

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 739

Introduced by Vargas, 7; Wayne, 13.

Read first time January 23, 2019

Committee: Judiciary

1 A BILL FOR AN ACT relating to treatment and corrections; to amend
2 sections 83-4,109, 83-4,110, 83-4,111, 83-4,113, 83-4,115, and
3 83-4,123, Reissue Revised Statutes of Nebraska, and sections
4 25-3401, 83-170, 83-173.03, 83-4,114, and 83-4,114.01, Revised
5 Statutes Cumulative Supplement, 2018; to name the Adult Institutions
6 Disciplinary Procedures Act; to define terms; to change and
7 eliminate provisions relating to solitary confinement, restrictive
8 housing, and disciplinary segregation; to prohibit placement of
9 members of vulnerable populations in restrictive housing as
10 prescribed; to provide procedures and requirements for decisions
11 regarding placement in restrictive housing and for appeals of such
12 decisions; to require the Department of Correctional Services to
13 adopt rules and regulations; to eliminate obsolete provisions; to
14 harmonize provisions; to repeal the original sections; to outright
15 repeal section 83-173.02, Revised Statutes Cumulative Supplement,
16 2018; and to declare an emergency.
17 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 25-3401, Revised Statutes Cumulative Supplement,
2 2018, is amended to read:

3 25-3401 (1) For purposes of this section:

4 (a) Civil action means a legal action seeking monetary damages,
5 injunctive relief, declaratory relief, or any appeal filed in any court
6 in this state that relates to or involves a prisoner's conditions of
7 confinement. Civil action does not include a motion for postconviction
8 relief or petition for habeas corpus relief;

9 (b) Conditions of confinement means any circumstance, situation, or
10 event that involves a prisoner's custody, transportation, incarceration,
11 or supervision;

12 (c) Correctional institution means any state or local facility that
13 incarcerates or detains any adult accused of, charged with, convicted of,
14 or sentenced for any crime;

15 (d) Frivolous means the law and evidence supporting a litigant's
16 position is wholly without merit or rational argument; and

17 (e) Prisoner means any person who is incarcerated, imprisoned, or
18 otherwise detained in a correctional institution.

19 (2)(a) A prisoner who has filed three or more civil actions,
20 commenced after July 19, 2012, that have been found to be frivolous by a
21 court of this state or a federal court for a case originating in this
22 state shall not be permitted to proceed in forma pauperis for any further
23 civil actions without leave of court. A court shall permit the prisoner
24 to proceed in forma pauperis if the court determines that the person is
25 in danger of serious bodily injury.

26 (b) A court may include in its final order or judgment in any civil
27 action a finding that the action was frivolous.

28 (c) A finding under subdivision (2)(b) of this section shall be
29 reflected in the record of the case.

30 (d) This subsection does not apply to judicial review of
31 disciplinary procedures in adult institutions administered by the

1 Department of Correctional Services governed by the Adult Institutions
2 Disciplinary Procedures Act ~~sections 83-4,109 to 83-4,123.~~

3 Sec. 2. Section 83-170, Revised Statutes Cumulative Supplement,
4 2018, is amended to read:

5 83-170 As used in the Nebraska Treatment and Corrections Act, unless
6 the context otherwise requires:

7 (1) Board means the Board of Parole;

8 (2) Committed offender means any person who, under any provision of
9 law, is sentenced or committed to a facility operated by the department
10 or is sentenced or committed to the department other than a person
11 adjudged to be as described in subdivision (1), (2), (3)(b), or (4) of
12 section 43-247 by a juvenile court;

13 (3) Department means the Department of Correctional Services;

14 (4) Director means the Director of Correctional Services;

15 (5) Director of Supervision and Services means the Director of
16 Supervision and Services appointed pursuant to section 83-1,101;

17 (6) Facility means any prison, reformatory, training school,
18 reception center, community guidance center, group home, or other
19 institution operated by the department;

20 (7) Good time means any reduction of sentence granted pursuant to
21 sections 83-1,107 and 83-1,108;

