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STATE OF INDIANA
IN THE SUPREME COURT

ROY WARD,

Appellant(s),

v.

ROBERT CARTER

BRUCE LEMMON

RON NEAL

Appellee(s).

Cause No. 46S03-1709-PL-00569

CERTIFICATION

STATE OF INDIANA)
) SS:
Court of Appeals)

I, Gregory R. Pachmayr, Clerk of the Supreme Court, Court of Appeals and Tax Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the Opinion of said Court in the above entitled case.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of THE CLERK of said Court, at the City of Indianapolis, this on this the 30th day of April, 2018.

Gregory R. Pachmayr,
Clerk of the Supreme Court

APPENDIX A

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In the Indiana Supreme Court

No. 46S03-1709-PL-00569

ROY LEE WARD,

Appellant (Plaintiff below),

V.

ROBERT E. CARTER, JR., COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, AND RON NEAL, SUPERINTENDENT OF THE INDIANA STATE PRISON, IN THEIR OFFICIAL CAPACITIES.

Appellees (Defendants below).

Appeal from the LaPorte Circuit Court, No. 46C01-1512-PL-2154
The Honorable Thomas J. Alevizos, Judge

On Petition to Transfer from the Indiana Court of Appeals, No. 46A03-1607-PL-1685

February 13, 2018

Goff, Justice.

Plaintiff challenges the Department of Correction's change to Indiana's lethal injection protocol, arguing the combination of drugs used in executions is a substantive rule that must be promulgated pursuant to the Administrative Rules and Procedures Act. We disagree. Because the Department's decision to add Brevital to the lethal injection cocktail does not carry the effect of

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law—that is, the change does not impose standards regulating Ward's conduct—we hold the new three-drug protocol is not a rule and, therefore, not subject to the Administrative Rules and Procedures Act.

Factual and Procedural History

Plaintiff, Roy Ward, sits condemned on Indiana's "death row" at Indiana State Prison in LaPorte County. Ward was sentenced to death by execution in 2007 for a 2001 rape and murder. See Ward v. State, 903 N.E.2d 946, aff'd on reh'g, 908 N.E.2d 595 (Ind. 2009), cert. denied, 559 U.S. 1038 (2010). The Indiana Code commands that "[t]he punishment of death shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person." Ind. Code § 35-38-6-1(a) (2014 Repl.). The Code tasks the Indiana Department of Correction (the Department) with housing death-row offenders and administering executions by lethal injection. See I.C. chapter 35-38-6.

In May 2014, the Department announced a change to the lethal injection protocol. Specifically, the Department said it would alter the three-drug combination used for executions, replacing Sodium Thiopental with Brevital—a barbiturate anesthetic in the same class. Following that announcement, Indiana's three-drug execution protocol included Brevital, followed by Pancuronium Bromide and then Potassium Chloride.

On December 22, 2015, Ward filed a complaint in the LaPorte Circuit Court, naming as defendants Bruce Lemmon, then-Commissioner of the Department, and Ron Neal, the Superintendent of the Indiana State Prison.[1] The complaint alleged the Department's change to the lethal injection protocol violated Ward's rights under Indiana's Administrative Rules and Procedures Act (ARPA) along with his due course of law and due process rights under the Indiana and United States constitutions. All Ward's claims hinged upon his contention that the Department's new three-drug cocktail amounted to an administrative "rule" that must be adopted and promulgated pursuant to ARPA.

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[1] At some point during this litigation Robert E. Carter, Jr., replaced Mr. Lemmon as Commissioner and was substituted as a proper party in this appeal pursuant to Indiana Appellate Rule 17(C)(1).

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The Defendants moved to dismiss Ward's complaint under Trial Rule 12(B)(6), arguing it failed to state a claim upon which relief could be granted. Following a hearing, the trial court granted the State's motion. It concluded: "Defendants were not required to go through ARPA as changing a drug in the lethal injection protocol is considered an internal policy and not rule promulgation."

Ward appealed, and the Court of Appeals reversed the trial court's order dismissing the complaint. Ward v. Carter, 79 N.E.3d 383 (Ind. Ct. App. 2017). The Court of Appeals holding proved twofold. First, in response to a newly raised argument from the Defendants, the court held the Department must follow ARPA when promulgating rules. Id. at 387. Second, it held the Department's execution protocol constituted a "rule" and since the Department failed to follow ARPA's requirements when adding Brevital to the three-drug combination, "the changed protocol is void and without effect." Id. at 388.

