

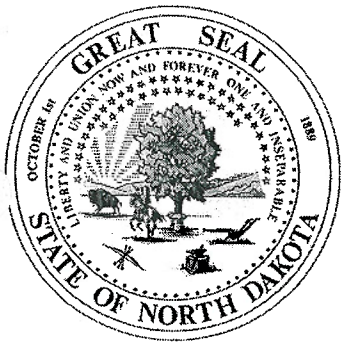
**Administrative Rules Committee****Senator Fischer****December 12, 2007**

Chairman Fischer and members of the Committee, for the record, I am Leann Bertsch, Director of the Department of Corrections and Rehabilitation.

The Department of Corrections and Rehabilitation (DOCR) is currently exempt from provisions of the Administrative Agencies Practices Act (AAPA). I have explained in my December 3, 2007 letter to the Committee, the need for the DOCR to remain exempt.

Other states also exempt their department of corrections from the AAPA recognizing the inherent limitation of resources available within a corrections system to operate under the requirements of the AAPA and the need for facility security, safety, health, order and discipline and inmate rehabilitation. The DOCR operates under an extensive system of rules. Subjecting the DOCR to the requirements of the AAPA would turn even routine changes in rules into a costly and time-consuming ordeal.

It is difficult to grasp the full extent of the impact that application of the AAPA would have on the DOCR, but it is very apparent that the impact would be adverse and far reaching. I addressed in my letter some of the more obvious areas of our operation that would be negatively affected if subject to the AAPA. I will not repeat the information I have outlined in my letter, but I would welcome any questions you may have



## DEPARTMENT OF CORRECTIONS AND REHABILITATION

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December 3, 2007

Senator Tom Fischer  
Chairman, Administrative Rules Committee  
North Dakota Legislative Council  
Attn: John Walstad  
State Capitol  
600 East Boulevard  
Bismarck, ND 58505-0360

RE: Response to administrative rule study relating to the Department of Corrections and Rehabilitation

Dear Senator Fischer and member of the Administrative Rules Committee:

Thank you for the opportunity to respond to the administrative rules study as it relates to the Department of Corrections and Rehabilitation. The responses to your questions are as follows:

1. *Does the Department of Corrections and Rehabilitation require exemption from the rulemaking provisions of NDCC Chapter 28-32, the adjudicative proceedings provisions of Chapter 28-32, or both? Please explain.*

The Department of Corrections and Rehabilitation (DOCR) requires exemption from both the rulemaking provisions and adjudicative proceedings provisions of N.D.C.C. Chapter 28-32. The DOCR operates under an extensive system of rules. Subjecting the DOCR to the requirements of the Administrative Practices Act (AAPA) would turn even routine changes in rules into a costly and time-consuming ordeal. Subjecting the DOCR to the AAPA would be very problematic for both the DOCR Adult Services Division and Juvenile Services Division. I have provided some examples of how the DOCR would be adversely impacted by subjecting the DOCR to the AAPA.

**Inmate Disciplinary Proceedings.** The DOCR has a system of rules that we expect the inmates to obey, but when they break one of these rules, they receive an incident report, and appear before the prison disciplinary committee for a hearing. The DOCR must make sure that the inmates receive a fair and impartial hearing, and that they receive due process. On average we hold over 175 of these disciplinary hearings each month. As the United States Supreme Court recognized in their decision in the landmark prison case Wolff v. McDonnell, 418 U.S. 539 (1974), the sheer volume of these cases dictate a lower standard of due process than what is found in the rules for court cases, or even in the rules set out in the AAPA for an "adjudicated hearing". Wolff established due process guidelines for prison disciplinary hearings to include the inmate's right to receive a written copy of the charges against him and have a minimum of 24 hours after receipt of those charges before his case can be heard to give

adequate time to prepare a defense. The inmate has the right to remain silent, and the right to have staff members help prepare and present their defense. They have the right to be present at the hearing, to receive a written copy of the committee's decision, and the right to appeal that decision to the Warden of the prison, and then also to the Director of the DOCR.

This issue of whether prison disciplinary hearings should be subject to administrative rules was raised in Jensen v. Little, 459 N.W.2d 237 (N.D. 1990). Jensen challenged his disciplinary hearing in connection with a drug testing program. The court, citing N.D.C.C. § 28-32-01(1)(m), held that the DOCR (actually, at that time the "Director of Institutions") was excluded from the definition of an administrative agency and not subject to the provisions of the Administrative Agencies Practice Act. The exclusion now appears at N.D.C.C. § 28-32-01(2)(m). The sole basis of the court's decision was the exclusion of the DOCR from the definition of an administrative agency. It appears that disciplinary proceedings will be subject to N.D.C.C. ch. 28-32, as they will be adjudicative proceedings, and the decisions will be orders.