22 (8) Maximum term means the maximum sentence provided by law or the
23 maximum sentence imposed by a court, whichever is shorter;

24 (9) Minimum term means the minimum sentence provided by law or the
25 minimum sentence imposed by a court, whichever is longer;

26 (10) Pardon authority means the power to remit fines and forfeitures
27 and to grant respites, reprieves, pardons, or commutations;

28 (11) Parole term means the time from release on parole to the
29 completion of the maximum term, reduced by good time; and

30 (12) Person committed to the department means any person sentenced
31 or committed to a facility within the department. ÷

1 ~~(13) Restrictive housing means conditions of confinement that~~
2 ~~provide limited contact with other offenders, strictly controlled~~
3 ~~movement while out of cell, and out-of-cell time of less than twenty-four~~
4 ~~hours per week; and~~

5 ~~(14) Solitary confinement means the status of confinement of an~~
6 ~~inmate in an individual cell having solid, soundproof doors and which~~
7 ~~deprives the inmate of all visual and auditory contact with other~~
8 ~~persons.~~

9 Sec. 3. Sections 83-4,109 to 83-4,123 and sections 3, 6, and 7 of
10 this act shall be known and may be cited as the Adult Institutions
11 Disciplinary Procedures Act.

12 Sec. 4. Section 83-4,109, Reissue Revised Statutes of Nebraska, is
13 amended to read:

14 83-4,109 Disciplinary procedures in adult institutions administered
15 by the Department of Correctional Services shall be governed by the Adult
16 Institutions Disciplinary Procedures Act ~~the provisions of sections~~
17 ~~83-4,109 to 83-4,123.~~

18 Sec. 5. Section 83-4,110, Reissue Revised Statutes of Nebraska, is
19 amended to read:

20 83-4,110 For purposes of the Adult Institutions Disciplinary
21 Procedures Act ~~sections 83-4,109 to 83-4,123,~~ unless the context
22 otherwise requires:

23 (1) Department means the Department of Correctional Services;

24 (2) (1) Director means shall mean the Director of Correctional
25 Services; and

26 ~~(2) Department shall mean the Department of Correctional Services.~~

27 (3) Member of a vulnerable population means an inmate who is
28 eighteen years of age or younger, pregnant, or diagnosed with a serious
29 mental illness as defined in section 44-792, a developmental disability
30 as defined in section 71-1107, or a traumatic brain injury as defined in
31 section 79-1118.01;

1 (4) Restrictive housing means conditions of confinement that provide
2 limited contact with other inmates, strictly controlled movement while
3 out of cell, and out-of-cell time of less than twenty-four hours per
4 week;

5 (5) Security threat means a threat to the security of the facility,
6 staff, the inmate himself or herself, other inmates, or the public; and

7 (6) Solitary confinement means confinement in an isolated cell,
8 alone or with another inmate, for an average of twenty-two or more hours
9 per day, in an environment that ensures maximum control.

10 Sec. 6. Section 83-173.03, Revised Statutes Cumulative Supplement,
11 2018, is amended to read:

12 ~~83-173.03~~ (1) ~~No Beginning July 1, 2016,~~ no inmate shall be held in
13 restrictive housing unless done in the least restrictive manner
14 consistent with maintaining order in the facility and pursuant to rules
15 and regulations adopted and promulgated by the department pursuant to the
16 Administrative Procedure Act.

17 (2) The department shall adopt and promulgate rules and regulations
18 pursuant to the Administrative Procedure Act establishing levels of
19 restrictive housing as may be necessary to administer the correctional
20 system. Rules and regulations shall establish behavior, conditions, and
21 mental health status under which an inmate may be placed in each
22 confinement level as well as procedures for making such determinations.
23 Rules and regulations shall also provide for individualized transition
24 plans, developed with the active participation of the committed offender,
25 for each confinement level back to the general population or to society.