The Defendants then sought transfer, which we granted, thereby vacating the Court of Appeals opinion. See Ind. Appellate Rule 58(A). The central issue presented in this case concerns whether the Department's lethal injection protocol constitutes a "rule" for ARPA purposes. Ward contends the protocol is a rule and, therefore, must go through ARPA's notice-and-comment rulemaking requirements. On the other hand, the Defendants maintain the lethal injection protocol is an internal Department policy exempt from ARPA's strictures. For the reasons set forth below, we agree with the Defendants and affirm the trial court.

Standard of Review

Since a 12(B)(6) motion to dismiss for failure to state a claim challenges only the legal sufficiency of the complaint, it presents a legal question that we review de novo. Thornton v. State, 43 N.E.3d 585, 587 (Ind. 2015). We may affirm a dismissal under 12(B)(6) "if it is sustainable on any basis in the record." Id.

Discussion and Decision

I. Administrative rules carry the effect of law, which means they prescribe binding standards of conduct on a regulated person.

ARPA governs agency rulemaking—i.e., adding, amending, or repealing administrative rules. Ind. Code § 4-22-2-13(a) (2012 Repl.). ARPA, however, does not apply to "[a] resolution or

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directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law." Id. at §4-22-2-13(c)(1). The parties debate whether the Department's lethal injection protocol—specifically, the drug combinations used in executions—constitutes a rule or internal policy or procedure under the ARPA statute.

ARPA defines "rule" accordingly:

> (b) "Rule" means the whole or any part of an agency statement of general applicability that:
> (1) has or is designed to have the effect of law; and
> (2) implements, interprets or prescribes:
> (A) law or policy; or
> (B) the organization, procedure, or practice requirements of an agency.

Id. at § 4-22-2-3(b). Case law defines an administrative "rule" similarly, laying out four elements: (1) "an agency statement of general applicability to a class;" (2) that is "applied prospectively to the class;" (3) that is "applied as though it has the effect of law;" and (4) that "affect[s] the substantive rights of the class." Villegas v. Silverman, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005) (citing Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984)). We observe straightaway that both definitions share the "effect of law" element. What's more, we see the "effect of law" requirement distinguishes agency rules from internal policies or procedures. Compare I.C. § 4-22-2-3(b)(1) (instructing administrative rules carry the effect of law), with I.C. § 4-22-2-13(c)(1) (instructing that internal agency policies and procedures do not). Taken together, Indiana law instructs that agency rules must carry the "effect of law"—a term left largely undefined in our jurisprudence.

A. To date, Indiana law provides an incomplete explanation for "effect of law."

We first acknowledge that this Court's case law addressing the "effect of law" has been limited to cases involving the reach of our court rules. For example, over the past century, we routinely instructed that courts have power to adopt rules that "*have the force and effect of law*, and are obligatory upon the court, as well as upon the parties to causes pending before it." Magnuson v. Billings, 152 Ind. 177, 180, 52 N.E. 803, 803-04 (1899) (emphasis added). See also Rout v. Ninde, 111 Ind. 597, 598, 13 N.E. 107, 107-08 (1887); State v. Van Cleave, 157 Ind. 608, 609, 62 N.E. 446, 447 (1902); Epstein v. State, 190 Ind. 693, 697, 128 N.E. 353, 353 (1920); State ex rel. Spelde v. Minker, 244 Ind. 421, 422, 193 N.E.2d 365, 365 (1963). While we have not expanded upon that

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principle, we recently rephrased it by stating court rules "have the force and effect of law . . . and are binding on both the court and all litigants." In re Adoption of J.T.D., 21 N.E.3d 824, 831 (Ind. 2014) (internal citations and quotation marks omitted). Overall, these cases instruct that a court rule governs more than procedure—a rule having "the effect of law" necessarily touches individual substantive rights too. See id. (stating that when a rule carries the "effect of law" litigants "have the right to assume that [the rule] will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business") (quoting Magnuson, 52 N.E. at 804). Although we find this precedent instructive, we recognize its limitations since it considers court rules, not agency rules.

Our Court of Appeals had the opportunity to apply the term "effect of law" to agency rules in the ARPA case, Villegas v. Silverman, 832 N.E.2d 598. There, the court considered whether the Bureau of Motor Vehicles's documentation requirements for obtaining Indiana driver licenses, permits, and identification cards constituted an agency rule subject to ARPA's rulemaking procedures. Id. at 608-10. Considering both ARPA's and the common law's definition for "rule," the court concluded the BMV's "identification requirements . . . constitute a rule." Id. at 609.

