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their concern for the welfare of their child. Each subjected the other to unnecessary travel and expense. We conclude that having imposed a compensatory sanction upon Vaelizadeh for his contempt, the district court abused its discretion in not imposing a similar sanction upon Hossaini for her subsequent, comparable contempt.

CONCLUSION

The district court did not abuse its discretion in finding both parties in contempt of orders pertaining to parenting time; nor did it abuse its discretion in imposing a monetary sanction against Vaelizadeh for his contempt. However, for the reasons discussed, the court did abuse its discretion in not imposing a monetary sanction against Hossaini for her contempt. Accordingly, we affirm the judgment of the district court in case No. S-11-509. In case No. S-11-508, we affirm the finding of contempt, but reverse, and remand to the district court with directions to determine the appropriate sanction to be imposed for Hossaini's contempt.

JUDGMENT IN NO. S-11-508 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN NO. S-11-509 AFFIRMED.

PROJECT EXTRA MILE ET AL., APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION AND HOBERT RUPE, ITS EXECUTIVE DIRECTOR, APPELLANTS.

810 N.W.2d 149

Filed March 2, 2012. No. S-11-157.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Appeal and Error.** An appellate court independently reviews a lower court's rulings on questions of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Standing: Jurisdiction: Parties.** A party's standing to commence an action presents a jurisdictional issue.

5. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
6. **Administrative Law: Standing.** Generally, Neb. Rev. Stat. § 84-911 (Reissue 2008) requires a plaintiff to have common-law standing to challenge an agency's regulation or its threatened application.
7. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
8. **Declaratory Judgments.** Neb. Rev. Stat. § 84-911 (Reissue 2008) does not limit a plaintiff to seeking only declaratory relief.
9. **Declaratory Judgments: Pleadings.** When a plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a court may order relief that is clearly within the scope of its declaratory judgment.
10. **Immunity: Declaratory Judgments.** The only limitations placed on the relief that a plaintiff can obtain in a declaratory judgment action authorized under Neb. Rev. Stat. § 84-911 (Reissue 2008) are the limitations imposed by sovereign immunity principles.
11. **Immunity: Public Officers and Employees.** State sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.
12. **Immunity: Public Officers and Employees: Declaratory Judgments: Injunction.** Neither Neb. Rev. Stat. § 84-911 (Reissue 2008) nor sovereign immunity bars injunctive relief in a declaratory judgment action authorized by § 84-911 when such relief would not require state officials to expend public funds.
13. **Actions: Taxation.** A taxpayer's interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law.
14. **Taxation: Equity.** Taxpayers have an equitable interest in public funds, including state public funds.
15. **Actions: Taxation: Standing: Proof: Public Officers and Employees.** A taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax. But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action.
16. **Administrative Law: Taxation: Standing.** In an action brought under Neb. Rev. Stat. § 84-911 (Reissue 2008), a taxpayer has standing to challenge an agency's unlawful regulation that negates the agency's statutory duty to assess taxes.
17. ____: ____: ____. No other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected.
18. **Administrative Law: Statutes.** A rule of deferring to agency interpretations does not apply when the agency's regulation contravenes the plain language of its governing statutes.

19. **Administrative Law: Courts: Statutes: Appeal and Error.** In determining whether an agency's governing statute is ambiguous, an appellate court is guided by its own principles of statutory construction.
20. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.
21. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
22. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court determines and gives effect to the legislative intent behind the enactment.
23. **Statutes: Legislature: Intent**. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
24. **Administrative Law: Liquor Licenses: Statutes: Legislature: Intent.** Under the Nebraska Liquor Control Act, the Legislature did not intend for a beer product to include beverages containing distilled alcohol in an amount constituting up to 49 percent of the total alcohol content.
25. **Administrative Law.** An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer. It may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
26. ____. An administrative agency has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
27. ____. An administrative agency cannot employ its rulemaking authority to adopt regulations contrary to the statutes that it is empowered to enforce.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellants.

Vincent M. Powers and Amanda M. Lightner, Senior Certified Law Student, of Vincent M. Powers & Associates, for appellees.

