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15-014
NO.
STATE OF NEBRASKA
OFFICIAL
OCT 20 2015
DEPT. OF JUSTICE

SUBJECT: Authority of the Department of Correctional Services to Adopt Administrative Regulations Without Complying With Rulemaking Procedures Required Under the Administrative Procedure Act

REQUESTED BY: Senator Dan Watermeier
Senator Heath Mello
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

As members of the Legislative Performance Audit Committee you requested an Attorney General's Opinion regarding the interpretation of Neb. Rev. Stat. § 84-901 of the Administrative Procedure Act and its application to the Department of Correctional Services ("DCS"). You informed us that the Research Office or Performance Audit Committee planned to conduct "an assessment to determine whether any of the Department of Correctional Services Administrative Regulations were promulgated in violation of the Administrative Procedure Act." In that context, you requested our opinion on this question.[1]

[1] As a preliminary matter, the memorandum attached to your request letter states that Attorney General Bruning previously referred to a 1991 Attorney General opinion, which may pertain to this question. We were unable to find a formal opinion on this subject. We note that Op. Att'y Gen. No. 91001 (January 3, 1991) discusses the statutory authority for a work furlough program, but does not address the question of promulgating rules or regulations.

It has been our general practice to issue opinions to members of the Legislature only with respect to pending or proposed legislation and not with respect to construction of existing statutes. Op. Att'y Gen. No. 157 (December 24, 1985). Also, it is our understanding that there are 225 DCS "Administrative Regulations", or ARs, such that a detailed review of each would not be practical. Further, we might be called upon to defend particular ARs if their validity was challenged in litigation. Therefore, based upon our longstanding policy and these considerations, we originally deemed it inappropriate to issue an opinion. We have now received the Committee's audit report which was released on September 3, 2015. One focus of this report is the exception for "internal management" rules and regulations found in the definition of "rule or regulation" at Neb. Rev. Stat. § 84-901(2), and it appears from the report that legislation may be proposed to modify or further define this exception. In this context, we will issue an opinion, limiting our response to a general discussion of § 84-901(2) and the Nebraska case law on this topic.

Our review reveals that DCS has issued numerous ARs to govern the agency and set forth general standards. In addition, each correctional institution has issued operational memoranda (OMs) designed to implement DCS policies. DCS also promulgates rules and regulations through the process outlined in the Administrative Procedure Act when directed to do so by statute. To the extent the ARs and OMs concern the internal management of the agency or otherwise fall within the exceptions listed in Neb. Rev. Stat. § 84-901(2), DCS need not comply with the formal rulemaking requirements of the Administrative Procedure Act.

You originally requested our opinion whether any of the ARs issued by DCS were promulgated in violation of the Administrative Procedure Act and directed our attention, in particular, to the "Temporary Alternative Placement" program and the "Re-entry Furlough Program." The Committee's audit report states that the "Temporary Alternative Placement" (TAP) program was developed through a memo by the former DCS Director and was not an AR. Audit Report at 10. Further, the DCS response, dated July 30, 2015, which is attached to the audit report, states that this program was eliminated in October of 2014. We will, therefore, not address the TAP program. With regard to the Re-entry Furlough Program, it appears to have been created in 2008 as AR number 201.12. You state that the program was suspended by the current DCS director on February 9, 2015. Audit Report at 9. The attached DCS response states that no new individuals have since entered the program and that there are five individuals who remain in the program as of July 27, 2015. Our discussion of the "internal management" exception may be relevant to the Re-Entry Furlough Program.

Discussion of § 84-901(2) and Nebraska Case Law

Neb. Rev. Stat. § 84-901(2) (2014) provides, in pertinent part, that a "[R]ule or regulation shall mean any rule, regulation, or standard issued by an agency, . . . designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure. Rule or regulation shall not include (a) rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . every rule and

regulation which prescribes a penalty shall be presumed to have general applicability or to affect private rights and interests." If a rule or regulation fits within this statutory definition it must be promulgated pursuant to the rulemaking requirements of the Administrative Procedure Act, including the provision of notice and the holding of a public hearing. See e.g., Neb. Rev. Stat. § 84-907. Agency regulations properly adopted and filed with the Secretary of State then have the effect of statutory law. *Swift and Co. v. Nebraska Dept. of Revenue*, 278 Neb. 763, 767, 773 N.W.2d 3831, 385 (2009).

