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ICAOS Advisory Opinion Issued by: Harry Hageman, Executive Director and Richard L Masters, Chief Legal Counsel		
State Requesting Opinion: Arkansas Date: March 5, 2010		
Description: Whether a receiving state may require all documents concerning the offender which it considers relevant and the authority to return an offender whom it determines can no longer be safely supervised in that state as conditions precedent to accepting a transfer of supervision of an offender under the compact.		

Background & History:

The State of Arkansas reported that the State of Washington denied recent transfer requests for three (3) Arkansas offenders eligible for transfer under Rule 3.101 of ICAOS Rules. Washington premised the denial of each of these transfer requests on written grounds, which have been provided to Arkansas that state as follows:

“In the interest of community safety Washington cannot accept the transfer of this Offender to Washington for supervision unless and until the following conditions are met and the following assurances are given: 1) That Arkansas provides all relevant documents concerning the offender’s known criminal history in Arkansas including all judgments and sentences, statements of Defendant on Plea of Guilty and any pre-sentence investigations; and 2) A commitment that Washington will be vested with the authority to decide when an offender transferred to Washington for supervision can no longer be safely supervised in the community and that the offender needs to be returned to Arkansas.”

Based upon the above facts and pursuant to Commission Rule 6.101(c), the State of Arkansas requested an advisory opinion regarding the requirements of the Compact and ICAOS Rules on the following issue:

Issue:

Whether a receiving state may unilaterally require all documents concerning the offender it considers relevant and the authority to return an offender whom it determines can no longer be safely supervised in that state as conditions precedent to accepting a transfer of supervision of an offender under the compact.

Applicable Rules:

Rule 3.101 provides:

“Rule 3.101 Mandatory transfer of supervision - At the discretion of the sending state, an offender shall be eligible for transfer of supervision in a receiving state under the compact, and the receiving state shall accept transfer, if the offender:



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- (a) has more than 90 days or an indefinite period of supervision remaining at the time the sending state transmits the transfer request; and
- (b) Has a valid plan of supervision; and
- (c) Is in substantial compliance with the terms of supervision in the sending state; and
- (d) Is a resident of the receiving state; or
- (e)
 - (1) has resident family in the receiving state who have indicated a willingness and ability to assist as specified in the plan of supervision; and
 - (2) can obtain employment in the receiving state or has means of support.”

Rule 3.107 provides:

“Rule 3.107 Transfer Request

- (a) A transfer request for an offender shall be transmitted through the electronic information system authorized by the commission and shall contain –
 - (1) transfer request form;
 - (2) instant offense in sufficient detail to describe the type and severity of offense and whether the charge has been reduced at the time of imposition of sentence;
 - (3) photograph of offender;
 - (4) conditions of supervision;
 - (5) any orders restricting the offender’s contact with victims or any other person;
 - (6) any known orders protecting the offender from contact with any other person;
 - (7) information as to whether the offender is subject to sex offender registry requirements in the sending state along with supportive documents;
 - (8) pre-sentence investigation report, if available;
 - (9) supervision history, if available;
 - (10) information relating to any court-ordered financial obligations, including but not limited to, fines, court costs, restitution, and family support; the balance that is owed by the offender on each; and the address of the office to which payment must be made.



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- (b) The original signed Offender Application for Interstate Compact Transfer shall be maintained in the sending state. A copy of the signed Offender Application for Interstate Compact Transfer shall be attached to the transfer request.
- (c) Additional documents, such as the Judgment and Commitment, and any other information may be requested from the sending state following acceptance of the offender. The sending state shall provide the documents if available.”

Rule 5.101 in relevant part provides:

“Rule 5.101 Retaking by the sending state

- (a) Except as required in Rule 5.102 and 5.103, at its sole discretion, a sending state may retake an offender, unless the offender has been charged with a subsequent criminal offense in the receiving state.”


Rule 5.103 in relevant part provides:

“Rule 5.103 Mandatory retaking for violation of conditions of supervision

- (a) Upon a request by the receiving state and a showing that the offender has committed three or more significant violations arising from separate incidents that establish a pattern of non-compliance of the conditions of supervision, a sending state shall retake or order the return of an offender from the receiving state or a subsequent receiving state.”

Analysis and Conclusion:

It appears to be undisputed that the three (3) offenders, whose supervision Arkansas sought to transfer to the State of Washington, were otherwise eligible for mandatory transfer under the provisions of ICAOS Rule 3.101. In addition, the information required to be submitted with the transfer requests pursuant to ICAOS Rule 3.107 appears to have been provided.


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Notwithstanding these circumstances, the State of Washington denied all three (3) of these requests for transfer on the basis that additional information concerning the criminal history of these offenders, some of which is not required by Rule 3.107 to be furnished, has not been provided and that the State of Arkansas refuses to agree that Washington will be vested with the authority to unilaterally decide when any of these offenders transferred can no longer be safely supervised in the community and that the offender needs to be returned to Arkansas, which appears to be in direct contradiction of ICAOS Rule 5. 103 (a), which requires a showing of a minimum of three (3) significant violations establishing a pattern of non-compliance before retaking by the sending state is required.

