

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

REVEREND STEPHEN C. GRIFFITH, and)
SENATOR ERNIE CHAMBERS,)
)
Plaintiffs,)
)
vs.)
)
NEBRASKA DEPARTMENT OF)
CORRECTIONAL SERVICES, SCOTT)
FRAKES, Director of the Nebraska Department)
of Correctional Services, in his official)
capacity, JOHN PETER RICKETTS, Governor)
of Nebraska, in his official capacity, and)
DOUG PETERSON, Nebraska Attorney)
General, in his official capacity,)
)
Defendants.)

Case No:

**COMPLAINT AND PETITION
FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF**

COME NOW the Plaintiffs by and through counsel and for their causes of action against the Defendants state as follows:

INTRODUCTION

1. Plaintiffs are two Nebraska residents who have a significant and direct interest in the State’s misguided and flawed plans to administer death sentences to Nebraska prisoners currently on death row.

2. In January 2017, the State approved a revised Execution Protocol promulgated by the Nebraska Department of Correctional Services (“NDCS”) (the revised protocol is referred to herein as “the January 2017 Execution Protocol” or the “Protocol”). In revising the Protocol, however, the NDCS failed to make the complete rule-making record of the revised Protocol publicly available, in violation of the Nebraska Administrative Procedure Act, *see* Neb. Rev. Stat. § 84-901, et seq. (“the APA”). Alternatively, the NDCS promulgated this very important

Protocol, upon which lives literally depend, on a single try and without making any drafts or working copies at all, and without consulting with any public or private experts, in violation of the Due Process Clause of the Nebraska State Constitution.

3. Under either scenario, the State of Nebraska is preparing to execute the first Nebraska prisoner in more than 20 years under a new procedure that the NDCS adopted hastily, secretly, and without following required procedures. As a result, the January 2017 Execution Protocol is invalid, and the NDCS should halt all steps to execute any Nebraska prisoner.

4. Plaintiffs seek a declaration that the January 2017 Execution Protocol—Title 69, Nebraska Administrative Code, Chapter 11—is null and void. Plaintiffs also seek an injunction preventing the NDCS from carrying out any executions or taking steps toward carrying out any executions until such time as the NDCS has duly promulgated another rule, regulation, or standard that complies with the Nebraska Administrative Procedure Act, the Nebraska State Constitution, and any other applicable laws, rules, regulations, standards, and procedures.

THE PARTIES

5. Plaintiff Reverend Stephen C. Griffith is a citizen of the State of Nebraska and a retired ordained United Methodist Minister who has served in churches across Nebraska, including in Lincoln, Omaha, Osceola, Lexington, Bertrand, Loomis, and Hardy.

6. Plaintiff Ernie Chambers is a citizen of the State of Nebraska and a member of the Nebraska State Legislature representing North Omaha's 11th District.

7. Defendant NDCS is the Nebraska State Agency to which the Nebraska Legislature has delegated the authority to create and maintain the State's Execution Protocol. *See* Neb. Rev. Stat. § 83-964.

8. Defendant Scott Frakes is the duly appointed Director of the NDCS for the State of Nebraska. Mr. Frakes, in his capacity as Director of the NDCS, certified the adoption of Title 69, Nebraska Administrative Code, Chapter 11. He is sued only in his official capacity.

9. Defendant John Peter Ricketts is the Governor of Nebraska. Governor Ricketts approved Title 69, Nebraska Administrative Code, Chapter 11 on January 26, 2017. He is sued only in his official capacity.

10. Defendant Doug Peterson is the Nebraska Attorney General. Mr. Peterson approved the Title 69, Nebraska Administrative Code, Chapter 11 on January 20, 2017. He is sued only in his official capacity.

JURISDICTION AND VENUE

11. This Court has jurisdiction over Plaintiffs' claims pursuant to Neb. Rev. Stat. § 84-911. The Court has authority to grant declaratory relief under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 through 25-21,164.

12. Venue is proper pursuant to Neb. Rev. Stat. § 84-911. Defendants are sued in their official capacity, and their official place of business is this District.

FACTUAL BACKGROUND

13. The Nebraska Legislature delegated to the NDCS the creation and maintenance of an Execution Protocol governing the administration of lethal substance(s) to Nebraska prisoners who are sentenced to death. *See* Neb. Rev. Stat. § 83-864.

14. Pursuant to that delegation, and after Nebraska voters voted to keep the death penalty following the Nebraska Legislature's repeal, the NDCS made proposed revisions to the Execution Protocol in late 2016/early 2017. On November 28, 2016, the NDCS issued a media

release stating that it would hold a public hearing on December 30, 2016 regarding proposed revisions to the State's Execution Protocol.

15. The proposed revisions altered what drugs would be used in the lethal injection procedure, who would be notified of the drugs and when, and the process of carrying out the execution. It also changed 43 of 53 section descriptors and subsections of the Protocol.

16. The APA requires that, when a rule or regulation is adopted, amended, or repealed by any agency, that agency must maintain and make publicly available a complete rule-making record, including "draft copies or working copies of all rules and regulations to be adopted, amended, or repealed." Neb. Rev. Stat. § 84-907.

