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January 19, 1983

ATTORNEY GENERAL OPINION NO. 83- 7

The Honorable John Carlin
Governor of Kansas
2nd Floor, State Capitol
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Department of Corrections -- Qualifications of
Secretary of Corrections

Synopsis: K.S.A. 1981 Supp. 75-5203 provides two alternative criteria for determining the eligibility of a person to be appointed by the Governor as Secretary of Corrections, and these criteria are separate and distinct from one another. That is, the requirement that the person so appointed has had at least five years' experience in the field of corrections is alternative to and separate and distinct from the provision establishing the eligibility of a person who has had at least five years' experience as an executive officer in the administration of federal or state penal or correctional institutions. Thus, Michael A. Barbara satisfies the eligibility requirements of this statute, since the information provided by the Governor's office regarding Mr. Barbara's professional experience indicates that he has more than five years' experience in the field of corrections. Cited herein: K.S.A. 1981 Supp. 75-5203, K.S.A. 77-201.

* * *

Dear Governor Carlin:

You have requested our opinion as to whether Mr. Michael A. Barbara is eligible for appointment by the Governor to the position of Secretary of Corrections pursuant to K.S.A. 1981 Supp. 75-5203. That statute provides, in pertinent part, as follows:

"The secretary shall be appointed by the governor, with the advice and consent of the senate, and shall serve at the pleasure of the governor. . . . No person shall be eligible for appointment to, or hold the position of, secretary of corrections unless such person shall have had at least five years experience as an executive officer in the administration of federal or state penal or correctional institutions or five years experience in the field of corrections but three years of such experience may be waived for an appointee having a degree from an accredited college or university, which degree is based on penology or a related field as a major field of study, except that if the governor is unable to appoint a person as secretary who possesses such qualifications, the governor may appoint a person without such qualifications as acting secretary, who shall serve at the pleasure of the governor."

In order to respond to your inquiry, we must first identify the eligibility criteria prescribed in this statute, and Mr. Barbara's qualifications must then be measured against such criteria. In the first instance, of course, our identification of the eligibility criteria requires a determination of legislative intent. As pronounced in Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

The Court also has provided guidance in ascertaining the legislature's intent, and we believe the following statement of the Court to be of relevance here:

"A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in

search of some other legislative purpose or extending the meaning beyond the plain terms of the Act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

Accordingly, in light of these judicial rules of interpretation, it is our judgment that the legislature in clear and unambiguous language has prescribed two separate and distinct standards for measuring the eligibility of a person to be appointed Secretary of Corrections. First, it has approved the appointment of a person who has had five years' experience in the administration of penal institutions. Second, it has deemed eligible for appointment a person who has had five years' experience "in the field of corrections." Arguably, it might be contended that the latter also requires experience in the administration of penal institutions. However, for several reasons, we are persuaded to the conclusion that this alternative criterion is separate and distinct from the provision establishing eligibility by reason of experience in the administration of penal institutions.

Foremost among our reasons is the fact that, as will be noted from the provisions of K.S.A. 1981 Supp. 75-5203 quoted above, the statutory language establishing these criteria is expressed in the disjunctive. "Normally, use of a disjunctive indicates alternatives and requires they be treated separately unless such a construction renders the provision repugnant to the Act." George Hyman Const. Co. v. Occupational Safety, 582 F.2d 834, 840 (4th Cir. 1978). Not only is there no repugnancy to the legislature's intent and purpose by treating these as alternative criteria, we believe it essential to a correct statement of such intent and purpose.

Unless these criteria are treated as separate and distinct bases for judging the qualifications of a person being considered for appointment as Secretary of Corrections, we must find that the legislature has done a useless and senseless thing. If the provision regarding experience in the field of corrections is not regarded as a criterion separate and distinct from the provision establishing eligibility by virtue of experience in the administration of penal or correctional institutions, these criteria are redundant. That is, if the provision establishing eligibility as a result of experience in the field of corrections is construed as meaning experience in the administration of penal or correctional institutions, it is but mere surplusage. Accordingly, we are

constrained by established rules of construction from attributing such an intent to the legislature. "A construction which renders part of a legislative act surplusage is to be avoided if reasonably possible." American Fidelity Ins. Co. v. Employers Mut. Cas. Co., 3 Kan.App.2d 245, Syl. ¶4 (1979). See, also, Consumers Co-operative Ass'n v. State Comm. of Rev. and Taxation, 174 Kan. 461, 466 (1953); Brown v. Illinois Bankers Life Assur. Co., 144 Kan. 670, 675 (1936).

Of similar import is the requirement that, in determining legislative intent, "[e]ffect must be given, if possible, to the entire statute and every part thereof (Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., *supra* at 367), and the court will not presume that the legislature used a meaningless word. In Re Dederick, 91 F.2d 646, 648 (10th Cir. 1937). "The statutory words should be treated as consciously chosen." In re Armed Forces Cooperative Insuring Ass'n, 5 Kan.App.2d 787, 793 (1981).

