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May 13, 1985

ATTORNEY GENERAL OPINION NO. 85- 50

Michael E. Cleary
Harvey County Attorney
Harvey County Courthouse
P.O. Box 687
Newton, Kansas 67114-0687

Re: Public Health -- Maternity Hospitals or Homes and Homes for Children -- Persons Prohibited from Operating Homes; Effect of Expungement of Prior Conviction

Synopsis: K.S.A. 1984 Supp. 65-516(a)(1), as amended by 1985 House Bill No. 2145, prohibits persons with certain felony convictions from working in a boarding home for children which is licensed by the department of health and environment. The statute contains no time limit upon such prohibition, with the result that a person having such a conviction is precluded from such employment for the remainder of his or her life. However, expungement of such convictions under K.S.A. 1984 Supp. 21-4619 is permitted, except in the case of boarding homes which are also detention facilities operated by a local or state criminal justice agency. The effect of expungement is to close the record of the felony conviction from public scrutiny, including that of the department of social and rehabilitation services, which is otherwise provided access to criminal history information concerning persons working in boarding homes for children. K.S.A. 1984 Supp. 65-516(d), as amended. The department of social and rehabilitation services is also authorized to validate reports of abuse or neglect by employees of such homes, pursuant to K.S.A. 1984 Supp. 65-516(a)(3), as amended, which process involves an investigation into the facts of the

incident. In the event an incident is validated, an independent review may be made by the department of health and environment as the licensing agency. Cited herein: K.S.A. 1984 Supp. 21-4619; 22-4701; 38-1523; 41-311; 65-503; 65-516, as amended by 1985 House Bill No. 2145; K.S.A. 76-12a01.

* * *

Dear Mr. Cleary:

As county attorney for Harvey County, you request our opinion on a series of questions concerning persons applying for licenses to operate children's boarding homes who either have been convicted of certain felonies or have been deemed to have committed acts of abuse by the Kansas Department of Social and Rehabilitation Services. You also inquire regarding the employment of such persons in a licensed boarding home for children. Both of these questions concern the provisions and effect of K.S.A. 1984 Supp. 65-516, as amended by 1985 House Bill No. 2145.

You first ask whether the prohibition in K.S.A. 1984 Supp. 65-516, as amended, includes any "time frame" relating to the convictions set out in subsection (a)(1) therein, or instead is a lifetime prohibition. The pertinent language of the amended statute reads as follows:

"(a) No person shall knowingly maintain a boarding home for children or maintain a family day care home if, in such boarding homes or family day care home, there resides, works or regularly volunteers any person who:

"(1) (A) Has a felony conviction for a crime against persons, (B) has a felony conviction under the uniform controlled substances act, (C) has a conviction of any act which is described in articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated and acts amendatory thereof or supplemental thereto or a conviction of an attempt under K.S.A. 21-3301 and amendments thereto to commit any such act, or (D) has been convicted of any act which is described in K.S.A. 21-4301 or 21-4301a and amendments thereto or similar statutes of other states or the federal government;

. . . .

"(3) has committed an act of physical, mental or emotinal abuse or neglect or sexual abuse as validated by the department of social and rehabilitation services pursuant ot K.S.A. 1984 Supp. 38-1523 and amendments thereto;"

No limitation on the amount of time for prohibiting convicted persons to work in, or operate, boarding homes is expressed in the statute. Furthermore, we see no basis to construe the statute to imply such a limitation. The primary goal in construction of a statute is to determine the legislative intent as expressed, and neither this office nor a court may look beyond the plain terms of the act when the language thereof is unambiguous. Calloway v. City of Overland Park, 211 Kan. 646, 650 (1973). Further, the legislature has previously established other prohibitions on the activities of convicted felons in areas where it has determined the public has a higher need for protection. See, e.g. K.S.A. 1984 Supp. 41-311(a)(2) (convicted felon cannot obtain liquor license--no time limit on prohibition).

You also ask the effect which an expungement would have on a person's status under K.S.A. 1984 Supp. 65-516(a)(1) or (3), as amended. This issue was previously dealt with in Attorney General Opinion No. 84-115. There, it was noted that the Kansas expungement statute does not act to eliminate the conviction itself, but rather closes the records of the conviction to public scrutiny. K.S.A. 1984 Supp. 21-4619 is the relevant expungement statute, and reads in pertinent part:

"(h) Whenever the record of any conviction has been expunged under the provisions of this section or under the provisions of any other existing or former statute, the custodian of the records of arrest, conviction and incarceration relating to that crime shall not disclose the existence of such records, except when requested by" (Emphasis added.)