It is well settled that as a congressionally approved interstate compact, the provisions of the ICAOS and its duly authorized rules enjoy the status of federal law. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions.” (citation omitted)); *see also Alabama v. Bozeman*, 533 U.S. 146 (2001) and *Reed v. Farley*, 512 U.S. 339 (1994); and *Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3rd 95, 103 (3rd Cir. 2008). As such, after a sending state grants permission to an offender meeting the mandatory acceptance criteria to relocate, the receiving state must assume supervision over the offender and treat the offender in the same manner as in-state offenders. *See Doe, supra.* at p.108.

While a receiving state is permitted, at the time of acceptance, to impose special conditions as set forth in ICAOS Rule 4.103 (a), it cannot do so, pre-emptively as a means of avoiding its general obligations under the compact prior to acceptance in order to prevent a transfer of supervision. *See ICAOS v. Tennessee Board of Probation and Parole*, No. 04-526 KSF (E.D. Ky. 2005).

The duly promulgated rules are equally binding upon the parties to the compact. One of the axioms of modern government is the ability of a state legislature to delegate to an administrative body the power to make rules and decide particular cases. This delegation of authority extends to the creation of interstate commissions through the vehicle of an interstate compact. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). It has been held that the states may validly agree by interstate compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009); *Dutton v.*

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Tawes, 171 A.2d 688 (Md. 1961); *Application of Waterfront Commission of New York Harbor*, 120 A.2d 504, 509 (N.J. Super. 1956). Thus, the provisions of Rule 3.101, 3.107 and 5.101 have been legally authorized and approved by the Commission and neither the State of Washington nor any other state, which is a party to the contractually binding provisions of the compact, is permitted to unilaterally modify these requirements.

In this case, however, the State of Washington appears to have unlawfully done so by imposing additional requirements on transfers of supervision that any other state from which an offender seeks to transfer to Washington must provide all documents concerning the offender, which it considers relevant regardless of what may be required under Rule 3.107 and the authority to return an offender, whom it determines can no longer be safely supervised in that state in contravention of Rule 5.101.

By entering into a compact, the member states contractually agree on certain principles and rules. Depending on the terms of the compact, a state may effectively cede a portion of its individual sovereignty over the subject of the agreement, as is the case with the Interstate Compact for Adult Offender Supervision. Once entered, the terms of the compact as well as any rules and regulations authorized by the compact supersede substantive state laws that may be in conflict. *See West Virginia ex rel. Dyer, supra at 29*. This applies to prior law (*See Hinderlider, infra*, 304 U.S. at 106) and subsequent statutes of the signatory states. *See Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823).

In *Dyer*, the Court also made clear that an interstate compact cannot be "... given final meaning by an organ of one of the contracting states." Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. *See Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). *See Wash. Metro. Area Transit Auth. v. Once Parcel of Land*, 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri*, 640 F.2d 173, 174 (8th Cir. 1981). *See also McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986); *Rao v. Port Authority of New York*, 122 F. Supp. 595 (S.D.N.Y. 1954), *aff'd* 222 F.2d 362 (2nd Cir. 1955); *Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, (Md. 1976).



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The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact's terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form. The contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures pursuant to the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts ..."); *see also West Virginia ex rel. Dyer, supra* at 33; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), *rev'd* 304 U.S. 92 (1938).

In a situation similar to that presented here, the Court in *Doe v. Ward*, 124 F. Supp.2d 900 (W.D. Pa. 2000) was confronted with a case in which the State of Pennsylvania attempted to add to the mandatory acceptance criteria of the predecessor compact (Interstate Compact on Parole and Probation), based upon a Pennsylvania statute pertaining to sex offender notification. The court held that the plain language of the compact provisions in this regard prohibited the Pennsylvania Board of Probation and Parole from rejecting the transfer from other states of offenders who met the compact's mandatory acceptance criteria and that the **state had no authority to add an "extraneous condition" as a condition of transfer.** *See Doe, supra* at 914-915. *See also McComb v. Wambaugh*, 934 F.2d 474, 479 (3rd Cir. 1991).

In summary, based upon the terms of the compact, the above referenced rules and the legal authorities cited herein, neither the State of Washington nor any other ICAOS member state may refuse otherwise valid mandatory transfers of supervision under the compact on the basis that additional information concerning the criminal history of these offenders, not required by Rule 3.107 to be furnished, has not been provided or that the State of Washington will be vested with the authority to unilaterally decide when any of these offenders transferred can no longer be safely supervised in the community and that the offender needs to be returned to the sending state in contravention of Rule 5. 103 (a), which requires a showing of a minimum of three (3) significant violations establishing a pattern of non-compliance before retaking by the sending state is required.