Marc E. Sorini and Jeffrey W. Mikoni, of McDermott, Will & Emery, L.L.P., and James P. Fitzgerald, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for amicus curiae Flavored Malt Beverages Coalition.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

We are asked to decide whether a flavored malt beverage is a beer or spirit under the Nebraska Liquor Control Act.[1] It makes a difference. Beer is taxed at 31 cents per gallon; spirits are taxed at $3.75 per gallon. The question presented is not whether the Legislature could classify and tax beverages containing distilled alcohol as beer. It could. The question is whether the Nebraska Liquor Control Commission and its executive director (collectively the Commission) exceeded its statutory authority in classifying and taxing these beverages as beer despite legislative inaction.

The Commission argues two issues: First, it contends that the district court erred in concluding that the appellees had standing to challenge its regulation. Second, it contends that the court erred in ruling that flavored malt beverages are spirits under the Nebraska Liquor Control Act.

We conclude that appellee Mary Doghman had taxpayer standing. The court correctly determined that the Commission exceeded its statutory authority by classifying and taxing flavored malt beverages as beer. The Nebraska Liquor Control Act plainly defines spirits as beverages that contain alcohol obtained by distillation. Up to 49 percent of the alcohol in flavored malt beverages is distilled alcohol. Therefore, a flavored malt beverage is a spirit. We affirm.

II. BACKGROUND

1. PROCEDURAL HISTORY

Of the four appellees in this case, three are Nebraska nonprofit organizations: Project Extra Mile, the Public Health Association of Nebraska, and Pride-Omaha, Inc. (collectively the nonprofits). The other appellee, Doghman, is a resident taxpayer.

The appellees alleged that Doghman had taxpayer standing because the Commission had spent public funds and would spend public time and money to implement and enforce an unlawful classification. They also alleged that the

[1] See Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010 & Supp. 2011).

classification would result in reduced tax revenues for the State; thus, it would increase the tax burden for Doghman and other taxpayers.

The appellees further alleged that the nonprofits had standing because of their status as Nebraska nonprofit corporations. The appellees' only factual allegations of injury from the regulation referred to Project Extra Mile's organizational purpose. They alleged that Project Extra Mile's primary mission and purpose was to address the issue of underage drinking. And they alleged that the Commission's actions would harm Project Extra Mile's mission.

The appellees sought a declaration that the Commission's regulations were illegal and void because the Commission had exceeded its authority under the Nebraska Liquor Control Act by classifying flavored malt beverages as beer. The appellees also sought a writ of mandamus compelling the Commission to classify and tax flavored malt beverages as spirits instead of beer.

The Commission moved to dismiss the action. It argued that (1) the appellees lacked standing, (2) sovereign immunity barred their action, and (3) a writ of mandamus was not an appropriate remedy.

The court ruled that Doghman had standing as a resident taxpayer to challenge the classification because she had alleged an illegal expenditure of public funds. It also ruled that she did not have to make a demand on the Commission before bringing her action because the demand would be useless.

In ruling that the nonprofits had representative standing, the court relied on the U.S. Supreme Court's decision in *Hunt v. Washington Apple Advertising Comm'n.*[2] The court reasoned that the nonprofits' members would have standing as resident taxpayers, the same as Doghman. The court, however, ruled that sovereign immunity barred the appellees' request for a writ of mandamus and dismissed that claim.

In their amended complaint, the appellees sought only a declaration that the regulation was invalid under the Nebraska

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[2] *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

Liquor Control Act. In its answer, the Commission affirmatively alleged that the appellees lacked standing and had failed to state a cause of action. It also alleged that the court lacked subject matter jurisdiction over any claim against its director. Finally, it alleged that the Commission's regulations were within the Commission's statutory authority.

2. Court's Order

The court found that the nonprofits were all seeking to prevent underage alcohol consumption. It again ruled that all the appellees had standing.

The court also ruled that the Commission's disputed regulation, 237 Neb. Admin. Code, ch. 1, § 009.01 (2009), violated the plain language of § 53-103(2) (Cum. Supp. 2008) of the Nebraska Liquor Control Act, which defines "spirits." The disputed regulation adopted federal regulations issued by the Alcohol and Tobacco Tax and Trade Bureau (the TTB) of the U.S. Treasury Department. The federal regulations permitted products that contained both fermented alcohol and distilled alcohol to be classified as malt beverages. The court rejected the Commission's argument that the Nebraska Liquor Control Act's definition of beer could include the federal regulatory definition of flavored malt beverages. It concluded that these beverages were clearly "spirits" under the Nebraska Liquor Control Act because they were a beverage that contained alcohol obtained by distillation, mixed with water and other substances.