As for the "effect of law" element specifically, the court determined "[t]he requirements are designed to have the effect of law because if an applicant does not produce the necessary documentation, then he or she cannot obtain a driver license, permit, or identification card." Id. The court did not unpack this statement, but we appreciate its value nonetheless. As we see it, the BMV's requirements carried the effect of law not just because they created rights or obligations, but because of who bore those rights or obligations—the individual, not the agency. Per the BMV requirements, the Villegas plaintiffs had to alter their conduct (provide certain documents) to receive the substantive benefits the law afforded (driver licenses, ID cards, or permits). And there was no latitude in compliance.

In support of its conclusion that the BMV's requirements represented an agency rule, the court went on to explain why the BMV's requirements did not amount to an agency resolution or directive, writing "[t]he new identification requirements do not relate primarily to the BMV's internal policies, procedures, or organization." Id. The court then focused on the requirements' impact: "The primary impact of the identification requirements is external, and it is the primary

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impact that is paramount." Id. The court said that "the identification requirements primarily impact applicants seeking new issuances of driver licenses, permits, and identification cards because it [sic] sets forth what is essential for them to obtain such cards." Id. at 610.

From Villegas, we surmise that if an agency requirement primarily affects citizens' conduct, it has the effect of law and constitutes a rule. Alternatively, if the agency requirement primarily affects agency conduct (internal policies or procedure), then it is an agency directive or resolution without the effect of law. We recognize the Court of Appeals did not utilize its "primary impact" reasoning in the "effect of law" analysis, but we still find it instructive to our task here since the "effect of law" element distinguishes a rule from an internal policy or directive. In sum, gleaning what we can from Indiana jurisprudence, we understand that a rule having the "effect of law" primarily affects individuals' substantive rights or conduct and can be enforced in a court of law. But since Indiana courts have considered "effect of law" in very few cases, our case law remains incomplete. Consequently, we turn to United States Supreme Court precedent for guidance.

B. United States Supreme Court "effect of law" precedent provides clarity.

The Supreme Court laid the foundation for "effect of law" in Chrysler Corporation v. Brown, 441 U.S. 281, 301 (1979), when it said: "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics"— meaning it must "affect[] individual rights and obligations," id. at 302. That case, in part, presented the question of whether certain agency regulations have the force and effect of law for purposes of the Trade Secrets Act. Id. at 295. The Court explained that agency rules have procedural and substantive characteristics. Rules first must derive from legislative authority, id. at 302, and then be properly promulgated, id. at 303. However, the Court labeled the substantive component—affecting individual rights and obligations—the "important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'" Id. at 302.

The Supreme Court built upon that cornerstone laid in Chrysler when it said the phrase "force and effect of law . . . 'connotes official, government-imposed policies' prescribing 'binding standards of conduct.'" Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 569 U.S. 641, 649 (2013) (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 229 n.5 (1995) (citation omitted) ("[T]he phrase 'having the force and effect of law' is most naturally read to 'refer to binding standards of conduct that

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operate irrespective of any private agreement.'")). In American Trucking, the Court considered whether requirements adopted by the Port of Los Angeles carried the "effect of law" for purposes of federal preemption. Id. at 648-49. Specifically, the Port required that certain trucking companies enter into "concession agreements" that mandated the companies affix placards on some trucks and submit parking plans for unused trucks. Id. at 645. The Port prescribed penalties for noncompliance. For example, a company's failure to enter into these agreements could result in a "misdemeanor . . . punishable by a fine of up to $500 or a prison sentence of up to six months." Id. The Port's requirements left trucking companies with a choice, either conform their conduct to Port standards or face penalties. In determining whether the Port's requirements carried the "effect of law," the Court explained the phrase "targets the State acting as the State," that is, when the State regulates individual conduct. Id. at 650. In other words, if an agency rule acts as a coercive mechanism or wields coercive power over people, it carries the effect of law. See id. at 650-51. Ultimately, the Court held that since the Port's regulations imposed mandatory obligations on trucking companies, those regulations had the force and effect of law. Id. at 652.

