

**LETTER OPINION**  
**96-L-110**

May 31, 1996

Ms. Elaine Little, Director  
ND Dept. of Corrections  
and Rehabilitation  
PO Box 1898  
Bismarck, ND 58502-1898

Dear Ms. Little:

Thank you for your letter requesting the opinion of this office regarding training for county correctional employees.

It is necessary to provide a brief background of the current laws in order to respond to your questions.

In 1979 the Legislative Assembly, in response to correctional management liability issues and inmate litigation occurring within the state and around the country, enacted N.D.C.C. ch. 12-44.1. The Legislature originally placed the responsibility of administering this chapter, including the promulgation of jail rules, jail inspection, and compliance and enforcement, with the North Dakota Attorney General. 1979 N.D. Sess. Laws ch. 172. Jail training was to be provided through the Combined Law Enforcement Council. 1979 N.D. Sess. Laws ch. 172, § 12. Prior to 1979, the Combined Law Enforcement Council also had the authority to recommend rules for the operation and maintenance of county and city jails and for the care and treatment of inmates. 1967 N.D. Sess. Laws ch. 117, § 5. The laws relating to the Combined Law Enforcement Council were repealed in 1981. See 1981 N.D. Sess. Laws ch. 154, § 13.

In 1981, the Legislative Assembly created a Criminal Justice Training and Statistics Division under the North Dakota Attorney General. 1981 N.D. Sess. Laws ch. 154, § 1. The powers and duties of the Criminal Justice Training and Statistics Division include the power and duty to conduct and certify training for local correctional officers. N.D.C.C. § 12-62-02(7). Another statute, N.D.C.C. § 12-62-06, prescribes training for newly appointed correctional officers:

Every newly appointed local correctional officer shall within the first year of employment attend a course of

training conducted by the division. The curriculum, location, and dates of such sessions shall be determined by the peace officer standards and training board and in cooperation with the sheriff's association.

In 1989, the Legislative Assembly created the Department of Corrections and Rehabilitation ("Department") and transferred the responsibilities of the Attorney General under N.D.C.C. ch. 12-44.1 to the Department. 1989 N.D. Sess. Laws ch. 156. No changes have been made to N.D.C.C. §§ 12-62-02(7) and 12-62-06 and they still exist as originally enacted. The Legislative Assembly gave the director of the Department various duties and powers under N.D.C.C. § 54-23.3-04:

The director of the department of corrections and rehabilitation has the following powers and duties:

1. To manage and control all institutions and programs within the department and to administer and enforce the laws with which the department is charged.
2. To promote a unified criminal justice system and develop a statewide correctional philosophy in cooperation with the courts, law enforcement, and other entities in the criminal justice system.
- . . . .
4. To develop, maintain, and revise as required a comprehensive master plan for the state's correctional system which must indicate the system's needs and resources.
5. To develop policies and procedures to carry out the responsibilities of the department.

Pursuant to N.D.C.C. § 54-23.4-04, the director of the Department is to administer and enforce the laws with which the Department is charged, and the director is to develop policies and procedures to carry out the responsibilities of the Department.

Your first question is: "Does N.D.C.C. § 12-44.1-04 provide the Department with the authority to mandate training for county corrections workers?" Section 12-44.1-04 provides in relevant part:

The governing body of each jail shall:

. . . .

4. Ensure that all full-time jail staff who work in direct and continuing contact with inmates receive jail management training as determined and funded by the department of corrections and rehabilitation or such other training as approved by the department of corrections and rehabilitation.

Unless words in a statute are defined in the code, they are to be construed according to their plain, ordinary, and commonly understood meaning. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694 (N.D. 1990). The plain meaning of the word "ensure" is "[t]o make sure or certain; insure." The American Heritage Dictionary 456 (2d coll. ed. 1991). Under N.D.C.C. § 12-44.1-04(4), the governing body of the jail is to "make sure or certain" all full-time staff receive: 1) "jail management training as determined and funded by the department of corrections and rehabilitation"; or 2) "such other training as approved by the department of corrections and rehabilitation."

A plain reading of N.D.C.C. § 12-44.1-04(4) is that the statute requires the governing body of each jail to provide training for full-time jail staff. In addition, N.D.C.C. § 12-44.1-13(1) prescribes that "[i]nmates shall be supervised on a twenty-four-hour basis by trained jail staff." Thus, the Legislature itself has mandated training be provided for county jail and regional corrections center staff.