III. ASSIGNMENTS OF ERROR

The Commission assigns that the court erred in overruling its motion to dismiss the appellees' complaint because Doghman and the nonprofits lack standing to challenge the Commission's regulation. The Commission also assigns that the court erred in declaring that flavored malt beverages are spirits under the Nebraska Liquor Control Act and that the Commission had exceeded its authority in promulgating the regulation.

IV. STANDARD OF REVIEW

[1-5] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment

of the district court for errors appearing on the record.[3] But we independently review a lower court's rulings on questions of law.[4] Statutory interpretation presents a question of law.[5] A party's standing to commence an action presents a jurisdictional issue.[6] And we determine jurisdictional questions that do not involve a factual dispute as a matter of law.[7]

V. ANALYSIS

1. Standing

The Commission argues that the court erred in concluding that Doghman and the nonprofits had standing to challenge its regulation. But because we conclude that Doghman has taxpayer standing to assert this claim, it is unnecessary for us to consider whether the nonprofits also have standing.[8] We address only the Commission's arguments regarding Doghman's standing.

Under Neb. Rev. Stat. § 84-911(1) (Reissue 2008), "[t]he validity of any rule or regulation may be determined upon a petition for a declaratory judgment . . . if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner."

[6,7] Generally, § 84-911 requires a plaintiff to have common-law standing to challenge an agency's regulation

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[3] *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011); *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

[4] See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[5] *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

[6] See, *id.*; *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[7] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[8] See, *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981), citing *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

or its threatened application.[9] Common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent.[10] But a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.[11] Here, the issue is whether we should recognize the taxpayer exception to common-law standing requirements under § 84-911. The Commission argues that we should not.

First, the Commission argues that we have recognized taxpayer standing only when the taxpayer seeks to enjoin an illegal expenditure of public funds. Second, it argues that in challenges to an agency's regulations, § 84-911 authorizes a plaintiff to seek only declaratory relief, not injunctive relief. Thus, it argues that Doghman cannot have taxpayer standing under § 84-911 because our case law precludes her from seeking anything but injunctive relief, which is not permitted under § 84-911.

(a) § 84-911 Does Not Limit Plaintiffs to Declaratory Relief

[8,9] Section 84-911 does not limit a plaintiff to seeking only declaratory relief. It provides that a plaintiff may challenge the validity of a rule or regulation in a declaratory judgment action. We have held that § 84-911 provides a limited waiver of sovereign immunity that permits a court to determine the validity of administrative rules and regulations.[12] But when a plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a court may order relief that is clearly within the scope of its declaratory

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[9] See *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990).

[10] See, *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011); *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011); *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[11] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[12] *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997).

judgment.[13] Enjoining a government entity or official from enforcing a regulation that the court has declared invalid would obviously be within the scope of the court's declaratory judgment. And under Neb. Rev. Stat. § 25-21,156 (Reissue 2008), even if a party's requested relief is not within the scope of a court's declaratory judgment, the court can grant such relief if the plaintiff applies for supplemental relief.[14]

[10,11] So when § 84-911 is read consistently with the declaratory judgment statutes, the only limitations placed on the relief that a plaintiff can obtain in a declaratory judgment action authorized under § 84-911 are the limitations imposed by sovereign immunity principles. But state sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.[15] The Commission's statutory argument is without merit.

(b) Taxpayers Can Seek Declaratory Relief in an Action Against a State Agency

Contrary to the Commission's contention, we have permitted a taxpayer to seek declaratory relief in an action against state officials when the taxpayer alleged an unauthorized expenditure of public funds.[16] The appellees also correctly contend that in *Chambers v. Lautenbaugh*,[17] we held that a taxpayer has standing to seek declaratory relief. The defendant in *Chambers* specifically claimed on appeal that the plaintiff lacked taxpayer standing to seek a declaratory judgment. We rejected that argument. The Commission points to no case in which we have held that a plaintiff can only seek injunctive relief in an action against state officials if the plaintiff relies on taxpayer standing to bring the action.

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[13] *Wetovick, supra* note 4.

[14] See *id.*

[15] See, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999).