Making prison disciplinary hearings subject to the full realm of rights and procedures in the AAPA, including discovery, subpoenas, administration of oaths, and appeals - procedures the US Supreme Court has already determined to be unnecessary for this type of proceeding, would be an untenable situation for the prisons. A greater concern would be the expense of 175 administrative hearings each month, and the time it would take to comply with type of hearing. If the goal of a disciplinary hearing is to correct bad behavior, the punishment given to the inmates must be fair, but must be applied quickly.

**Inmate Grievances.** When an inmate believes that he or she has been treated unfairly, either because staff have violated one of their constitutional rights, or even unfairly taken away one of their privileges, they file what is known as an inmate grievance. The first step in the process is to fill out a grievance form, which is then investigated, and answered by their case manager. However, if they are not satisfied with the response, they have the right to appeal the case manager's decision to the warden, and then up to the Director of the DOCR if they disagree with the warden's response. This grievance procedure is very similar to those found in every prison across the country, and has been recognized by the courts as a fair, and standard practice. In fact, Congress and the Courts recognized these grievance procedures when they passed the Prison Litigation Reform Act (PLRA), which requires inmates to exhaust their administrative remedies before they are allowed to file a lawsuit. The PLRA has greatly reduced the number of frivolous lawsuits inmates have been able to file in recent years.

If the DOCR becomes subject to the AAPA, the appeal process to the grievance decisions would be considered an "adjudicated hearing" and would require these 80 monthly grievances to follow the extensive procedures of the AAPA. Not only would this be extremely costly, but it would also impede the timely resolution of grievances.

**Other Prison Hearings and Appeal Processes.** The prisons system has numerous hearings, and each hearing includes an appeal process. In each instance, this appeal process would be considered an "adjudicated hearings", and require a lengthy, untimely, and costly administrative hearing. Some examples of how this could cripple the prison system include:

**Classification decisions:** Each inmate is classified at least once each year, so there would be about 120 of these decisions each month. This process examines a number of their risk factors, and assigns a custody rating (maximum, medium, or minimum custody) If the inmates are not satisfied with their classification hearing decision, they can appeal it to the warden, only now this process could take weeks to resolve, instead of hours. The DOCR's concern is that these lengthy hearings would paralyze our ability to move inmates through the system, because we

couldn't move them to a different prison until their administrative hearing was complete. A greater concern would be when we need to reclassify an inmate to a higher custody level. For example, if an inmate is caught trying to escape from our minimum security facility, and we reclassify him to maximum security because he is now considered an escape risk, adherence to AAPA hearing procedures could delay our ability to move him behind the prison walls. To effectively operate a prison, an administrator needs to be able to make decisions and act quickly. We can't afford to follow a process that spans weeks or months before we are allowed to take action.

**Inmate Transfers:** Our prisons are full, and we need to transfer inmates to facilities outside our system to make enough room for the daily new arrivals. We may also need to transfer a mentally ill inmate to the Special Assistance Unit at the James River Correctional Center for psychiatric care. Presently, inmates have the right to appeal these transfer decisions to the wardens, and they receive a response within the same day. With the proposed changes in this bill, these appeals may also be considered adjudicated hearings. Our system would be clogged while we waited for the administrative decision to move inmates to contract facilities, and the mentally ill inmate would be delayed in getting the treatment he needs, but may not want.

**Inmate Funds:** The DOCR hold inmates responsible for damages they cause to prison property, or for medical costs that aren't necessary. If an inmate requests to see the doctor, they are assessed a \$3.00 co-pay. If an inmate damages his cell, or assaults another inmate, we expect that they pay for the costs of repair, or the medical expenses. Both of these policies teach the inmates responsibility and to be accountable for their actions. If they disagree with the amount assessed, they receive a hearing, and a right to an appeal. Subjecting the DOCR to the AAPA may require the DOCR to follow the involved hearing procedures set forth in the ACT. This would cost the state more money to hold the hearings than we would collect in restitution, and these learning tools would be lost, along with an average of about \$20,000 we collect from inmates each year.

**Impact to the Division of Juvenile Services.** Subjecting the DOCR to the AAPA would also greatly impact the Division of Juvenile Services (DJS). DJS has under its care, custody and control a daily count of almost 400 delinquent youth. These youth are adjudicated delinquent in a North Dakota District Court, are found to be in need of treatment and rehabilitation, and the disposition removes custody from their parents and places them with the Division of Juvenile Services.

The mission of the Division of Juvenile Services is to provide a continuum of services to juvenile delinquent and unruly youth in North Dakota and to protect society from those juveniles who are a danger to themselves and others. This system of care operates under the philosophy that services should be provided in the least restrictive environment consistent with the practice of assuring the safety of society and the well being of the juvenile. Applying the AAPA to DJS would have a crippling effect in our ability to implement the mission, confounding overall daily operations of the agency, as well as dramatically driving up the costs of service delivery. The following example uses the most conservative estimates at every calculation point in order to illustrate one example of the systemic impact this legislation could have.