The exceptions which follow this provision do not allow access for either "boarding homes" as defined by K.S.A. 1984 Supp. 65-503(a), or the Secretary of Health and Environment, who is empowered to revoke the license of such a home. While the Secretary of Social and Rehabilitation Services is permitted access [at (h)(4)], it is only in the context of "institutions" as defined by K.S.A. 76-12a01, which do not include boarding homes for children.

The exception at subsection (h) (2), however, is of relevance, and permits disclosure of expunged convictions to:

"(2) a criminal justice agency, private detective agency, private detective agency or private patrol operator, and the request is accompanied by a statement that the request is being made in conjunction with an application for employment with such agency or operator by the person whose record has been expunged;" (Emphasis added.)

As noted in the previous opinion, "criminal justice agency" is defined by K.S.A. 1984 Supp. 22-4701(c) (1) to include "detention centers" which are maintained by local or state law enforcement agencies. A similar term is also found at K.S.A. 1984 Supp. 65-503(a) (4), which includes within the definition of board homes for children:

"(4) any receiving or detention home for children under 16 years of age provided or maintained by, or receiving aid from any city or county or the state." (Emphasis added.)

The references in the above statutes to "detention centers" (K.S.A. 1984 Supp. 22-4701) and "detention home" (K.S.A. 1984 Supp. 65-503) led us in the earlier opinion to the conclusion that the statutes should be read in pari materia, because they deal with the same subject matter, even though they were enacted at different times and appear in different places in the statutes. Atty. Gen. Opin. No. 88/115. See also Claflin v. Walsh, 212 Kan. 1 (1973). Accordingly, we reaffirm that, as to criminal justice agencies, which includes a detention home for children which is operated by a city or county, expunged records of criminal convictions must be disclosed by custodians. Furthermore, the person having the expunged conviction shall also disclose that the conviction occurred to such a detention home. See K.S.A. 1984 Supp. 21-4619(e) (2).

With regard to other boarding homes not conforming to K.S.A. 65-503(a) (4) (i.e. "any receiving or detention home . . . provided or maintained by, or receiving aid from any city or county or the state"), the exceptions for disclosure by a custodian or a person with an expunged conviction in K.S.A. 1984 Supp. 21-4619(e) and (h) do not apply. Consequently, other types of boarding homes employing persons with expunged convictions would not be precluded from continued operations and the individuals themselves from continued employment.

You next ask the meaning of the language "validated by the department of social and rehabilitation services" set out in K.S.A. 1984 Supp. 65-516(a)(3) as amended. In order to best explain this process, we have enclosed a memorandum from the Youth Services Division of the Department of Social and Rehabilitation Services which sets forth the nature and scope of the validation process. In essence, the Youth Services Division receives and investigates reports of child abuse or neglect pursuant to K.S.A. 1984 Supp. 38-1523. Next, it conducts an investigation and compiles documentation concerning alleged acts. A review of the evidence or lack thereof follows the investigation, and if the agency is satisfied that there is reason to believe the alleged act occurred, a confirmation is filed in the Youth Services Registry. Later, a validation committee reviews the investigation report and makes a determination of validity independent of the earlier confirmation before notifying the department of health and environment. Even after such a validation, an opportunity for a hearing before the department of health and environment is available prior to the removal of any license. Denial or suspension of license is, therefore, not an automatic result.

In passing, we note that your letter also contained a third question, namely whether a constitutional problem is presented by the process of denial of employment which is set out by K.S.A. 1984 Supp. 65-516, as amended. We have declined to answer this inquiry due to the existence of several pending lawsuits at the district court level which contain this question as an issue. In that it is the long-standing policy of this office to refrain from issuing legal opinions on matters which are in litigation or in which litigation is imminent, we can only suggest that you await the guidance of the courts in this regard.

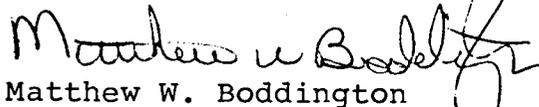
In conclusion, K.S.A. 1984 Supp. 65-516(a)(1), as amended by 1985 House Bill No. 2145, prohibits persons with certain felony convictions from working in a boarding home for children which is licensed by the department of health and environment. The statute contains no time limit upon such prohibition, with the result that a person having such a conviction is precluded from such employment for the remainder of his or her life. However, expungement of such convictions under K.S.A. 1984 Supp. 21-4619 is permitted, except in the case of boarding homes which are also detention facilities operated by a local or state criminal justice agency. The effect of expungement is to close the record of the felony conviction from public scrutiny, including that of the department of social and rehabilitation services, which is otherwise provided access to criminal history information concerning persons working in boarding homes for children.