Weaving together this federal and state precedent, we observe a common thread—a rule carrying the effect of law primarily affects individual rights and obligations by setting binding standards of conduct for persons subject to its authority. This "effect of law" concept manifests in everyday situations where Hoosiers must conform their conduct to meet agency standards. To be sure, when an agency standard requires citizens to alter their behavior—i.e., when it regulates their conduct—it necessarily affects the citizens' rights or obligations because it compels them to do something they would not do otherwise or face legal consequences for noncompliance. And so that agency standard carries the effect of law. We therefore settle on the following summation of the phrase "effect of law" for Indiana jurisprudence: An agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority.

II. Since the Department's lethal injection protocol does not bind Ward's conduct, it does not have the effect of law.

Ward's complaint alleged the Department's three-drug execution protocol amounted to a rule subject to ARPA's notice-and-comment rulemaking requirements. In support of that allegation, the complaint thrice stated: "The new rules have the effect of law." Notably, Ward attached and incorporated into the complaint five exhibits that either detail the lethal injection process or confirm

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the Department purchased Brevital. Three of those five—Exhibits C, D, and E—are confidential or restricted Department documents that list the drugs approved for use in executions. Because Ward cabined his claim to the three-drug cocktail—specifically, adding Brevital—we confine our "effect of law" analysis to portions of those three exhibits that discuss the drugs approved for lethal injections. In other words, we must determine whether the Department's lethal injection three-drug protocol prescribes binding standards of conduct for condemned offenders. It does not. In our view, the exhibits Ward presented as Indiana's lethal injection process represent an internal policy or procedure, not an administrative rule having the effect of law.

Exhibit C, for example, is a three-page document that identifies what drugs are used for lethal injections and outlines how the Department obtains, stores, prepares, and administers them. It instructs that one of the drugs that could be used during an execution is Brevital. Exhibit C places no requirements on the condemned offender's conduct. Instead, it informs Department personnel what they must do to prepare and use the pharmaceuticals during a lethal injection.

Exhibit D is a longer Department document detailing the entire lethal execution protocol, including procedures the Department will use in the weeks, days, hours, and even minutes before an execution. But for our purposes here, we consider one paragraph in Exhibit D's Section F, which states, Department "[s]taff are trained by a licensed physician in the mixing, preparation, and administration of the Sodium Thiopental, Pentobarbital or Brevital, Pancuronium Bromide or Vecuronium and Potassium Chloride." Section F goes on to read: "In the event of an unavailability of a sufficient quantity of Sodium Thiopental from available resources, a sufficient quantity of Pentobarbital, or Brevital will be acquired and administered in the place of the Sodium Thiopental." Exhibit D's one paragraph discussing the drugs used during lethal injections in no way regulates the offender's behavior or conduct.

Exhibit E is a one-page document, akin to a checklist, designating and sequencing the drugs approved for lethal injections. Exhibit E directs that Sodium Pentothal, Pentobarbital, or Brevital must be placed in a yellow syringe, Pancuronium or Vecuronium must be placed in a blue syringe, Potassium Chloride must be placed in a red syringe, and Saline must be placed in a black syringe. Like Exhibits C and D, Exhibit E does not require an offender to do anything or alter his or her behavior in any way.

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In our view, none of these exhibits primarily affect an offender's rights or obligations. No exhibit prescribes binding standards of conduct that condemned offenders, like Ward, must follow to vindicate a substantive right. Unlike the Villegas plaintiffs or the American Trucking companies, Ward is not required to alter his conduct in any way. He is not faced with a choice of conforming his conduct to Department standards or foregoing a substantive right—his fate remains unaltered. Rather, the exhibits outline what Department personnel must do. They relate to the Department's internal policies and procedures that bind Department personnel and no one else. We therefore conclude that the Department's lethal injection protocol, as evidenced by these exhibits, does not carry the effect of law. Consequently, we hold the Department's lethal injection procedures do not constitute rules under Section 4-22-2-3(b) and are exempt from ARPA's rulemaking strictures. Because we resolve Ward's claims on this narrow ground, we decline to address the Defendant's alternative, broader argument that the Department is free to decide whether to follow ARPA when promulgating rules governing executions by lethal injection.

We pause briefly to note that Ward does not raise an Eighth Amendment cruel-and-unusual-punishment argument here. His Indiana and federal constitutional claims cited only due process violations, which hinged upon whether the Department's lethal injection protocol amounted to a rule subject to ARPA. Since we hold the Department protocol does not carry the effect of law and therefore is not a rule subject to ARPA, his constitutional claims necessarily fail.

Conclusion

For these reasons, we affirm the trial court's judgment dismissing Ward's complaint.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

In the
Indiana Supreme Court

Roy Lee Ward,
Appellant,

v.