In American Federation of State, County, and Mun. Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983), the North Dakota Supreme Court stated, "[i]t is well-settled that public officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority." Similarly, the court has stated that state administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984).

The Department is a governmental agency with the authority to exercise the statutory powers specified in N.D.C.C. ch. 12-44.1, as well as those powers which are necessarily implied from the express grant of authority.

Ms. Elaine Little  
May 31, 1996  
Page 4

While N.D.C.C. § 12-44.1-04(4) does not, by itself, convey express authority to the Department to mandate training, the Department has the implied authority to mandate training under N.D.C.C. ch. 12-44.1. The director of the Department is to enforce the laws with which the department is charged and to establish policies and procedures necessary to carry out the responsibilities of the Department. See N.D.C.C. §§ 54-23.3-04(1) and 54-23.3-04(5). North Dakota statutes regarding juvenile detention centers, jails, and regional correctional centers place the responsibility of enforcing the training requirements with the Department. See N.D.C.C. ch. 12-44.1. The Department is to determine and approve the jail management training to be provided. See N.D.C.C. § 12-44.1-04(4). The Department is to prescribe rules establishing minimum standards for the construction, operation, and maintenance of juvenile detention centers, jails, and regional corrections centers. See N.D.C.C. § 12-44.1-24(1).

As stated above, N.D.C.C. § 12-44.1-13(1) requires that trained jail staff supervise inmates on a twenty-four hour basis. Under N.D.C.C. § 12-44.1-26, all jails, juvenile detention centers, and regional corrections centers shall comply with the requirements of the rules and regulations promulgated by the Department. The Department's present administrative rules require training for correctional officers. See N.D. Admin. Code §§ 94-02-17-01 and 94-02-17-02. The Department is to appoint a qualified jail inspector to inspect juvenile detention centers, jails, and regional corrections centers at least once each year to determine whether there is compliance with the rules and regulations of the Department. The jail inspector must include an inspection of the juvenile detention center's, jail's, or regional correctional center's personnel training. See N.D.C.C. § 12-44.1-24(4). The Department may enforce corrective action for deficiencies in jail operations, which includes noncompliance with training, under N.D.C.C. §§ 12-44.1-25 and 12-44.1-27.

Therefore, it is my opinion that the Department's authority to mandate training for juvenile detention staff, jail staff, and regional correctional center staff is necessarily implied from its statutory duties under N.D.C.C. § 53-23.4-04 and from its duties and responsibilities under N.D.C.C. ch. 12-44.1 to determine and approve training, to make jail rules, and to enforce compliance with the provisions of N.D.C.C. ch. 12-44.1 and any duly promulgated rules.

Your second question is: "Does this authority extend only to full-time employees or can the Department also require training for part-time correctional officers?"

Ms. Elaine Little  
May 31, 1996  
Page 5

Under N.D.C.C. § 12-44.1-04, the governing body of a jail must ensure that all full-time staff who work in direct and continuing contact with inmates receive jail management training as determined and funded by the Department or such other training as approved by the Department. In N.D.C.C. § 12-44.1-04(4), the Legislature has mandated full-time correctional staff receive training. This does not preclude the Department from mandating training for part-time correctional staff. N.D.C.C. § 12-44.1-13(1) requires that "[i]nmates shall be supervised on a twenty-four-hour basis by trained jail staff." The statute does not distinguish between full-time and part-time staff. "Generally, the law is what the Legislature says, not what is unsaid." Little v. Tracy, 497 N.W.2d 700, 701 (N.D. 1993).

"It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the 'court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it'."

Id. at 705 quoting City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940) (citations omitted).

N.D.C.C. § 12-44.1-13(1) requires inmates be supervised on a twenty-four hour basis by trained jail staff. Further, N.D.C.C. § 12-62-06 requires all newly appointed local correctional officers receive a course of training within the first year of employment. In order for part-time jail staff to supervise inmates, the part-time staff must be trained. N.D.C.C. ch. 12-44.1 expressly authorizes the Department to determine and approve training, to prescribe rules and regulations, to perform inspections, including inspection of personnel training, and to enforce compliance with N.D.C.C. ch. 12-44.1 and the rules and regulations it prescribes. It is my opinion, therefore, that the express grant of authority under N.D.C.C. ch. 12-44.1 includes an implied grant of authority to mandate training for part-time correctional staff who supervise inmates.