17. In December 2016, while the rule-making process for the January 2017 Execution Protocol was ongoing, Plaintiff Reverend Griffith sought to participate in the process, but his participation was thwarted because the NDCS did not make the complete rule-making record publicly available as required by law. Specifically, on December 20, 2016, 10 days before the NDCS's public hearing on the revisions to the Execution Protocol, Reverend Griffith visited the NDCS offices at 801 W. Prospector Place, Lincoln, Nebraska and expressly asked the NDCS to view information related to the proposed revisions to the Execution Protocol. The NDCS provided Reverend Griffith only with the draft regulation, an incomplete portion of the rule-making record, omitting the fiscal impact statement and any draft copies or working copies of the proposed revisions.

18. As a result of the NDCS's failure to follow the APA, Plaintiffs were unable to fully and fairly participate in the public notice and comment procedures that Nebraska law requires. Plaintiffs Reverend Griffith and Senator Chambers provided testimony at the public

hearing on the revisions to the Protocol, but they were unable to provide fully-informed testimony without having access to draft copies or working copies of the revisions.

FIRST CAUSE OF ACTION

19. Plaintiffs incorporate by reference all preceding paragraphs.

20. This first cause of action is brought pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 through 25-21,164, and the Nebraska Administrative Procedure Act, Neb. Rev. Stat. 84-901 through 84-920.

21. Defendants have not properly adopted and promulgated rules and regulations to implement the State's Execution Protocol, including by failing to keep and make publicly available a complete rule-making record. *See* Neb. Rev. Stat. § 84-907 (requiring the NDCS to make available "draft copies or working copies of all rules and regulations to be adopted, amended, or repealed.")

22. As a direct and proximate result of Defendants' failure to fulfill their statutory duty to adopt and promulgate rules and regulations, the Nebraska Department of Correctional Services is acting and will continue to act without established standards created in conformance with the Administrative Procedure Act.

23. Unless enjoined by this Court, Defendants may execute Nebraska prisoners pursuant to a statutorily-flawed protocol.

SECOND CAUSE OF ACTION

24. Plaintiffs incorporate by reference all preceding paragraphs.

25. This alternative and second cause of action is brought pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 through 25-21,164.

26. As reported in the *Lincoln Journal Star* on December 26, 2016, the NDCS claims that there are no working drafts or working copies of the January 2017 Execution Protocol and no records of consultation with anyone in preparing the protocol. JoAnne Young, “State won’t detail how it crafted execution protocol,” *Lincoln Journal Star*, December 26, 2016. The NDCS has not answered reporter questions about with whom it consulted and how the Execution Protocol was written. According to the article, the attorney for NDCS “said no drafts or revisions, and no records of consultation with anyone exist. And she did not answer more informal questions about who she consulted with and how she wrote the protocol.” The newspaper’s Freedom of Information request and subsequent ACLU requests did not reveal any drafts or records of consultation either.

27. If Defendants are telling the truth that the NDCS did not prepare any drafts or revisions of the January 2017 Execution Protocol and did not consult with anyone regarding the Protocol, then Defendants’ actions are unreasonable and arbitrary in violation of the Due Process Clause of Article I, section 3 of the Nebraska State Constitution. Among other defects, Defendants’ actions violate the fundamental principle of administrative law that an agency’s actions must be based on a factual foundation in the record of the proceedings.

28. Unless enjoined by this Court, Defendants may execute Nebraska prisoners pursuant to a constitutionally-flawed Protocol.

WHEREFORE, Plaintiffs request the following relief:

a. A declaration of this Court that the APA imposes upon Defendants a mandatory obligation to adopt rules and regulations that comport with the APA;

b. A declaration of this Court that any rule, regulation, directive, policy, or practice by Defendants implementing the enforcement of death sentences in Nebraska is null and void absent compliance with the APA;

c. In the alternative, if the NDCS's statements about the absence of drafts and records is true, a declaration of this Court that Defendants' actions as described herein violate the Due Process Clause of Article I, section 3 of the Nebraska State Constitution;

d. A declaration that the January 2017 Execution Protocol, Tile 69, Nebraska Administrative Code, Chapter 11, is null and void;

e. Issuance of a preliminary and permanent injunction enjoining Defendants in their official capacity, their successors in interest, and anyone acting on their behalf, from carrying out any executions or taking steps toward carrying out any executions until such time as the NDCS has duly promulgated a rule, regulation, or standard for an Execution Protocol pursuant to the Nebraska Administrative Procedure Act and consistent with the Nebraska State Constitution and any other applicable laws, rules, regulations, standards, and procedures;

f. For costs and attorney's fees and expenses pursuant to Neb. Rev. Stat. § 25-1803; and

g. For such further relief as the Court may deem just and proper.

Dated: March 26, 2018

Respectfully submitted,

REVEREND STEPHEN C. GRIFFITH and
SENATOR ERNIE CHAMBERS

A handwritten signature in blue ink, appearing to read "Ernie Chambers", is written below the typed name.

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