expire.

Id. at 584. There are a large number of noncode agencies in Nebraska state government, one of which is the Board of Parole. *Id.* at 678.

The answer to your final question is that the Board of Parole is a noncode agency. While the Board of Parole consists of members appointed by the governor, it is an independent agency which is not subject to the direct control of the governor.

CONCLUSION

For the reasons set forth herein, we conclude that the five-member Board of Parole is the head of the agency, that the Board is responsible for those duties as found in § 83-192(1), and that the Chairperson has broad authority over the day-to-day operations of the agency not specifically assigned to the Board in § 83-192(1). We also conclude that the members of the Board are not entitled to sick or vacation leave. Additionally, the Board of Parole is a noncode state agency.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

Approved:



Attorney General