Ms. Elaine Little  
May 31, 1996  
Page 6

Your third question relates to N.D.C.C. §§ 12-62-02(7) and 12-62-06 and whether there is any conflict between these statutes and the Department's authority to mandate training.

N.D.C.C. §§ 12-62-02(7) and 12-62-06 provide for the Criminal Justice and Statistics Division under the Attorney General to conduct and certify training for local correctional officers. Under N.D.C.C. § 12-62-06, the curriculum, location, and dates of such sessions are to be determined by the Peace Officer Standards and Training Board in cooperation with the sheriff's association. Under the statutory scheme, the Department is to enforce training requirements for local correctional officers and the Criminal Justice and Statistics Division is to provide the training. There is not any conflict.

The present practice has been for the Department to coordinate and schedule training for correctional officers. The training is conducted at the Law Enforcement Training Academy. The training is provided by officials of the Department, county correctional officers, regional corrections center officers, and the Attorney General. It is also my understanding that the curriculum, while modified and updated from year to year, has been approved by the Peace Officer Standards and Training Board. While the Department may wish to seek amendments to N.D.C.C. §§ 12-62-02(7) and 62-02-06 to reflect the changes made to N.D.C.C. ch. 12-44.1, it is my opinion that the Department's training requirements are not inconsistent with the current statutory scheme.

Your fourth question relates to the promulgation of rules for jails and regional corrections centers.

N.D.C.C. § 12-44.1-24, as originally enacted, provided in part:

The attorney general shall:

1. Prescribe rules and regulations pursuant to chapter 28-32 establishing minimum standards for the construction, operation, and maintenance of public or private juvenile detention centers, county and city jails and regional corrections centers.
2. Prescribe rules for the care and treatment of inmates.

N.D.C.C. ch. 28-32 is the North Dakota Administrative Agencies Practice Act (AAPA). The AAPA includes very specific procedures with respect to the adoption of administrative rules.

Ms. Elaine Little  
May 31, 1996  
Page 7

In 1989 the Legislative Assembly amended N.D.C.C. § 12-44.1-24 and made it the responsibility of the Department to prescribe rules and regulations. The statute still required the rules be promulgated pursuant to N.D.C.C. ch. 28-32. 1979 N.D. Sess. Laws ch. 156, § 5.

In 1990 the North Dakota Supreme Court ruled the Penitentiary was not subject to the provisions of N.D.C.C. ch. 28-32. Jensen v. Little, 459 N.W.2d 237 (N.D. 1991). At that time, the Department was under the office of the Director of Institutions, which the court noted was excluded from the definition of an administrative agency and therefore not subject to the provisions of the AAPA. Id. at 239. In 1991 the Legislative Assembly amended N.D.C.C. § 12-44.1-24 by deleting the words "and regulations pursuant to chapter 28-32." 1991 N.D. Sess. Laws ch. 115, § 1. In addition, the Department, with the exception of the Crime Victims Compensation program, was excluded from the definition of the term "administrative agency." See N.D.C.C. § 28-32-01(i)(m).

The Department has the statutory authority to promulgate rules for juvenile detention centers, jails, and regional corrections centers. The Department is not required to follow the rule-making procedures prescribed under N.D.C.C. ch. 28-32. It is still advisable for the Department to allow county officials and correctional administrators opportunity for input and comment prior to the amendment or adoption of any rules.

Your fifth question relates to licensed peace officers who work as both deputy sheriffs and as corrections officers.

Although your question referred to N.D.C.C. ch. 12-62, the provisions of N.D.C.C. ch. 12-44.1 have also been considered. There are no provisions in N.D.C.C. ch. 12-62 or N.D.C.C. ch. 12-44.1 that prohibit licensed peace officers from serving as correctional officers in county jails or in regional corrections centers. In fact, that may frequently be the case. However, in order to supervise inmates, it is my opinion that the licensed peace officer must still receive correctional training to serve as a correctional officer.

Sincerely,

Ms. Elaine Little  
May 31, 1996  
Page 8

Heidi Heitkamp  
ATTORNEY GENERAL

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