26 (3) On and after July 1, 2019, no inmate who is a member of a
27 vulnerable population shall be placed in restrictive housing. In line
28 with the least restrictive framework, an inmate who is a member of a
29 vulnerable population may be assigned to immediate segregation to protect
30 himself or herself, staff, other inmates, or inmates who are members of
31 vulnerable populations pending classification. The department shall adopt

1 and promulgate rules and regulations pursuant to the Administrative
2 Procedure Act regarding restrictive housing to address risks for inmates
3 who are members of vulnerable populations. Nothing in this subsection
4 prohibits the department from developing secure mental health housing to
5 serve the needs of inmates with serious mental illnesses as defined in
6 section 44-792, developmental disabilities as defined in section 71-1107,
7 or traumatic brain injuries as defined in section 79-1118.01 in such a
8 way that provides for meaningful access to social interaction, exercise,
9 environmental stimulation, and therapeutic programming.

10 Sec. 7. (1) The department shall not place or retain an inmate in
11 restrictive housing for more than ninety days in any calendar year,
12 whether consecutive or not, due to a security threat posed by the inmate
13 unless there is an individualized determination made by a specialized
14 inmate classification committee in accordance with this section.

15 (2) The director shall convene a specialized inmate classification
16 committee to make determinations under this section. The committee shall
17 consist of such employees of the department as the director determines to
18 be appropriate but shall consist of at least one qualified mental health
19 professional.

20 (3) Before the department may place or retain an inmate in
21 restrictive housing beyond the duration specified in subsection (1) of
22 this section, the specialized inmate classification committee must find
23 by a preponderance of the evidence, following a hearing pursuant to
24 subsection (4) of this section, that less restrictive alternatives are
25 unsuitable in light of a continuing and serious security threat as a
26 result of the inmate's:

27 (a) History of serious violent behavior in correctional facilities;

28 (b) Acts such as escapes or attempted escapes from secure
29 correctional settings;

30 (c) Acts or threats of violence likely to destabilize the
31 institutional environment to such a degree that the order and security of

1 the facility are threatened;

2 (d) Membership in a security threat group accompanied by a finding
3 based on specific and reliable information that the inmate either has
4 engaged in dangerous or threatening behavior directed by the group or
5 directs the dangerous or threatening behavior of others; or

6 (e) Incitement or threats to incite group disturbances in a
7 correctional facility.

8 (4) When making a determination under subsection (3) of this
9 section, the inmate shall be afforded, at a minimum, the following
10 procedural protections:

11 (a) Timely, written, and effective notice:

12 (i) Of the inmate's rights under this section;

13 (ii) That such a placement or retention in restrictive housing is
14 being considered; and

15 (iii) The facts upon which such consideration is based. This
16 subdivision does not require disclosure of information if the committee
17 finds, by a preponderance of the evidence, that such disclosure would
18 present a security threat;

19 (b) A hearing at which the inmate may be heard in person and, absent
20 an individualized determination of good cause by a preponderance of the
21 evidence, a reasonable opportunity to present available witnesses and
22 information;

23 (c) An opportunity to confront and cross-examine any witness, unless
24 the committee finds, after making an individualized determination, that
25 there is good cause to limit such right, in which case the inmate shall
26 have an opportunity to propound questions to be relayed to the witness;

27 (d) An interpreter if necessary for the inmate to understand or
28 participate in the proceedings;

29 (e) If the specialized classification committee determines that an
30 inmate is unable to prepare and present evidence and arguments
31 effectively on his or her own behalf, the provision of counsel or some

1 other appropriate advocate for the inmate;

2 (f) An independent determination by the specialized classification
3 committee of the reliability and credibility of confidential informants
4 if information allowing such determination is available;

5 (g) A written statement setting forth the evidence relied upon and
6 the reasons for placement; and

7 (h) Prompt review of the specialized inmate classification
8 committee's decision by the department's administrators.

9 (5) Following any review of the specialized inmate classification
10 committee's decision by the department's administrators, an inmate may
11 appeal the final decision of the department under this section, and the
12 appeal shall be in accordance with the Administrative Procedure Act. If
13 the court determines that the department erred, the inmate shall be
14 immediately released from restrictive housing unless the court orders
15 otherwise based upon a showing by the department that such release will
16 pose an immediate security threat.