[16] See *Myers, supra* note 11. See, also, *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[17] *Chambers, supra* note 16.

[12] It is true that the action in *Chambers* was not brought under § 84-911. But recognizing the taxpayer exception to standing requirements under § 84-911 is consistent with the reason for recognizing taxpayer standing in *Chambers* and in other actions brought against state officials. If state agencies could unlawfully promulgate rules that waste public funds with impunity, following the law would be "irrelevant to those entrusted to uphold it."[18] We hold that neither § 84-911 nor sovereign immunity bars injunctive relief in a declaratory judgment action authorized by § 84-911 when such relief would not require state officials to expend public funds.

(c) Taxpayers Can Challenge an Unlawful Regulation That Reduces State Revenues in Contravention of an Agency's Governing Statutes

The only remaining issue is whether a taxpayer has standing to assert a claim that a state agency has unlawfully promulgated a rule that results in reduced tax revenues. As noted, the Commission also argues that the mere promulgation of a rule is not an expenditure of public funds. A complaint's allegations are normally insufficient to confer taxpayer standing if the taxpayer alleges a general interest common to all members of the public.[19] Our decision in *Chambers*,[20] however, supports a conclusion that a resident taxpayer has standing to challenge a state action that allegedly violates statutory law as an unlawful expenditure or waste of public funds.

In *Chambers*, the plaintiff sought injunctive relief and a declaration that the Douglas County election commissioner had exceeded his statutory authority in redrawing the legislative districts for Omaha's city council elections. The trial court determined that the commissioner had acted lawfully. On appeal, we concluded that the plaintiff had standing because he had alleged an illegal expenditure of public funds. We pointed to the following allegations:

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[18] *Rath v. City of Sutton*, 267 Neb. 265, 281, 673 N.W.2d 869, 885 (2004).

[19] See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[20] *Chambers, supra* note 16.

> [The plaintiff] alleges, "Employees in the office of the Douglas County Election Commission have spent and will spend in the future public time and money to implement the new district boundary lines, when such new boundary lines are not authorized by law." Finally, in his prayer for relief, [the plaintiff] asks the district court to "declar[e] that the commitment of employee time and the expenditure of tax monies for such purposes is unlawful and not authorized by law . . . ."[21]

The county election commissioner's alleged misapplication of state statutes in *Chambers* is the same as the appellees' claim that the Commission promulgated a rule in contravention of its governing statutes. In both cases, the allegation is that a statutorily created official or government entity took an unlawful action under its governing statutes. So, under *Chambers*, preventing the use of public time and money to implement and enforce allegedly invalid rules is a sufficient interest to confer taxpayer standing to challenge the rules. In other cases, however, we have held that a claim of unauthorized government action is insufficient to confer taxpayer standing when the plaintiff has not shown an individualized injury in fact.[22]

This conflict occurs because of the competing considerations frequently presented by taxpayer actions. Primarily, government officials must perform their duties without fear of being sued whenever a taxpayer disagrees with their exercise of authority.[23] But courts also recognize that a taxpayer may be the only party who would challenge an unlawful government action because the persons or organizations directly affected by the government action have benefited from it.[24] Additionally, a taxpayer's action sometimes raises matters of great public

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[21] *Id.* at 928, 644 N.W.2d at 548.

[22] See, e.g., *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[23] See *State ex rel. Reed, supra* note 19.

[24] See, *Ritchhart, supra* note 22; *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

concern that far exceed the type of injury in fact that an individual could normally assert in an action against government officials or entities.[25]

These competing concerns explain the tension between *Chambers* and our cases holding that an allegation of unlawful government action is insufficient to show an illegal expenditure of public funds. Arguably, *Chambers* would have been more correctly presented as raising a matter of great public concern: If true, the county election commissioner's alleged statutory violation would have unlawfully altered the way that the city's residents elected their city council representatives. But we need not resolve here the tension between *Chambers* and our cases requiring a plaintiff to show an illegal expenditure of public funds. Instead, our conclusion that Doghman has standing rests on her allegation that under the disputed regulation, the Commission has failed to assess state taxes required under its governing statutes.