Robert E. Carter, Jr., Commissioner of the Indiana Department of Correction, and Ron Neal, Superintendent of the Indiana State Prison, in their Official Capacities,
Appellee(s).

Supreme Court Case No.
46S03-1709-PL-569

Court of Appeals Case No.
46A03-1607-PL-1685

Trial Court Case No.
46C01-1512-PL-2154

Order

Appellant's Petition for Rehearing is hereby DENIED.
Done at Indianapolis, Indiana, on 4/23/2018.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

APPENDIX B

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IN THE
COURT OF APPEALS OF INDIANA

Roy Lee Ward,

Appellant-Plaintiff,

v.

Robert E. Carter, Jr., Commissioner of the Indiana Department of Correction, and Ron Neal, Superintendent of the Indiana State Prison, in their official capacities,

Appellees-Defendants

June 1, 2017

Court of Appeals Case No. 46A03-1607-PL-1685

Appeal from the LaPorte Circuit Court

The Honorable Thomas J. Alevizos, Judge

Trial Court Cause No. 46C01-1512-PL-2154

Baker, Judge.

APPENDIX C

[1] Roy Lee Ward is an Indiana inmate on death row. In 2014, the Department of Correction (DOC) internally adopted a new method of lethally injecting inmates; the new method includes a cocktail of drugs that has never been administered in an execution in the United States. Ward filed a claim seeking injunctive and declaratory relief, arguing that the DOC was required to promulgate this new policy as a rule under the Administrative Rules and Procedure Act (ARPA).[1] The State filed a motion to dismiss the claim, which the trial court granted. Ward now appeals. Finding that the General Assembly has not exempted the DOC from ARPA and that the statutory definition of "rule" clearly includes the DOC's execution protocols, we reverse.

Facts[2]

[2] In 2007, Ward was sentenced to death by execution in Indiana. He is currently imprisoned at Indiana State Prison in LaPorte County. State officials, through the DOC, administer all state executions, which occur by the intravenous injection of lethal substances. In May 2014, State officials announced that they had adopted a new rule in their execution protocol. The new rule was not promulgated under ARPA but was instead adopted informally as an internal DOC policy.

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[1] Ind. Code ch. 4-22-2 et seq.

[2] We held oral argument in Indianapolis on May 17, 2017. We thank counsel for both parties for their written and oral presentations.

[3] This new rule, which was effective immediately, provided that all prisoners sentenced to death in Indiana (including Ward) would be executed by a new combination of three drugs—methohexital (known by the brand name Brevital), pancuronium bromide, and potassium chloride. No prisoner of any state nor of the federal government has ever been executed with this particular combination of drugs.

[4] On December 22, 2015, Ward filed a complaint seeking injunctive relief and a declaratory judgment. His essential argument was that because this new rule was not promulgated under ARPA, it is unlawful and violates his rights under ARPA and his right to due process under the state and federal constitutions. On March 29, 2016, the State filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6), arguing that Ward had failed to state a claim on which relief could be granted. Essentially, the State contended that ARPA did not apply to the adoption of this new rule and that, consequently, no due process violation had occurred. Following a hearing, the trial court granted the motion and dismissed Ward's complaint.[3] Ward now appeals.

Discussion and Decision

[5] We apply a de novo standard of review to a trial court's order granting a Rule 12(B)(6) motion to dismiss a complaint for failure to state a claim. *Allen v.*

---

[3] In its order, the trial court relied heavily on federal cases grounded in arguments related to cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Appellant's App. p. 12-13. Ward, however, is not making an argument related to the Eighth Amendment.

Clarian Health Partners, Inc., 980 N.E.2d 306, 308 (Ind. 2012). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the facts supporting it. *Id.* In conducting our review, we must take all allegations of the complaint as true, construing them in the light most favorable to the plaintiff, to determine whether the complaint states any facts upon which the trial court conceivably could have granted relief. *Id.* We will reverse an order granting such a motion if there is any set of circumstances under which a plaintiff would be entitled to relief. *Id.*

[6] Ward argues that the method in which the State adopted this new execution policy violated his rights under ARPA and his due process rights under the state and federal constitutions.

I. Relevant ARPA Provisions

[7] Under ARPA, a "rule" is defined as follows:

> [T]he whole or any part of an agency statement of general applicability that:
>
> (1) has or is designed to have the effect of law; and
>
> (2) implements, interprets, or prescribes:
>
> (A) law or policy; or
>
> (B) the organization, procedure, or practice requirements of an agency.