17 Sec. 8. Section 83-4,111, Reissue Revised Statutes of Nebraska, is
18 amended to read:

19 83-4,111 (1) The department shall adopt and promulgate rules and
20 regulations pursuant to the Administrative Procedure Act to establish
21 criteria for justifiably and reasonably determining which rights and
22 privileges an inmate forfeits upon commitment and which rights and
23 privileges an inmate retains.

24 (2) Such rules and regulations shall include, but not be limited to,
25 criteria concerning (a) disciplinary procedures and a code of offenses
26 for which discipline may be imposed, (b) restrictive housing disciplinary
27 segregation, (c) grievance procedures, (d) good-time credit, (e) mail and
28 visiting privileges, and (f) rehabilitation opportunities.

29 (3) The rules and regulations adopted pursuant to the Adult
30 Institutions Disciplinary Procedures Act ~~sections 83-4,109 to 83-4,123~~
31 shall in no manner deprive an inmate of any rights and privileges to

1 which he or she is entitled under other provisions of law or under
2 policies adopted in a correctional facility.

3 Sec. 9. Section 83-4,113, Reissue Revised Statutes of Nebraska, is
4 amended to read:

5 83-4,113 All adult disciplinary action within the system of the
6 department shall be pursuant to the Adult Institutions Disciplinary
7 Procedures Act ~~sections 83-4,109 to 83-4,123~~. Inmates shall be informed
8 of rules of behavior and discipline. Such rules shall be posted or
9 otherwise made available to the inmates.

10 Sec. 10. Section 83-4,114, Revised Statutes Cumulative Supplement,
11 2018, is amended to read:

12 83-4,114 (1) There shall be no corporal punishment or disciplinary
13 restrictions on diet.

14 (2) Disciplinary restrictions on clothing, bedding, mail,
15 visitations, use of toilets, washbowls, or scheduled showers shall be
16 imposed only for abuse of such privilege or facility and only as
17 authorized by written directives, guidance documents, and operational
18 manuals.

19 (3) No person shall be placed in solitary confinement.

20 (4) The director shall issue an annual report on or before September
21 15 to the Governor and the Clerk of the Legislature. The report to the
22 Clerk of the Legislature shall be issued electronically. For all inmates
23 who were held in restrictive housing during the prior year, the report
24 shall contain the race, gender, age, and length of time each inmate has
25 continuously been held in restrictive housing. The report shall also
26 contain:

27 (a) The number of inmates held in restrictive housing;

28 (b) The reason or reasons each inmate was held in restrictive
29 housing;

30 (c) The number of inmates held in restrictive housing who have been
31 diagnosed with a mental illness or behavioral disorder and the type of

1 mental illness or behavioral disorder by inmate;

2 (d) The number of inmates who were released from restrictive housing
3 directly to parole or into the general public and the reason for such
4 release;

5 (e) The number of inmates who were released from restrictive housing
6 based upon an order of a district judge under section 7 of this act;

7 (f) (e) The number of inmates who were placed in restrictive housing
8 for their ~~his or her~~ own safety and the underlying circumstances for each
9 placement;

10 (g) (f) To the extent reasonably ascertainable, comparable
11 statistics for the nation and each of the states that border Nebraska
12 pertaining to subdivisions (4)(a) through (f) (e) of this section; and

13 (h) (g) The mean and median length of time for all inmates held in
14 restrictive housing.

15 (5)(a) There is hereby established within the department a long-term
16 restrictive housing work group. The work group shall consist of:

17 (i) The director and all deputy directors. The director shall serve
18 as the chairperson of the work group;

19 (ii) The behavioral health administrator within the department;

20 (iii) Two employees of the department who currently work with
21 inmates held in restrictive housing;

22 (iv) Additional department staff as designated by the director; and

23 (v) Four members as follows appointed by the Governor:

24 (A) Two representatives from a nonprofit prisoners' rights advocacy
25 group, including at least one former inmate; and

26 (B) Two mental health professionals independent from the department
27 with particular knowledge of prisons and conditions of confinement.