[13] We reaffirm our previous holding that a taxpayer's interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law.[26] But the reason for permitting taxpayer actions challenging an unlawful expenditure of public funds exists here. A good deal of unlawful government action would otherwise go unchallenged.[27] And a claim that state officials have unlawfully expended public funds mirrors a claim that state officials have failed to impose or collect statutorily required taxes. Both claims alleged an unlawful act that depletes the State's coffers.

[14] We have held that taxpayers have an equitable interest in public funds, including state public funds.[28] And we

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[25] *Cunningham v. Exxon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

[26] See, *Neb. Against Exp. Gmblg., supra* note 22; *Consumer Party of Pennsylvania v. Com.*, 510 Pa. 158, 507 A.2d 323 (1986), *abrogated on other grounds, PA Against Gambling Expansion Fund v. Com.*, 583 Pa. 275, 877 A.2d 383 (2005).

[27] *Sprague, supra* note 24.

[28] See, *Rath, supra* note 18; *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).

have held that a taxpayer can challenge the tax-exempt status of another property when the taxpayer can show that public officials have a clear duty to tax the property.[29] Most important, denying taxpayer standing here would mean that a government entity's unlawful failure to impose taxes on, or collect taxes from, favored individuals or organizations is unreviewable in court: The only persons or groups directly affected by the government action would have no incentive to challenge it.

[15-17] We hold that a taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax.[30] But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action.[31] In an action brought under § 84-911, this rule means a taxpayer has standing to challenge an agency's unlawful regulation that negates the agency's statutory duty to assess taxes. We further hold that no other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected.[32]

Doghman has met this burden. She alleged that the Commission's regulation is contrary to the statutory taxation requirements for flavored malt beverages. And because the parties most directly affected by the regulation are beneficially

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[29] Compare *State v. Drexel*, 75 Neb. 751, 107 N.W. 110 (1906), with *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[30] See *Drexel, supra* note 29. Accord, *Vasquez v. State of California*, 105 Cal. App. 4th 849, 129 Cal. Rptr. 2d 701 (2003); *Sonoma Cty. v. State Bd. of Equalization*, 195 Cal. App. 3d 982, 241 Cal. Rptr. 215 (1987); *Mtr of Dudley v Kerwick*, 52 N.Y.2d 542, 421 N.E.2d 797, 439 N.Y.S.2d 305 (1981).

[31] See, *Ritchhart, supra* note 22; *Consumer Party of Pennsylvania, supra* note 26.

[32] See *Consumer Party of Pennsylvania, supra* note 26.

affected, they have no incentive to challenge it. No better suited party exists to assert the public's interests in challenging the Commission's alleged failure to assess statutorily required taxes. The court did not err in ruling that Doghman had taxpayer standing to challenge the regulation.

2. The Commission's Regulations Exceeded Its Statutory Authority

We come at last to the merits of the case. The Commission's disputed regulation states the following: "For the purpose of the classification of flavored malt beverages, the . . . Commission shall utilize the same classification as adopted by the [TTB] found at 27 CFR Parts 7 and 25 . . . which went into effect January 3, 2006."[33] As the TTB's regulations show, the Commission's adoption of the federal regulations through its own regulation permits beverages containing a significant amount of distilled alcohol (up to 49 percent of the alcohol content) to be classified as beer under the Nebraska Liquor Control Act. The court ruled that the Commission's classification violated the plain language of the Nebraska Liquor Control Act (hereinafter the Act) because such beverages were clearly spirits under those statutes.

At the heart of our inquiry is whether the Commission's adoption of federal regulations that classify flavored malt beverages as beer is permitted under the Act's definition of beer or whether under the Act, the beverages must be classified as spirits. In short, the Act defines beer as a "beverage obtained by alcoholic fermentation"[34] and spirits as a "beverage which contains alcohol obtained by distillation."[35]

(a) The TTB's Regulations

The TTB amended two parts of its regulations, parts 7 and 25, to permit beverages containing ingredients with distilled alcohol to be produced in breweries and marketed as beer products. Part 7 deals with the labeling and advertising of

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[33] 237 Neb. Admin. Code, ch. 1, § 009.01.

[34] § 53-103(4) (Cum. Supp. 2008) (now codified as § 53-103.03).