One of the purposes of an Administrative Procedure Act is to give the public notice of the existence of rules that could affect their rights and to allow members of the public to have input into those rules. However, as explained in a comment to the Model State Administrative Procedure Act upon which the Nebraska Act is patterned, in part, subjecting all agency statements or rules to the formal rulemaking requirements would be unnecessary and unduly burdensome. Section 3-116(1) of the 1981 version of the model act provided that the rulemaking requirements were inapplicable to a rule concerning only the internal management of an agency. "The exemptions from usual rule-making procedures and publication requirements for [certain] rules . . . represent an effort to strike a fair balance between the need for public participation in, and adequate publicity for, agency policymaking on the one hand, and the conflicting need for efficient, economical and effective government on the other hand." 1981 Model State Admin. Procedure Act § 3-116, comment, 15 U.L.A. 56. See, *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998) (recognizing this comment to the model act). The same internal management exception is found in the definition of "rule" in the Revised Model State Administrative Procedure Act of 2010.

Section 84-901(2) provides that the term "rule or regulation" includes any rule, regulation or standard designed to interpret the law. Nebraska courts have considered this portion of the statutory definition when determining whether a court had subject matter jurisdiction under Neb. Rev. Stat. § 84-911, which provides a limited waiver of sovereign immunity for the purpose of reviewing the validity of a rule or regulation. For example, the Nebraska Court of Appeals examined the issue of jurisdiction under § 84-911 in a case involving good time credit. The Court of Appeals held that the decision of the state defendants as to awarding good time credit could be reviewed by filing a declaratory judgment action pursuant to § 84-911. "When Clarke and the Department decided to determine the length of these sentences pursuant to § 83-1,107 . . . the decision was a 'standard issued by an agency . . . designed to implement, interpret, or make specific the law' administered by it." *Richardson v. Clarke*, 2 Neb. App. 575, 577-78, 512 N.W.2d 653, 655 (1994), quoting the definition of rule or regulation at § 84-901(2).

On the other hand, in a subsequent case, *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *disapproved on other grounds*, *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999), an inmate sought a determination whether DCS could revoke his good time credit based on a letter by the Nebraska Attorney General interpreting relevant statutes. The director of DCS then sent a memorandum to the DCS records administrator regarding that interpretation. In

determining whether the district court had jurisdiction under Neb. Rev. Stat. § 84-911, the Nebraska Supreme Court concluded that the director's memorandum concerning the interpretation of good time credit statutes was *not* a rule, regulation or standard as defined in § 84-901. The Supreme Court in *Perryman* found that "*Richardson* is distinguishable from the instant case because it involved the judicial interpretation of a standard, not a statute." *Perryman* at 70, 568 N.W.2d at 245.

The Nebraska Supreme Court has discussed the internal management exception of § 84-901(2) in a personnel case involving DCS in *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998). A DCS employee was charged with violating an AR, or administrative regulation, and appealed the decision in a disciplinary proceeding. While the AR at issue might be characterized as a personnel policy, and DCS asserted that it fell within the internal management exception of § 84-901, the Court disagreed. The Court found that violation of the AR could result in pecuniary punishment such as suspension without pay or demotion. Section 84-901 excludes those rules and regulations concerning the internal management of the agency and not affecting private rights and interests. However, the statute further provides that "every rule and regulation which prescribes a penalty shall be presumed to have general applicability or to affect private rights and interests." Because the AR at issue prescribed a penalty, it was presumed to affect private rights and interests and did not fit within the internal management exception.

