

July 13, 1999

Peter W. Spirup, Lieutenant
Office of Professional Standards
Department of State Police
400 Public Service Bldg
Salem, OR 97310

Re: Opinion Request 1999-2

Dear Lt. Spirup:

You have asked several questions regarding Oregon State Police (OSP) enforcement of certain administrative rules adopted by the Oregon Department of Administrative Services (DAS) governing the use of state buildings and grounds in the Capitol Mall area. Your questions and our short answers are set forth below, followed by a discussion.

1. Does OSP have authority to enforce OAR 125-075-0005, which governs the use of Capitol Mall area parks and grounds?

If the Governor has approved the enforcement of DAS administrative rules by OSP, OSP has authority to enforce all of the provisions of OAR 125-075-0005.

2. Must OSP contact the Salem Police Department before enforcing the portions of OAR 125-075-0005 that incorporate Salem city ordinances?

OAR 125-075-0005 requires DAS's capitol area security personnel to cooperate with the City of Salem Police Department in enforcing that rule. Neither the rule nor OSP's interagency agreement with DAS specifies what form this cooperation must take. In many cases, a violation of city ordinances relating to parks would also be a violation of OAR 125-075-0005. OSP could enforce a violation of OAR 125-075-0005 without first contacting the Salem Police.

3. Must signs be posted describing the conduct prohibited by OAR 125-075-0005 before OSP may enforce that rule?

No, unless such posting is specifically required by the rule or by a city ordinance that is incorporated into the rule by reference.

4. Is there any penalty for violations of OAR 125-075-0005?

Violations of OAR 125-075-0005 are "violations" under the state criminal statutes and are punishable by a fine fixed by the court, not to exceed \$250.

Discussion

OSP patrols portions of the Capitol Mall area pursuant to an interagency agreement with DAS. Your questions relate to OSP's enforcement of OAR 125-075-0005, which governs the use of Capitol Mall area parks and grounds.

1. OSP's Authority to Enforce Rules

a. OSP Enforcement Authority

We first consider whether OSP has statutory authority to enforce DAS's administrative rules governing the use of the Capitol Mall area. ORS 181.050 provides:

The state police, with the approval of the Governor, may be called upon by any other branch or department of the state government to enforce criminal laws or any regulation of such branch or department.

Two other statutes provide authority for DAS's appointment of OSP as state building police officers. ORS 276.021 provides in part:

The Director of [DAS], subject to any applicable provisions of the State Personnel Relations Law, shall appoint and supervise state building police officers, who shall protect the buildings and property in the capitol area that are within the jurisdiction of the Oregon Department of Administrative Services and enforce traffic and parking rules established by the department in areas subject to its jurisdiction * * * .

And ORS 283.110(1) provides:

Subject to rules prescribed by [DAS], any state agency shall, as its own facilities permit, furnish to any other state agency such services (including labor), facilities and materials as are requisitioned by the head of another agency. The expense shall be charged to the agency served, which shall pay the expense to the agency furnishing the services, facilities or materials in the manner other claims are paid. Agencies shall, as far as practicable, cooperate with one another in the use of services, quarters and equipment.

Read together, ORS 181.050, 276.021 and 283.110(1) authorize DAS to appoint OSP to serve as state building police officers and enforce DAS's administrative rules governing the use of state buildings and property. However, the Governor must approve the portion of the arrangement between DAS and OSP that requires OSP to enforce DAS's administrative rules.⁽¹⁾

b. Enforceability of Rules

The remaining issue is whether the rule in question is enforceable. DAS is specifically authorized to "manage and control the utilization of * * * [b]uildings and properties in the capitol area" other than the State Capitol and the Supreme Court Building.⁽²⁾ ORS 276.004(1)(a). "Capitol area" means the state buildings in Salem in and about the Capitol Mall and the grounds owned by the state adjacent to those buildings. ORS 276.010(1), (3). DAS also has general authority to "make reasonable rules and regulations that are necessary or proper for the administration of the laws that [DAS] is charged with administering." ORS 184.340. Under these provisions, DAS has general statutory authority to adopt any rules that it reasonably determines to be necessary or proper for managing and controlling the use of the Capitol Mall area buildings and properties under its jurisdiction.

OAR 125-075-0005 imposes restrictions and conditions on the use of state-owned parks and grounds in the Capitol Mall area.⁽³⁾ OAR 125-075-0005(2) incorporates by reference certain City of Salem ordinances. The legislature cannot

authorize an agency to adopt administrative rules incorporating future standards to be adopted or amended by another authority. Or Const, Art I, § 21; Art III, § I; Art IV, § I. *See also* 40 Op Atty Gen 384, 386 (1980); *Seale v. McKennon*, 215 Or 562, 572-73, 336 P2d 340 (1959). However, an agency may be authorized to adopt rules that incorporate standards established by another authority on or before the rules' effective date. *Id.*; 40 Op Atty Gen at 386.