28 (b) The work group shall advise the department on policies and
29 procedures related to the proper treatment and care of offenders in long-
30 term restrictive housing.

31 (c) The director shall convene the work group's first meeting no

1 later than September 15, 2015, and the work group shall meet at least
2 semiannually thereafter. The chairperson shall schedule and convene the
3 work group's meetings.

4 (d) The director shall provide the work group with quarterly updates
5 on the department's policies related to the work group's subject matter.

6 Sec. 11. Section 83-4,114.01, Revised Statutes Cumulative
7 Supplement, 2018, is amended to read:

8 83-4,114.01 (1) The chief executive officer of each facility of the
9 department shall be responsible for the discipline of inmates who reside
10 in such facility. No inmate shall be punished except upon the order of
11 the chief executive officer of the facility, and no punishment shall be
12 imposed otherwise than in accordance with this section.

13 (2) Except in flagrant or serious cases, punishment for misconduct
14 shall consist of deprivation of privileges. In cases of flagrant or
15 serious misconduct, the chief executive officer may order that an
16 inmate's reduction of term as provided in section 83-1,107 be forfeited
17 or withheld, and also that the inmate be confined in disciplinary
18 segregation. ~~During the period of disciplinary segregation, such inmate~~
19 ~~shall be put on an adequate and healthful diet. An inmate in disciplinary~~
20 ~~segregation shall be visited at least once every eight hours.~~ No cruel,
21 inhuman, or corporal punishment shall be used on any inmate.

22 (3) The chief executive officer shall maintain a record of breaches
23 of discipline, of the disposition of each case, and of the punishment, if
24 any, for each such breach. Each breach of discipline shall be entered in
25 the inmate's file, together with the disposition or punishment for the
26 breach.

27 (4) The chief executive officer may recommend to the director that
28 an inmate who is considered to be incorrigible by reason of frequent
29 intentional breaches of discipline or who is detrimental to the
30 discipline or the morale of the facility be transferred to another
31 facility for stricter safekeeping and closer confinement, subject to the

1 provisions of section 83-176.

2 (5) The department shall adopt and promulgate rules and regulations
3 to define the term flagrant or serious misconduct.

4 Sec. 12. Section 83-4,115, Reissue Revised Statutes of Nebraska, is
5 amended to read:

6 83-4,115 Any review of disciplinary action imposed upon any person
7 shall be pursuant to the Adult Institutions Disciplinary Procedures Act
8 ~~sections 83-4,109 to 83-4,123~~. The director shall establish procedures to
9 review the disciplinary actions of inmates. The director may establish
10 one or more administrative review boards within the department to review
11 disciplinary actions. No member of any review board shall also be a
12 member of a disciplinary hearing board, but the same considerations for
13 appointing members to the disciplinary hearing board may apply to
14 appointing members to a review board.

15 Sec. 13. Section 83-4,123, Reissue Revised Statutes of Nebraska, is
16 amended to read:

17 83-4,123 Nothing in the Adult Institutions Disciplinary Procedures
18 Act ~~sections 83-4,109 to 83-4,123~~ shall be construed as to restrict or
19 impair an inmate's free access to the courts and necessary legal
20 assistance in any cause of action arising under such sections or to
21 judicial review for disciplinary cases which involve the imposition of
22 disciplinary isolation or the loss of good-time credit in accordance with
23 the Administrative Procedure Act. Such judicial review may only be
24 invoked after completion of any review of the hearing prescribed by
25 section 83-4,122 by the department.

26 Sec. 14. Original sections 83-4,109, 83-4,110, 83-4,111, 83-4,113,
27 83-4,115, and 83-4,123, Reissue Revised Statutes of Nebraska, and
28 sections 25-3401, 83-170, 83-173.03, 83-4,114, and 83-4,114.01, Revised
29 Statutes Cumulative Supplement, 2018, are repealed.

30 Sec. 15. The following section is outright repealed: Section
31 83-173.02, Revised Statutes Cumulative Supplement, 2018.

1 Sec. 16. Since an emergency exists, this act takes effect when
2 passed and approved according to law.