[35] § 53-103(2) (now codified as § 53-103.38).

malt beverages.[36] Part 25 deals with the operation of breweries.[37] The TTB amended part 25 to allow breweries to use "flavors and other nonbeverage ingredients containing alcohol" to contribute up to 49 percent of the alcohol content of a finished beer product.[38] It similarly amended part 7 of its regulations so that the definition of malt beverages would include beverages produced with distilled alcohol ingredients, contributing up to 49 percent of the total alcohol content in the beverages.[39]

The regulations specified that the distilled alcohol in these beverages is "from the addition of flavors and other nonbeverage ingredients containing alcohol."[40] Neither part 7 nor part 25 of the TTB's regulations defines "flavors" or "alcohol." But in other parts of its regulations, the TTB defines alcohol as distilled alcohol.[41] In addition, the comments to its final rule amending these regulations provide a description of the production process. Importantly, the description clarifies that the "flavorings" that producers are permitted to add to these beverages contain distilled spirits:

> Although flavored malt beverages are produced at breweries, their method of production differs significantly from the production of other malt beverages and beer. In producing flavored malt beverages, brewers brew a fermented base of beer from malt and other brewing materials. Brewers then treat this base using a variety of processes in order to remove the malt beverage character from the base. For example, they remove the color, bitterness, and taste generally associated with beer, ale, porter, stout, and other malt beverages. This leaves a base product to which brewers add various flavors, *which*

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[36] See 27 C.F.R., part 7 (2011).

[37] See *id.*, part 25.

[38] *Id.*, § 25.15(b) at 681.

[39] *Id.*, § 7.11(a)(1).

[40] See *id.* at 92-93.

[41] See *id.*, §§ 1.10 and 4.10.

typically contain distilled spirits, to achieve the desired taste profile and alcohol level.[42]

(b) The Parties' Contentions

The Commission contends that the court incorrectly ruled that its regulation violated the plain language of the Act. The Commission stipulated that under its adoption of the TTB's regulations, up to 49 percent of the alcohol content in flavored malt beverages may be flavorings with distilled alcohol. But it contends that it could properly classify the TTB's definition of a "malt beverage" as beer under the Act. It argues that the beer classification is permitted because the distilled alcohol in these beverages comes from flavorings and other nonbeverage ingredients, not from the direct addition of distilled spirits. It cites the TTB regulations that specifically prohibit the products from being labeled or advertised in a manner that gives the impression that they contain distilled spirits.

Additionally, the Commission argues that even if flavored malt beverages could be classified as spirits under the Act, they could also be classified as beer because they are a hybrid; i.e., they contain both fermented alcohol and distilled alcohol. The Commission argues that the court conceded in its order that these beverages could be classified as either beer or spirits. So the Commission argues that its regulation cannot be invalid. It cites a case in which we deferred to an agency's interpretation of a statute that the agency was charged with enforcing.

The appellees contend that it is irrelevant that the beverages satisfy the TTB's regulations because the beverages are clearly distilled spirits under the Act. We agree.

(c) Analysis

(i) No Deference Is Afforded the Commission's Interpretation of the Act

We reject the Commission's argument that we should defer to its interpretation of the Act. It is true that we have occasionally stated the following rule: "Although construction of a

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[42] See Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), 70 Fed. Reg. 195 (Jan. 3, 2005) (emphasis supplied).

statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation."[43] But this rule was obviously not intended to permit agencies to adopt regulations that directly conflict with the Legislature's decision not to adopt the rules that the agency purports to find through statutory interpretation. That happened here.

In 2005, the General Affairs Committee of the Legislature voted to amend the definition of beer to conform to the TTB's approved regulations by adding "flavored malt beverages" to the definition of beer. Additionally, that bill would have specifically provided that a "[f]lavored malt beverage means a beer that derives not more than forty-nine percent of its total alcohol content from flavors or flavorings containing alcohol obtained by distillation."[44] The TTB regulations were approved in December 2004 and took effect in January 2006.[45] But the General Affairs Committee's proposed bill was indefinitely postponed in April 2006.[46] In August 2006, the Commission announced that it would adopt the TTB's regulations. The Attorney General approved the regulation in 2009.

This history does not show the Legislature's acquiescence in an agency's interpretation of its governing statutes. On the contrary, it shows an agency's attempt to achieve through regulations what the Legislature declined to enact through proposed statutory amendments. We are not inclined to give any deference to the Commission's interpretation of its governing statutes.