K.S.A. 1984 Supp. 65-516(d), as amended. The department of social and rehabilitation services is also authorized to validate reports of abuse or neglect by employees of such homes, pursuant to K.S.A. 1984 Supp. 65-516(a)(3), which process involves an investigation into the facts of the incident. In the event an incident is validated, an independent review may be made by the department of health and environment as the licensing agency.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Matthew W. Boddington
Assistant Attorney General

RTS:JSS:MWB:crw
Enclosure

Enclosure I

VALIDATION PROCESS
In compliance with K.S.A. 1984 Supp. 65-516 (a)(1).

A central office committee comprised of the Program Administrator for the Management Services Section, and one representative each from the Division of Children in Need of Care, the Juvenile Offender Program, and the Licensing and Contracting Unit, shall form the Youth Services Validation Committee.

The purpose of the Validation Committee is to assure compliance with K.S.A. 1984 Supp. 65-516(a)(1) in regard to validation of confirmed abuse or neglect concerning licensed/registered facilities.

The validation process is only utilized in a licensing or registration context. The examination of a specific incident alleged to have been committed by an individual forms the basis for whether or not a letter of validation will be sent to the State Department of Health & Environment. Therefore, this process will not be invoked for unregulated child care facilities or for licensed facilities when the individual identified as the alleged abuser/neglector of a confirmed incident of child abuse/neglect is no longer a resident, employee or volunteer in that facility. In these instances, the confirmation of abuse/neglect and the alleged abuser/neglector will be in the Central Child Abuse/Neglect Registry. Should the alleged abuser or neglector apply for a paid or volunteer position in a licensed facility or apply for a license or registration, a check of the Registry will be made and the validation process will occur at that time.

Within five working days following the receipt of all requested material, the members of the Committee shall separately review confirmed incidents utilizing established criteria. A majority of the Committee must agree before validation can occur. In the event that a majority of the committee do not agree, the case shall be referred to a meeting of the committee as a whole for further consideration. The Committee of the whole shall meet within five working days following the completion of the individual review. In the event the committee as a whole cannot agree, the case will be referred to the Commissioner of Youth Services.

The Committee shall: -

1. Conduct a review of circumstances surrounding a confirmed incident of child abuse/neglect, where the alleged perpetrator is:
 - a. maintaining or seeking to maintain a licensed/registered child care facility;
 - b. residing in a licensed or registered child care facility;
 - c. volunteering in a licensed or registered child care facility; or
 - d. employed in a licensed or registered child care facility.
2. Utilize the following criteria for the review:
 - *a. How long has it been since the incident occurred? (days, months, years)
 - b. Who reported the incident? Is the name of the reporter known?
 - c. How long after the incident did the investigation occur?
 - d. Have there been previous complaints on the facility/provider?
 - e. Did the incident result in injury to a child(ren)? If so, how serious?

STATE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES
Youth Services
Smith-Wilson Bldg.
2700 W. 6th St.
Topeka, Kansas 66606

State Commr. L-

To: Area Managers
Chiefs of Social Service
Social Service Supervisors

(Code 5)

Re: Central Office Validation of Confirmed Incidents of Child Abuse/Neglect to Insure
Compliance to Statutes Related to the Licensing or Registration of Child Care
Facilities

PURPOSE

The purpose of this letter is to inform area staff of the Youth Services Central Office process of validating and reporting to the Department of Health and Environment validated cases of child abuse/neglect in accordance with 65-516(a).

BACKGROUND

The 1984 legislature amended KSA 65-516(a), requiring the Department of Health and Environment to deny or revoke the license of a person who maintains a boarding home for children, or family day care home, if within the home there resides, works or volunteers any person who has committed an act of physical, mental or emotional abuse or neglect or sexual abuse as validated by the Department of Social and Rehabilitation Services.

This Validation Process was established because of the retroactive nature of this legislation and to determine whether sufficient documentation exists to support action by the Department of Health and Environment. The action of the Validation Committee does not change the finding of the social services worker who conducted the investigation nor the information in the Central Registry. It does review the available material in light of the criteria listed in Attachment I to determine if there is sufficient documentation to sustain a recommendation to revoke or deny a license or registration. Furthermore, the Validation Process allows us to honor corrective action plans which were entered into prior to the effective date of this legislation (July 1, 1984) and which have been developed and adhered to by the licensee or registrant.

The Validation Process consists of a review by a committee of central office staff of the information on file related to a person who was identified as an alleged abuser or neglecter in an incident where there was a confirmation that a child was abused or neglected. The central office process and the criteria used are detailed in Attachment I.

ACTION REQUIRED

Become familiar with procedure and be prepared to provide the validation committee with supporting documentation upon request.