Ind. Code § 4-22-2-3(b). An administrative rule is one that has (1) general applicability; (2) prospective application; (3) the effect of law; and (4) affects a class of individuals' rights. *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984).

[8] An Indiana agency takes "rulemaking action" when it engages in "the process of formulating or adopting a rule." I.C. § 4-22-2-3(c). When an agency takes rulemaking action, it must promulgate the rule according to the process set forth in ARPA, with certain exceptions. I.C. § 4-22-13(a). Relevant to this case is an exception stating that an agency does not have to comply with ARPA if the rulemaking action results in "[a] resolution or directive . . . that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law." I.C. § 4-22-2-13(c)(1).

[9] To enforce compliance, ARPA creates individual rights in the administrative procedure, voids the legality of unlawfully adopted agency rules, and provides a cause of action in the instance a state agency violates the law's provisions. I.C. §§ 4-22-2-14, -44, -45.

II. Does ARPA Apply to the DOC?

[10] On appeal, the State abandons its position taken before the trial court and instead argues that ARPA does not apply to the DOC's execution protocols. The State directs our attention to the lethal injection statute, which provides, in relevant part, as follows:

> (a) The punishment of death shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person:
>
> > (1) in a quantity sufficient to cause the death of the convicted person; and
> >
> > (2) until the convicted person is dead.
>
> ***
>
> (d) The department of correction *may* adopt rules under IC 4-22-2 necessary to implement subsection (a).

Ind. Code § 35-38-6-1 (emphasis added). The State focuses on the word "may" in subsection (d), arguing that this permissive word means that, while the DOC has the option of promulgating execution protocol rules under ARPA, it is not required to do so.

[11] We disagree. Initially, we note that the lethal injection statute must be read in conjunction with ARPA. ARPA explicitly excludes two state agencies from its provisions, and neither is the DOC. I.C. § 4-22-2-13(b) (excluding any military officer or board and any state educational institution from ARPA). If the legislature intended to exempt the DOC from the purview of ARPA altogether, or even to exempt the DOC's execution protocols, it could have easily done so, but it has not. The DOC insists that requiring it to comply with ARPA in the context of the death penalty is burdensome and unworkable. But it is not the role of the judiciary to determine the statutory obligations of State agencies; that

rests with the General Assembly. We can only conclude that, by omitting the DOC from the list of entities excluded from ARPA, the General Assembly has determined that the DOC is, indeed, bound to follow it.[4]

[12] Having reached that conclusion, the plain meaning of Indiana Code section 35-38-6-1(d) becomes clear. The DOC is not required to adopt rules. But if it chooses to do so, it is bound to follow ARPA. The DOC's approach would require us to ignore ARPA altogether, which we may not and shall not do. The legislature has determined that DOC is not exempt from ARPA; consequently, when it adopts rules, it must comply with the procedures set forth in ARPA.[5] What we must determine next, therefore, is whether the DOC's lethal injection protocol constitutes a rule.

---

[4] The DOC submitted a notice of additional authority, contending that this authority "evidences present legislative intent to further exempt from the ordinary practice of public access, administrative process, and discovery the decisions and details related to the process undertaken by the [DOC] leading up to the execution of a sentence of death." Notice of Add'l Auth. p. 1-2. This authority includes section 158 of House Enrolled Act (HEA) 1001, which (1) gives the DOC authority to enter into a contract for the issuance of substances used for lethal injection and (2) protects the identity of the person with whom DOC contracts for that purpose. In our view, HEA 1001 is not germane to the issue at hand, which is whether DOC must comply with ARPA. Therefore, we are not persuaded by this additional authority.

[5] The DOC emphasizes that death row inmates have the right to challenge the fact and method of their execution under Section 1983 and the Eighth Amendment to the United States Constitution. But the case before us is something entirely different—a civil suit against the State for alleged violations of administrative agency law, "and the cause of action he brings, and the rights he asserts, are recognized by the ARPA." Reply Br. p. 9. ARPA notes that the procedural rights it creates in citizens and the procedural duties it imposes on state agencies are "in addition to those created and imposed by other law." I.C. § 4-22-2-14. Therefore, the fact that Ward has other rights, under other statutes and constitutions, does not vitiate his rights under ARPA.