Finally, we note that, when the statute in question was first enacted (L. 1973, ch. 339, §3), it provided only that a person must have the prescribed experience in the administration of penal or correctional institutions. When it was amended in 1974 (L. 1974, ch. 403, §5), the legislature inserted the phrase "or five (5) years experience in the field of corrections." In our judgment, this further supports the conclusion that the legislature intended that experience in the field of corrections is a means of establishing eligibility for appointment as Secretary of Corrections that is alternative to and separate and distinct from the statute's provisions establishing eligibility through experience in the administration of penal or correctional institutions. "[C]hanges made in a statute are to be considered by the court in determining legislative intent for the purpose of statutory construction [Callaway v. City of Overland Park, 211 Kan. 646, 650 (1973)], and "any changes and additions made in existing legislation raise a presumption that a change in meaning and effect is intended." Hessell v. Lateral Sewer District, 202 Kan. 499, 504 (1969).

Thus, it is our opinion that K.S.A. 1981 Supp. 75-5203 provides two alternative criteria for determining the eligibility of a person to be appointed by the Governor as Secretary of Corrections, and these criteria are separate and distinct from one another. That is, the requirement that the person so appointed has had at least five years' experience in the field of corrections is alternative to and separate and distinct from the provision establishing the eligibility of a person who has had at least five years' experience as an executive officer in the administration of federal or state penal or correctional institutions. Hence, the question remaining is whether Mr. Barbara's professional background satisfies the requirement as to experience in the field of corrections.

Accompanying your letter of request was a copy of Mr. Barbara's resume, supplemented by additional information regarding his professional background and experience. A review of the resume and supplemental information discloses that Mr. Barbara has not had any experience as an executive officer in the administration of federal or state penal or correctional institutions. However, it also is apparent that Mr. Barbara has extensive experience in the criminal justice system. Hence, the question arises whether Mr. Barbara's professional experience, in the absence of any experience in the administration of a penal or correctional institution, satisfies the eligibility criteria specified in the above-quoted provisions of K.S.A. 1981 Supp. 75-5203.

Resolution of this issue necessarily requires a determination of the meaning of "field of corrections." Here, we are guided by K.S.A. 77-201 Second, which states, for purposes of construing Kansas statutes, as follows:

"Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meaning."

Of similar import is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

"[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.)" 221 Kan. at 214.

We have found no case law in this or other jurisdictions that would impart "a peculiar and appropriate meaning in law" to the phrase "field of corrections." Hence, it is appropriate to ascribe to these words their plain and ordinary meanings, as they are used within the context of the statute. In Webster's Seventh New Collegiate Dictionary, "correction" is defined as "the treatment of offenders through a program involving penal custody, parole and probation." Id. at 187. "Field" means "an area or division of an activity." Id. at 311. Hence, within the context of the statute, we believe experience in the "field of corrections" means experience in the area of treating criminal offenders through programs involving penal custody, parole and probation.

With this in mind, and based on the credentials of Mr. Barbara, as described in his resume and the other materials submitted with your inquiry, we have concluded that Mr. Barbara is eligible for appointment as Secretary of Corrections. Since Mr. Barbara's credentials are, for the most part, matters of public record which will be subjected to public scrutiny during the confirmation hearings in the Kansas Senate, we will resist the temptation to discuss in detail his experience in the field of corrections, in order to avoid unduly burdening this opinion. However, while we will generalize our discussion in this regard, we think it appropriate to identify certain areas of experience in the field of corrections.

Accordingly, suffice it to state that, in addition to Mr. Barbara's involvement in the criminal justice system as a District Judge for the Third Judicial District (Shawnee County) from 1967 to 1980, he has been involved in the field of corrections for more than ten years as an author, speaker, guest lecturer, consultant, panelist, moderator of and participant in training seminars, member of various professional committees and law professor. Of particular significance, Mr. Barbara:

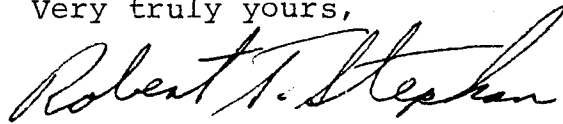
1. Is currently Professor of Law at Washburn University School of Law, teaching courses in Criminal Law and Administration of Criminal Justice.
2. Was a member of the Advisory Committee to the legislature's 1977 Special Committee on Corrections.
3. Was a member of the State Advisory Board on Community Correction Standards in 1978.
4. Has been a member of Shawnee County Community Corrections Advisory Board since 1978 (chairman in 1981 and 1982).
5. Was Project Director of a federal discretionary grant to the Shawnee County Work Release Center in 1978.
6. Was Project Director of grants and funding from the Governor's Committee on Criminal Administration for Shawnee County Court Services from 1972 to 1980, acting as administrative judge supervising adult probation services during this period.
7. Has taught a Corrections and Sentencing Seminar at Washburn Law School (1982-1983).
8. Reviewed prison facilities in France, Spain, Italy, Yugoslavia and Austria in 1970, 1973 and 1976.

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9. Received in 1981 the Kansas Corrections Association's "Presidential Award" for outstanding contributions by an individual in the area of corrections.

Thus, we have no difficulty in concluding that Mr. Barbara has more than five years' experience in the field of corrections and is eligible for appointment as Secretary of Corrections pursuant to K.S.A. 1981 Supp. 75-5203. Of course, since this statute requires that such appointment be made "with the advice and consent of the senate," the final determination of Mr. Barbara's qualifications to hold this office must be made by the Kansas Senate.

Very truly yours,



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W. Robert Alderson
First Deputy Attorney General

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