As previously stated, DJS has at any point in time approximately 400 youth under its custody. The average length of custody is about 19 months. Over that period of time, the median number of movements (placements) is three. In other words, a placement decision is made about 1200 times in those 400 cases. AAPA would allow the youth the opportunity to appeal any decision that results in further placement. Fifty-seven percent of those youth fall into a category of medium or high on the risk/needs assessment instrument used in the treatment planning process. Because of the elevated level of risk posed to the public and level of risk to self, it is reasonable to assume that DJS would as that these youth be placed into some sort of short term setting while the appeal process was underway. This could include additional requests for detention, or for shelter care. There could be an additional



684 such requests, if only moderate to high- risk offenders are considered. Seriously high need, lower risk offenders would likely be included as well. The first step of the AAPA appeals process requires a 20- day advance notice, so one might reasonably conclude that the shortest conceivable delay in placement from time of appeal would be 20 days. If a moderate to high-risk youth engaged in the appeal process, DJS would likely request permission from the court to place into detention or some other short- term placement. If the request was for detention, the North Dakota average cost is \$142/day. A 20 -day detention stay would be about \$2800 per youth, with the potential of 684 requests. If only ½ of the potential cases chose to appeal and required the minimum of 20 days, the costs would be nearly \$1,000,000 over the average length of custody. If each youth chose to appeal their placement, the costs jump to \$1,915,000, based on a rate of \$142 per day.

The scenario outlined above has not even begun to address the issue of bed space. There are detention beds currently operating in 7 sites in North Dakota. Detention will not be available or appropriate in many areas or circumstances. In those cases, another layer of care will need to be developed, as public safety concerns coupled with issues of personal safety will require that the youth be safely housed while the appeal is heard. Funding to build beds will be needed, and building and staffing beds is expensive. North Dakota has not built a new juvenile corrections bed in 20 years because the system has in place the tools necessary to make the best use of the entire continuum of resources. Each bed day in the existing system serves the purpose of moving the youth closer to the goal of successful reintegration into the home community. Building new beds simply for the purpose of housing youth while they are appealing their placement decision would be a giant step backwards for the youth corrections system in North Dakota, both in terms of responding to the needs of the young people it serves, and making good use of the resources available in our state.

This scenario depicts one dimension of the consequences involved if the decision to apply AAPA to the Division of Juvenile Services were to move forward. There are other equally compelling scenarios. Length of stay will increase. Therefore, caseload size will increase. This will necessitate a request for more personnel. A system for hearing appeals will need to be devised and staffed. There are currently no resources in place or in the budget projections that could feasibly be expected to address the shear volume of work that will be created within this Division, given the number of youth served, and the number of situations which could be appealed.

All of this has not yet begun to address the issues that the Youth Correctional Center will face if this legislation is enacted. The Division of Juvenile Services has always worked closely with the Office of the Attorney General and the Office of Risk Management to insure that our policies and practices are responsive to the urgent behavioral and mental health needs of youth committed to our care. In custodial situations, it is critical that facility staff make decisions quickly and with the best interests of the youth in mind. The safety of the youth as well as facility staff is the highest priority and the flexibility to act or react to situations without delay is essential in a well- run juvenile correctional facility.

2. *Does the Department of Corrections and Rehabilitation make any rules for purposes other than internal management, which are of general statewide application and might affect rights or duties of persons outside your agency?*

Pursuant to N.D.C.C. Chapter 12-44.1, the DOCR is responsible for inspecting all city, county and regional correctional facilities. The DOCR prescribes the North Dakota Correctional Facility Rules. The DOCR conducts annual inspections of North Dakota's twenty-six adult correctional facilities as well as six juvenile detention facilities to ensure compliance with these rules.

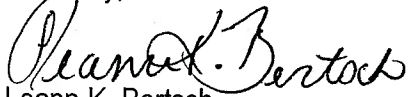
3. *Does the Department of Corrections and Rehabilitation hold hearings to act on complaints, applications, or appeals? If so, what rules govern the conduct of the hearings and rights of the parties?*

The DOCR holds numerous hearings and each hearing includes an appeal process. The various types of hearings and the rules that govern the conduct of these hearings are included in the response to questions number one.

4. *Do you believe the exemption for your agency under subsection 2 of NDCC Section 28-32-01 should be Continued unchanged, modified, or eliminated?*

The DOCR believes the exemption should continue unchanged. Subjecting the DOCR to the provisions of the AAPA would be detrimental for the efficient and effective operation of the DOCR within its Adult and Juvenile Divisions.

Sincerely,



Leann K. Bertsch  
Director