III. Are DOC's Execution Protocols Rules?

[13] When the parties argued this issue before the trial court, the State contended that changes in execution protocols were simply changes in internal agency policy rather than rules falling under ARPA. On appeal, the State is entirely silent on this argument. It does not contend that changes in execution protocols are internal agency policies, nor does it address Ward's contention that the execution protocols are rules.

[14] As noted above, a "rule," for the purpose of ARPA, is

> [T]he whole or any part of an agency statement of general applicability that:
>
> (1) has or is designed to have the effect of law; and
>
> (2) implements, interprets, or prescribes:
>
> (A) law or policy; or
>
> (B) the organization, procedure, or practice requirements of an agency.

Ind. Code § 4-22-2-3(b). An administrative rule is one that has (1) general applicability; (2) prospective application; (3) the effect of law; and (4) affects a class of individuals' rights. *Blinzinger*, 466 N.E.2d at 1375.

[15] It is readily apparent that the definition of "rule" encompasses the DOC's execution protocol. The protocol has general applicability (as opposed to

applicability only to a specific case) and prospective application. It has the effect of law in that it is binding on DOC employees and death row inmates. And it certainly affects a class of individuals' rights—all prisoners scheduled to be put to death in Indiana following the 2014 announcement.

[16] In another case related to an agency policy that was changed without promulgating a rule under ARPA, this Court found that the changed policy did not "relate primarily to the [agency's] internal policies, procedures, or organization. The primary impact of the [new] requirements is external, and *it is the primary impact that is paramount.*" *Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005) (emphasis added). Here, likewise, the primary impact of the change in execution protocols is external—its most significant impact is on the death row inmates who will be executed according to its terms. Although the State attempted to argue below that the primary impact of this policy is not on inmates such as Ward, we agree with Ward that "[i]t is unclear what, if any, effect a change in lethal injection substances would have on the state employees who execute prisoners" aside from a slight change in behavior in that the employees might have to reach into a different drawer, open a different package, or read an alternate list of instructions. Appellant's Br. p. 19.

[17] The General Assembly has defined what a rule is in the context of ARPA. That definition clearly includes the DOC's execution protocol. A change in that execution protocol, therefore, is a new rule that may not be implemented until the DOC complies with ARPA. Given the legislature's determination that the DOC is not exempt from ARPA, as well as the way in which it has defined

"rule," we are compelled to reverse the trial court's order granting the dismissal of Ward's complaint.[6] As a matter of law, DOC must comply with ARPA when changing its execution protocol, and its failure to do so in this case means that the changed protocol is void and without effect.

[18] The judgment of the trial court is reversed and remanded for further proceedings.

Barnes, J., and Crone, J., concur.

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[6] Because we have found that Ward's complaint prevails based on relevant statutory language, we need not consider his due process arguments.

STATE OF INDIANA	)	LAPORTE CIRCUIT COURT
	)SS:	
COUNTY OF LAPORTE	)	2016 TERM
	)	CAUSE NO. 46C01-1512-PL -002154
ROY WARD, #914976 Plaintiff,	)	
v.	)	
BRUCE LEMMON and RON NEAL, Defendants	)	

ORDER

The Court, having taken into consideration Defendant's Motion to Dismiss, Defendant's Memorandum in Support of Defendant's Motion to Dismiss, Plaintiff's Response to Defendant's Motion to Dismiss, and having conducted a hearing on Defendant's Motion to Dismiss, the Court finds the following:

Issues Before the Court:

The Plaintiff in this matter brings before the Court three claims for relief:

1. Plaintiff's rights under the Indiana Administrative Rules and Procedures Act were violated when Defendant failed to go through the proper rules of the ARPA when they decided to change the first drug in their lethal injection protocol.

2. Plaintiff's due process rights were violated under Ind. State Constitution Article 1, § 2 when Defendant failed to use proper procedure under ARPA when changing this drug; and

3. Plaintiff's Fifth and Fourteenth Amendment rights under the United States Constitution were violated when Defendant decided to change this drug without properly using the procedures laid out in the ARPA.

Relevant Law

Indiana Trial Rule 12(B)(6) governs motions to dismiss and states:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following

defenses may be made by motion ... Failure to state a claim upon which relief can be granted".

Ind. Code §35-38-6-1(d), allows the Indiana Department of Correction may adopt rules for state executions under the Administrative Rules and Procedures Act.