The issue of whether an AR or OM should have been promulgated in compliance with the Administrative Procedure Act arose in two other cases filed by inmates against DCS, but the appellate courts did not directly address the issue. In *Randolph v. Dept. of Corr. Servs.*, 205 Neb. 672, 289 N.W.2d 529 (1980), DCS had issued certain OMs concerning the acquisition and disposition of hobby materials by inmates. Randolph claimed that the OM in question was invalid because the provisions of the Administrative Procedure Act had not been met. The trial court found that the OM fell within the internal management exception and need not meet the requirements of the Act. The Supreme Court, however, based its decision on a statute and did not address the validity of the OM. In *Meis v. Houston*, 19 Neb. App. 504, 808 N.W.2d 897 (2012), the Court of Appeals reviewed an AR and an OM in which DCS limited the amount of personal property that can be possessed by an inmate. While the trial court found that the property limitation was not required to be formally promulgated as it fell within the internal management exception, the Court of Appeals held that it need not address the validity of the property limitation because it did not interfere with any legally recognized rights of the inmate.

In an unpublished opinion, *Abdullah v. Gunter*, 1 Neb. C.A. 2442, 1992 WL 359093, the Court of Appeals concluded that two OMs pertaining to processing of grievances and the provision of inmate clothing need not be promulgated under the Administrative Procedure Act as they were regulations concerning the internal management of DCS.

Nebraska courts have also addressed the statutory definition of rule or regulation in cases involving other state agencies. For example, in *Capitol City Telephone, Inc. v.*

Dept. of Revenue, 264 Neb. 515, 650 N.W.2d 467 (2002), the Supreme Court held that, just as the DCS director's memorandum in *Perryman* was not a rule or regulation, a letter written by the deputy Tax Commissioner stating the department's position on the taxation of telephone companies was not a rule or regulation.

In a civil contempt case concerning the Department of Health and Human Services, the Court held that two policies which the Department was ordered to prepare and distribute to departmental employees and those of the Nebraska Families Collaborative were not rules or regulations as defined by § 84-901(2). *In Re Interest of Zachary D. and Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015) found that the policies fell within the internal management exception as the policies were intended to provide notice to employees of certain requirements of state law. "The two policies at issue here are akin to those that concern 'the internal management of the agency.' Moreover, while these policies certainly relate to statutes governing the juvenile court process, they 'are not designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure.' Rather, these policies are intended to provide notice to all departmental and NFC employees of certain requirements of state law relating to notice of changes in placement and records review and retention policies." Id. at 771, 857 N.W.2d at 330.

These Nebraska cases provide some indication as to how our courts might interpret § 84-901(2). While the answer would differ on a case by case basis, it appears that at least some of the ARs and OMs issued by DCS need not be formally promulgated in compliance with the Administrative Procedure Act. In our view, the courts have not construed the "internal management" exception so narrowly as to include only agency personnel rules. And, *McAllister*, discussed above, indicates that at least certain personnel policies or rules may need to be formally promulgated if they are found to prescribe a penalty.

With regard to the Re-Entry Furlough Program, AR 201.12, which you mentioned in your request letter, the cases discussed above provide little guidance. Our review of AR 201.12 reveals that portions of the AR may fall within the internal management exception to the extent they describe the program, set up responsibilities for various categories of staff members, provide limitations on inmates participating in the program and include attachments such as checklists and interview forms. We recognize that Nebraska courts might disagree and that it could be argued that provisions of the AR pertaining to violations of the furlough agreement or termination of the inmate from the Re-Entry Furlough Program, for example, might be viewed as rules which prescribe a penalty and, therefore, presumed to affect private rights and interests. In its response to the Legislative Performance Audit Committee's findings, DCS has stated that it "is currently in the process of reviewing all of its internal policies to determine which of those policies should be promulgated under the APA." If DCS decides to reinstate this suspended program, it may wish to review this AR to determine whether the AR, or any portion of it, should be formally adopted in compliance with statutory requirements.

Conclusion

In summary, there is currently no clear definition of the term "internal management" within § 84-901 or in Nebraska case law. Nebraska courts have provided some guidance on this issue, but there are not a great number of cases which discuss the internal management exception or other exceptions to the statutory definition of rule or regulation. For these reasons, enactment of clarifying legislation may be helpful.

Sincerely,

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