[18] More important, a rule of deferring to agency interpretations does not apply when the agency's regulation contravenes the plain language of its governing statutes. We make

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[43] See *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002).

[44] See First Reading, L.B. 563, General Affairs Committee, 99th Leg., 1st Sess. (January 18, 2005).

[45] See Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), *supra* note 42.

[46] Legislative Journal, 99th Leg., 2d Sess. 1726 (Apr. 13, 2006).

independent conclusions on the meaning and interpretation of statutes.[47] Thus, we have stated that deference to an agency's interpretation of its governing statutes is improper when the statutes are unambiguous:

> [W]hile we agree that an administrative agency's interpretation of a statute may be helpful to this court when reaching its independent conclusion concerning the meaning of a statute, this court has long held: "'Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.'"[48]

So any deference that we afford an agency's interpretation of its governing statutes does not apply when we can clearly discern the Legislature's intent and whether an agency's regulations are contrary to that intent. Contrary to the Commission's arguments, these statutes are not ambiguous.

(ii) The Act Unambiguously Requires Flavored Malt Beverages to Be Classified as Spirits

[19,20] In determining whether an agency's governing statute is ambiguous, we are guided by our own principles of statutory construction.[49] A statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.[50]

[21-23] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[51] In construing a statute, we determine and give effect to the legislative intent

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[47] See, e.g., *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011).

[48] *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 888, 601 N.W.2d 508, 515 (1999). See, also, *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998).

[49] See *Cox Cable of Omaha, supra* note 48.

[50] See *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

[51] *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

behind the enactment.[52] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[53]

The Commission's argument that these beverages can be classified as beer conflicts with both the plain language of the Act's definition of beer and the Legislature's intent to exclude beverages containing a significant amount of distilled alcohol from the definition of beer. This intent is clear when the Act's provisions are read consistently.

First, we reject the Commission's argument that these beverages can be classified as beer because they also contain fermented alcohol. Even if distilled spirits are only indirectly added to the beverages through "flavorings" during production, the Act does not define beer to include beverages that contain distilled alcohol. Instead, the Act defines beer to mean a "beverage obtained by alcoholic fermentation of an infusion or concoction of barley or other grain, malt, and hops in water and includes, but is not limited to, beer, ale, stout, lager beer, porter, and near beer."[54] Even though this list of beer products is not exclusive, a beverage containing alcohol obtained through fermentation—not distillation—is obviously the definitive criteria for beer under the Act.

In contrast, the Act defines spirits to mean "any beverage which contains *alcohol obtained by distillation, mixed with water or other substance in solution*, and includes brandy, rum, whiskey, gin, or other spirituous liquors and such liquors when rectified, blended, *or otherwise mixed with* alcohol or *other substances*."[55] The Act's definition of spirits is not limited to beverage solutions containing the direct addition of distilled spirits. It includes any beverage solution containing distilled

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[52] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011), *cert. denied* ___ U.S. ___, 132 S. Ct. 341, 181 L. Ed. 2d 214.

[53] *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

[54] § 53-103(4) (now codified as § 53-103.03).

[55] § 53-103(2) (now codified as § 53-103.38) (emphasis supplied).

alcohol. When this definition is read consistently with a statutory exception for alcohol used in flavorings, the definition of spirits includes any beverage containing more than an insignificant amount of alcohol used for flavoring.

As the Commission argues, the Act does not apply to alcohol in products such as flavoring extracts and food products unfit for beverages.[56] The Flavored Malt Beverages Coalition, as amicus curiae, argues that many beers and soft drinks contain small amounts of alcohol because these flavorings are added. The coalition further argues that unlike most states, Nebraska's statutes do not have a minimum threshold of alcohol content that a beverage may contain without being classified as an alcoholic beverage. So the coalition contends that the court's judgment will require all beverages containing even insignificant amounts of distilled alcohol to be classified and taxed as spirits. We disagree.

Despite the Act's exception for flavoring extracts and food products unfit for beverages, the same section specifically provides that the Act applies to alcohol used to make confections and candy if the alcohol content exceeds one-half percent of the product's ingredients.[57] This section of the Act shows that the Legislature did not intend the Act to apply to insignificant amounts of distilled alcohol used for flavoring, but that it did intend for it to apply if a significant amount of distilled alcohol was used for flavoring.