Ind. Code § 4-22-2-3(b) defines a rule as "the whole or part of an agency statement of general applicability that: (1) Has or is designed to have the effect of law; and (2) Implements, interprets, or prescribes: (A) Law or policy; or (B) The organization, procedure, or practice requirements of an agency." A rule is distinguished based on characteristics general applicability to a class, prospective application to the class, and being applied as though it has the effect of law. *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984).

Ind. Code § 4-22-2-13(c)(1) states this chapter does not apply to rulemaking action when "A resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law." Agency actions which result in resolutions which relate to internal policy, procedure, or organization and do not have the effect of law are not subject to the same requirements. *Villegas v. Silverman*, 832 N.E.2d 598, 608-609 (Ind. Ct. App. 2005).

Ind. Code § 4-13-1-5 allows State Agencies to have liberal use of power to effectuate polices and purposes to improve financial, personal and managerial activities of the State Government. A State Agency is defined by Ind. Code § 4-13-1-1 as "an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative, department of state government."

Ind. Code § 4-22-2-14 states this chapter only creates procedural rights and duties.

While there is no Indiana case regarding whether the changing of a drug in the lethal injection procedure constitutes a significant change which would require administrative notice and comment procedures, this issue has be heavily litigated in other circuits. In *Powell v. Thomas*, and *Valle v. Singer*, the Eleventh Circuit determined that the changing the first drug in the lethal injection formula was not a significant alteration in the lethal injection protocol and does not violate the Fourteenth Amendment due process rights, 643 F.3d 1300, 1304 (11th Cir. 2011) and 655 F.3d 1223, 1230 (11th Cir. 2011). The court in *Powell*, reasoned that because the drug previously in place was in the same category of drugs as the drug replacing it, both being barbiturates, there was no significant alteration. *Powell*. at 1304. Furthermore, as Powell was told of this alteration. it did not deprive him of his rights. *Id*.

In *Valle*, the court was asked the exact same question of whether the altering of the first drug in the lethal injection protocol was a significant alteration which violated Valle's Eight and Fourteenth Amendment rights. *Valle*. at 1229. Again, the court found that this change was not a

significant alteration of protocol and therefore did not violate Valle's Eight and Fourteenth Amendment rights. *Id.* at 1230.

Conclusions

As Plaintiff has decided not to continue with his Fifth Amendment Constitutional violation claims, the Court sees no reasons to discuss these further and they are dismissed. The Court will take each other claim in turn. Under Ind. Code § 4-13-1-1, the Indiana Department of Correction is an agency. Therefore, the Indiana Department of Correction has liberal use of power to effectuate polices and purposes to improve financial, personal and managerial activities of the State Government. Ind. Code § 4-13-1-5. This includes decisions concerning the drug protocol for lethal injection.

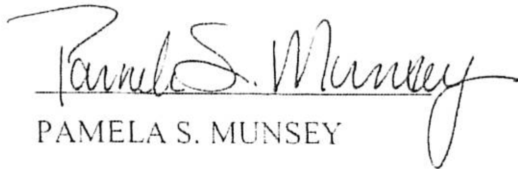
The changes or rules promulgated by the Indiana Department of Correction, only provides for procedural rights and not substantive rights. If Defendant had promulgated a new rule, Plaintiff would only have procedural rights. Those rights have been met when the Court held a hearing on the matter on June 24, 2016. Plaintiff appeared and was able to be heard by the Court. Therefore, Plaintiff's due process rights have not been violated.

The Indiana Department of Correction does not have to submit the changing from one drug used in lethal injection to another to the procedures of the ARPA. Like in *Villegas*, where internal changes to policies or procedures do not have to go through the rigorous requirements of the ARPA, the changing of these drugs is not more than a change in protocol. A rule has not been promulgated by Defendant. As seen in the Eleventh Circuit, altering one drug for another in the lethal injection process is not a significant alteration of the protocol which would violate a person's Eight or Fourteenth Amendment rights. As the altering of one drug to another does not constitute a significant alteration in lethal injection protocol, Plaintiff's Fourteenth Amendment rights have not been violated.

IT IS ORDERED, ADJUDGED AND DECREED that the findings are hereby confirmed in all respects and are hereby incorporated herein by reference and made a part of this Court Order.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Motion to Dismiss Plaintiff's Amended Complaint is hereby GRANTED because Defendant's were not required to go through ARPA as changing a drug in the lethal injection protocol is considered an internal policy and not rule promulgation.

SO ORDERED this 13th day of July, 2016.



PAMELA S. MUNSEY

MAGISTRATE

Judge Thomas Alevizos

LaPorte Circuit Court

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