We interpret OAR 125-075-0005(2) as incorporating by reference the provisions of City of Salem Code 94.010 to 94.990 as in effect in 1983, when the rule was originally adopted. So interpreted, the rule does not constitute an impermissible delegation of legislative authority.⁽⁴⁾

Nothing in this rule conflicts with any other statutory or constitutional limitation. Accordingly, we conclude that OSP may enforce all provisions of OAR 125-075-0005.

2. Cooperation With Salem Police Department

Your second question is whether OSP must contact the Salem Police Department before enforcing the portions of OAR 125-075-0005 that incorporate Salem city ordinances. OAR 125-075-0005(5) provides in part:

Enforcement of this rule shall be carried out by [DAS's] Capitol area security personnel in cooperation with the City of Salem Police Department * * * .

The rule does not specify the manner or extent of the required cooperation with Salem Police. Because a single act of misconduct could violate both DAS's administrative rule and a city ordinance, the most likely reasons for the cooperation requirement are to give city police an opportunity to enforce ordinances in the Capitol Mall area parks and grounds and to ensure consistent interpretation and application of the city ordinances incorporated into the rule. Therefore, we believe OSP should discuss the enforcement of this rule with the Salem Police and mutually agree on procedures to give the Salem Police the opportunity to enforce ordinances in Capitol Mall area parks. In many cases, a violation of city ordinances relating to parks would also be a violation of OAR 125-075-0005, and such discussions could also ensure consistent enforcement between the two agencies. We do not interpret OAR 125-075-0005(5) as requiring that OSP contact the Salem Police before enforcing violations of the administrative rules.

3. Posting Signs

Your third question is whether signs must be posted describing the conduct prohibited by OAR 125-075-0005 before OSP may enforce that rule. Although a statute may specifically require the posting of particular administrative rules, *see, e.g.*, ORS 276.594(2), there is no general requirement that administrative rules be posted before they can be enforced.

There is no specific statutory requirement that the rule in question be posted. In some instances, however, a rule itself may require the posting of signs. For example, OAR 125-075-0005 incorporates by reference City of Salem Code 94.020(b). That ordinance, as in effect when the rule was adopted,⁽⁵⁾ prohibited any person from permitting a dog to enter upon any portion of a park that was not specifically designated by posting as a dog exercise area.⁽⁶⁾ When, as in this example, the posting of signs is specifically required by the rule or an ordinance incorporated by reference into the rule, the signs must be posted before the rule may be enforced.

4. Penalties

Finally, you ask whether any penalty may be imposed on persons who violate DAS's OAR 125-075-0005. This rule implements DAS's statutory authority under ORS 276.002 and 276.004. Those statutes do not authorize the agency to impose a monetary civil penalty for violations of its administrative rules governing the use of state buildings and

property.⁽⁷⁾

Nevertheless, ORS 276.990 provides, in part:

(1) A person who violates any rule lawfully promulgated under ORS 276.001 to 276.736 and this section commits a violation.

A person convicted of a "violation" may be sentenced to pay a fine, fixed by the court, not exceeding \$250. ORS 161.635(3).

We conclude that rules implementing DAS's statutory authority under ORS 276.002 and 276.004 are "promulgated under" ORS 276.001 to 276.736 within the meaning of ORS 276.990(1). Consequently, any violation of a rule lawfully promulgated by DAS regarding the use of state buildings and property in the Capitol Mall area constitutes a "violation" for which a court may impose a fine. ORS 276.990(1), 161.635(3).

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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1. We understand that OSP and DAS have entered into an interagency agreement governing the patrol of the Capitol Mall area.

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2. The Capitol Building is controlled by the Legislative Administration Committee. ORS 276.002(1). The Supreme Court Building is controlled by the Supreme Court, acting through the State Court Administrator. ORS 276.587.

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3. OAR 125-075-0005 provides:

(1) The State Capitol grounds including Wilson Park, Capitol Park, and other parks and grounds in the Capitol area as defined in ORS 276.010, save and except that property used for residential purposes located in the northern portion of the Capitol area, are open to the public for use, subject to restrictions specified in this rule.

(2) The restrictions specified in the City of Salem Code 94.010, as adopted by Salem City Council on October 25, 1955, are hereby adopted by the Department of Administrative Services and, except for the modifications set forth in section (5) of this rule, are made a part of this rule governing the use of the State Capitol area parks and grounds.

(3) Any request for information, applications for permits or reservations for a park or a portion thereof for use should be sent to: Manager, Operations and Maintenance Section, Facilities Division, Department of Administrative Services, 1225 Ferry Street S.E., Salem, OR 97310.