So if the court had ruled that an insignificant amount of distilled alcohol used for flavoring in a beer product did not render the beverage a spirit, we would agree that this was a reasonable interpretation of the Act. But the court was not asked to decide that question. And the Act cannot be reasonably interpreted as permitting the alcohol in a beer product to have up to 49 percent distilled alcohol.

[24] In sum, in reading the Act's provisions consistently, it is obvious that the Legislature did not intend for a beer product to include beverages containing distilled alcohol in an amount constituting up to 49 percent of the total alcohol content.

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[56] See § 53-103(5) (now codified as § 53-103.02(2)).

[57] See *id.*

Because the TTB regulations describe flavored malt beverages as a solution containing fermented alcohol and the distilled alcohol in these beverages is not an insignificant amount used for flavoring, the beverages clearly fall within the Act's definition of spirits. Moreover, contrary to the Commission's argument, the court did not concede that flavored malt beverages could be classified as either beer or wine. That argument takes the court's statement out of context. Its order simply reflects its decisionmaking process. It reached the same decision that we reach here. The statutes are not ambiguous when read consistently.

(iii) The Commission Exceeded Its Authority

[25,26] An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer. It may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.[58] It has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.[59]

Section 53-117(2) gives the Commission the following power:

> To fix by rules and regulations the standards of manufacture of alcoholic liquor not inconsistent with federal laws in order to [e]nsure the use of proper ingredients and methods in [such] manufacture . . . . The Legislature intends, by the grant of power to adopt and promulgate rules and regulations, that the commission have broad discretionary powers to govern the traffic in alcoholic liquor and *to enforce strictly all provisions of the act* in the interest of sanitation, purity of products, truthful representations, and honest dealings in a manner that generally will promote the public health and welfare.

(Emphasis supplied.) While the Legislature has given the Commission broad discretion to promulgate regulations, it

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[58] *Upper Big Blue NRD v. State*, 276 Neb. 612, 756 N.W.2d 145 (2008); *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[59] See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

clearly intended the Commission to exercise that discretion to strictly enforce the Act for the public's benefit.

[27] We note that the comments to the TTB regulations show that the federal agency did not intend to preempt state law.[60] But even if a change in Nebraska's laws were necessary to avoid a conflict with federal law, the decision to make that change falls to the Legislature. An administrative agency cannot employ its rulemaking authority to adopt regulations contrary to the statutes that it is empowered to enforce. We conclude that the court correctly ruled that the Commission had exceeded its statutory authority.

VI. CONCLUSION

We conclude that the court correctly ruled that Doghman had taxpayer standing to challenge the Commission's regulation. We hold that the taxpayer standing rules apply to a declaratory judgment action authorized by § 84-911. We expand the rule that a taxpayer may seek to enjoin state officials from unlawfully expending public funds to permit a taxpayer in an action brought under § 84-911 to challenge an agency's failure to comply with a clear statutory duty to assess or collect taxes. But the taxpayer must show that no other potential party is better suited to challenge the rule. Here, the only persons or entities directly affected by the Commission's regulation were beneficially affected by it and had no incentive to challenge it. So no better suited party existed to assert the public's interests in having the Commission comply with its duty to assess statutorily required taxes.

The court correctly determined that the Commission had exceeded its statutory authority in classifying flavored malt beverages as beer. We give no deference to the Commission's interpretation of these statutes because they are unambiguous. The statutory definition of beer is limited to beverages that contain alcohol obtained by fermentation. In contrast, the statutory definition of spirits includes any beverage that contains distilled alcohol. When these sections of the Act are read

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[60] Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), *supra* note 42.

consistently with an exception for alcohol used in flavorings, the Act unambiguously required the Commission to define any beverage containing more than an insignificant amount of distilled alcohol used for flavoring as a "spirit" and to tax it accordingly.

AFFIRMED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PAUL W. SEYLER, RESPONDENT.

809 N.W.2d 766

Filed March 2, 2012. No. S-11-252.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. ____. Neb. Ct. R. § 3-304 provides that attorney misconduct shall be grounds for disbarment, suspension, probation in lieu of or subsequent to suspension, censure and reprimand, or temporary suspension by the court, or private reprimand by the Committee on Inquiry or Disciplinary Review Board.
4. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
6. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
7. ____. In an attorney disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.

Original action. Judgment of suspension.