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February 2, 1989

ATTORNEY GENERAL OPINION NO. 89- 9

The Honorable Wanda Fuller
State Representative, Eighty-Seventh District
State Capitol, Room 182-W
Topeka, Kansas 66612

Re: Criminal Procedure--Code; Release Procedures--Parole Eligibility; Program Agreement

State Departments; Public Officers and Employees--Department of Corrections; Secretary--Program Agreements Between Secretary and Inmate

Synopsis: K.S.A. 1988 Supp. 22-3717(e)(2) and 75-5210a, provisions establishing the use of program agreements for inmates placed in the custody of the secretary of corrections, apply only to inmates incarcerated after the effective date of the enactment of which those two statutes are a part. The types of "programs" required are to be determined by the secretary of corrections, consistent with pertinent legislation. Cited herein: K.S.A. 1988 Supp. 22-3717; K.S.A. 75-5210; 75-5210a; K.S.A. 1988 Supp. 75-5211; K.S.A. 75-5267, K.S.A. 1988 Supp. 75-52,117; L. 1988, ch. 3079, §11.

* * *

Dear Representative Fuller:

You have requested our opinion regarding the 1988 amendments to K.S.A. 22-3717(e) which, together with K.S.A. 1988 Supp.

75-5210a, establish the use of program agreements for inmates in the custody of the secretary of corrections.

The statutory provisions in question state:

> "(e) Subject to the provisions of this section, the Kansas parole board may release on parole those persons confined in institutions who are eligible for parole when:
>
> . . . .
>
> "(2) the secretary of corrections has reported to the board in writing that the inmate has satisfactorily completed the programs required by any agreement entered under K.S.A. 75-5210a, or any revision of such agreement, and the board believes that the inmate is able and willing to fulfill the obligations of a law abiding citizen and is of the opinion that there is reasonable probability that the inmate can be released without detriment to the community or to the inmate."
>
> "(h) . . . If an agreement has been entered under K.S.A. 75-5210a and the secretary of corrections has reported to the board in writing that the inmate has satisfactorily completed the programs required by such agreement or any revision thereof, the board shall not require further program participation." K.S.A. 1988 Supp. 22-3717.
>
> "(a) Within a reasonable time after a defendant is committed to the custody of the secretary of corrections, the secretary shall enter into a written agreement with the inmate specifying those educational, vocational, mental health or other programs which the secretary determines the inmate must satisfactorily complete in order to be prepared for release on parole. The agreement shall be conditioned on the inmate's satisfactory conduct, employment and attitude while

incarcerated. If the secretary determines that the inmate's conduct, employment, attitude or needs require modifications or additions to those programs which are set forth in the agreement, the secretary shall revise the requirements. The secretary shall agree that, when the inmate satisfactorily completes the programs required by the agreements, or any revision thereof, the secretary shall report that fact in writing to the Kansas parole board. If the inmate becomes eligible for parole before satisfactorily completing such programs, the secretary shall report in writing to the Kansas parole board the programs which the inmate must yet satisfactorily complete.

"(b) A copy of any agreement and any revisions thereof shall be entered into the inmate's record." K.S.A. 1988 Supp. 75-5210a.

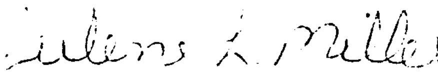
You first ask whether these provisions apply retrospectively to inmates incarcerated before their effective date of May 19, 1988. Kansas courts have consistently held that a statute must be construed to operate prospectively only unless the statute clearly indicates legislative intent for it to operate retroactively. Anderson v. National Carriers, Inc., 240 Kan. 101 (1986); State ex rel. Stephan v. Board of County Commissioners of County of Lyon County, 234 Kan. 732 (1984). This general rule has been modified when the statutory change in question is merely procedural or remedial in nature and does not prejudicially affect substantive rights of the parties. Stair v. Gaylord, 232 Kan. 765 (1983); Nitchals v. Williams, 225 Kan. 285 (1981). Further, it has been held that an amendment will generally operate prospectively unless its language clearly indicates retroactive application and retroactive application will not impair vested rights. Horton v. Fleming Co., 3 Kan. App.2d 121 (1979). We do not consider the provisions in question to be merely procedural or remedial in nature. They operate to allow imposition of specific requirements on inmates, thus effecting their eligibility for parole, and they restrict the authority of the parole board. Further, there is no indication the legislature intended these provisions to operate retrospectively. In contrast, other provisions in the same enactment (L. 1988, ch. 115) specifically require

retroactive application. L. 1988, ch. 115, secs. 1(n), 11. It is therefore our opinion that K.S.A. 1988 Supp. 22-3717(e)(2) and 75-5210a apply only to inmates incarcerated after the effective date of their enactment. However, we know of nothing which would prevent the secretary and an inmate incarcerated prior to May 19, 1988, from voluntarily entering into a K.S.A. 1988 Supp. 75-5210a agreement if any pre-existing parole board program requirements are included in the agreement.

You inquire also whether the term "program" as used in K.S.A. 1988 Supp. 22-3717(e)(2) and 75-5210a includes placement programs such as pre-release, work release and in community residential centers. We have found no definition for the term "program" either in L. 1988, ch. 115 or the preexisting statutes concerning the department of corrections, the parole board or criminal sentencing and release. But see K.S.A. 75-5210. When no legislative definition exists, courts have given broad deference to agency interpretation of statutes they are to administer. Board of County Comm'rs of Johnson County v. Greenshaw, 241 Kan. 119 (1987); Kansas Bd. of Regents v. Pittsburg State University Chapter of Kansas Nat'l Education Ass'n. 233 Kan 801 (1983). The department of corrections has apparently interpreted the term to include community residential center, pre-release and work release programs. See Kansas Department of Corrections Program Agreement Form, DOC #010-106-001, Effective September 1988. This interpretation is consistent with the statutory language which speaks to "those educational, vocational, mental health or other programs which the secretary [of corrections] determines the inmate must satisfactorily complete in order to be prepared for release on parole." K.S.A. 1988 Supp. 75-5210a. See also K.S.A. 1988 Supp. 75-5211; K.S.A. 75-5267; K.S.A. 1988 Supp. 75-52,117. Since the department of corrections has adopted this interpretation of the term "program" and such interpretation is consistent with the pertinent legislation, we will not attempt to substitute our judgment for that of the department.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
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RTS:JLM:jm