

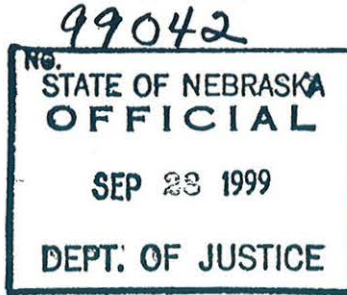


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DATE: September 23, 1999

SUBJECT: Whether the Department of Correctional Services' Interpretation of Neb. Rev. Stat. § 83-1,107(1)(b) Regarding an Inmate's Intentional Failure to Comply with The Department-approved Personalized Program Plan Is Within the Meaning of § 83-1,107(1)(b)

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

WRITTEN BY: Don Stenberg, Attorney General
Melanie J. Whittamore-Mantzios, Assistant Attorney General

You have requested our opinion as to whether the Department of Correctional Services' interpretation of Neb. Rev. Stat. § 83-1,107(1)(b) is correct in regards to an inmate's intentional failure to comply with the Department-approved personalized program plan ("Plan") when an inmate is placed in segregation. Neb. Rev. Stat. § 83-1,107(1)(b) was revised by the Legislature in 1997 to provide the following:

(b) A modification in the department-approved personalized program plan may be made to account for the increased or decreased abilities of the committed offender or the availability of any program. Any modification shall be made only after notice is given to the committed offender. Intentional failure to comply with the department-approved personalized program plan by a committed offender as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the department resulting in the forfeiture of up to a maximum of three months good time for the scheduled year.

(Emphasis supplied). The Department has promulgated rules and regulations that provide that an inmate may be disciplined for his or her intentional failure to comply with the Plan in compliance with this provision. Title 68 NAC Chapter 5.005.1(M). The Department has also notified the inmates that they will not be able to participate in programming if they are

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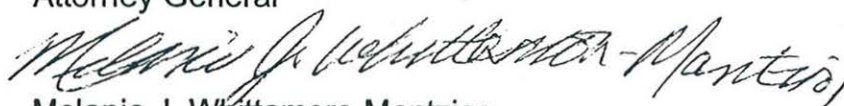
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in segregation. The Department interprets the intentional failure to comply with the Plan to include situations where the inmate has failed to participate in programming as a result of being in segregation. You have indicated that it has been argued that this should not constitute an intentional failure to comply with the Plan because the inmate did not intentionally fail to participate in programming but was prohibited from doing so as a result of the Department failing to provide the programming as required by Neb. Rev. Stat. § 83-1,107(1)(a) while the inmate was in segregation. Section 83-1,107(1)(a) provides that the Department shall provide the programs to allow compliance by the committed offender with the Plan.

It is our opinion that the Department's interpretation of Neb. Rev. Stat. § 83-1,107(1)(b) is correct and that it is within the parameters of § 83-1,107(1)(b) to hold an inmate responsible for intentional failure to comply with the Plan when the inmate has failed to comply with the Plan as a result of being placed in segregation. The Department is given discretion to determine how the programs are to be made available to the inmates. As you stated, it is not possible to provide programming to inmates who are in segregation. Inmates are given advanced notice that they will not be able to participate in programming while they are placed in segregation. It is as a direct result of an inmate's own actions that an inmate may be placed in disciplinary, administrative, or intensive management segregation. As a result, section 83-1,107(1)(b) certainly indicates that in such a situation an inmate risks the potential of three months loss of good time for intentional failure to comply with the personalized plan.

Sincerely,

DON STENBERG
Attorney General



Melanie J. Whittamore-Mantzios
Assistant Attorney General

APPROVED BY:



DON STENBERG, Attorney General