(4) Any use of the Capitol area parks and grounds for the following activities shall require use authorization by the Department:

(a) Sales and solicitations, as provided under the City of Salem Code 94.100;

(b) Public demonstration, as provided under the City of Salem Code 94.090;

(c) Any organized or group activity, as referenced in the City of Salem Code 94.200.

(5) Enforcement of this rule shall be carried out by the Department's Capitol area security personnel in cooperation with the City of Salem Police Department with the following stipulations modifying the City of Salem Codes 94.010 to 94.990 for the purposes of this rule:

(a) For the purposes of City Code 94.070 on throwing objects, frisbees are exempted from the prohibited category of "other missile"

(b) For the purposes of City Code 94.100 on sales and solicitations, the Department may follow the Department's rule OAR 125-080-0000 and 125-080-0010 for granting permits;

(c) For the purposes of City Code 94.110, no bathing, wading or swimming shall be allowed in fountains, water displays or systems, with the exception of the Wall of Water Fountain on the Capitol Mall Plaza, in front of the Capitol Building, where wading is allowed;

(d) For the purposes of City Codes 94.160 to 94.180 relative to use of motor vehicles and parking, the Department may follow the Department rules OAR 125-095-0000 through 125-095-0065;

(e) For the purposes of City Code 94.190, the Department shall not permit any overnight use of the parks and grounds subject to this rule;

(f) For the purposes of City Code 94.195 on the use of alcoholic beverages, the

Department shall follow the Department's rule OAR 125-075-0015(2), and prohibits use of any illegal drugs or controlled substances by law in addition to any alcoholic beverages;

(g) For the purposes of City Code 94.200, the Department may choose not to set or post any signs for public information on opening and closing hours of the Capitol grounds. However, as provided under section (4) of this rule, the Department will regulate organized activities to minimize traffic congestion in the Capitol Mall area, disruption of state business by noise, such as by high amplification equipment, and informal use of the parks;

(h) No posters or placards may be placed on public grounds except those authorized by the Facilities Division for the conduct of public business;

(i) The State Capitol Building and the Supreme Court Building including their respective entrance areas are outside the jurisdiction of the Department. For any proposed use thereof, inquiries should be directed to the Administrative Services, Legislative Administration Committee, S401 State Capitol, Salem, OR 97310; or the office of State Court Administrator, Supreme Court Building, Salem, OR 97310, respectively.

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4. As originally adopted on January 19, 1983, OAR 125-075-0005(2) incorporated by reference "[t]he restrictions specified in the City of Salem Codes 94.010 to 94.990 (attached as Exhibit A) * * * with changes stipulated under section (5) of this rule." The rule was amended on November 23, 1992, to add restrictions on the use of fountains. This amendment also revised the language that incorporated the City of Salem ordinances. As amended, OAR 125-075-0005(2) incorporates by reference only the provisions of "City of Salem Code 94.010, as adopted by the Salem City Council on October 25, 1955." The amendment is confusing for several reasons. First, the amended rule, like the original rule, includes specific modifications of "the City of Salem Codes 94.010 to 94.990." OAR 125-075-0005(5). This suggests that the rule was intended to incorporate all of the city ordinances from 94.010 to 94.990, not just 94.010. Second, the city ordinances in question were adopted on April 22, 1957, rather than October 25, 1955. Finally, at the time of adopted by the City Council, the ordinances in question were codified at Section 23 of the Salem City Code, rather than Section 94.

The Certificate and Order and Statement of Need filed by DAS with the 1992 rule amendment indicate that the amendment was for the sole purpose of including specific restrictions on the use of water fountains. There is no indication that the amendment was intended to effect any substantive change to the incorporation by reference language. Accordingly, although the issue is not entirely clear, we believe that DAS likely intended to incorporate by reference the provisions of City of Salem Code 94.010 to 94.990, as in effect when the rule was originally adopted in 1983.

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5. See note 4.

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6. This ordinance has since been changed to prohibit dogs in any portion of a park that is temporarily posted as an area prohibited to dogs. Because the DAS rule could not incorporate by reference any future changes to the ordinance in question, we believe this change has not been incorporated into OAR 125-075-0005.

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7. An administrative agency may impose a monetary civil penalty against persons who violate the agency's statutes or rules only if the governing statutes expressly authorize the agency to do so. See Letter of Advice dated June 14, 1985, to Dan Smith, Administrator, Building Codes Division, Department of Commerce (OP-5852) at 2, and examples cited therein. Similarly, the courts may impose penalties for unlawful conduct only as authorized by statute. We have noted that "[a]lthough an act may be prohibited, it is not subject to a penalty unless the statutes clearly so provide." Letter of Advice dated July 28, 1970, to the Honorable Louis L. Selken, Deschutes County District Attorney (OP-0611); see also *State v. Gaunt*, 13 Or 115, 118, 9 P 55 (1885).

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