STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

94008

STATE OF NEBRASKA
OFFICIAL
FEB 9 1994
DEPT. OF JUSTICE

DATE: February 7, 1994

SUBJECT: LB 76, Status and Authority of the Election Commissioner in Counties Over 50,000 in Population

REQUESTED BY: Senator Kate Witek
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 76 is a currently pending bill which would substantially revise the election laws in Nebraska. Among other things, the bill deals with the office of election commissioner, and Section 29 of the bill provides that the election commissioner required in counties over 50,000 in population shall be appointed by the Governor. On the other hand, Section 39 of the bill provides that the election commissioner, deputy election commissioner and employees of the office of the election commissioner shall be county employees. Section 38 of LB 76 also requires the county board to provide an office and the necessary supplies for the election commissioner. You are apparently concerned that these various provisions might create some confusion as to the status and authority of the election commissioner in counties over 50,000 in population, and you consequently requested our opinion as to various aspects of the bill.

You first ask to whom the election commissioner in counties over 50,000 in population "is responsible under this situation; the Governor, the county board, or is the election commissioner an independent office holder similar to the elected county office holders?"

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The answer to your initial question depends, to some extent, upon what you mean by asking to whom the election commissioner "is responsible." Under Section 36 of LB 76, the Governor shall remove the election commissioner in counties over 50,000 in population:

> . . . when it appears that (1) he or she has been derelict in the performance of the duties of his or her office, (2) he or she is incompetent, (3) his or her conduct is prejudicial to the public interest, (4) he or she has appointed incompetent, negligent, or corrupt precinct or district inspectors, judges of election, clerks of election, or deputy registrars, (5) a fair and impartial registration of election was not obtained in any district of the county, or (6) the act was not enforced in the county.

Therefore, the Governor has the power to remove the election commissioner under LB 76, and in that sense, the election commissioner "is responsible" to the Governor.[1] Also, amendments to LB 76 provide that the Nebraska Secretary of State may "review the practices and procedures of election commissioners," so the election commissioner has some responsibility to the Secretary of State.

On the other hand, under Section 36 of LB 76 the election commissioner is "responsible for the enforcement of the Election Act as it relates to his or her office and for the competency, integrity and conduct of his or her chief deputy election commissioner and all personnel appointed by him or her." In addition, the election commissioner also has a number of specified additional powers and duties under the bill. For example, the election commissioner adopts rules and regulations for elections and the registration of voters, and the election commissioner selects and appoints places of voter registration and polling places. This makes the position appear more like "an independent office holder similar to the elected county office holders." Therefore, if you wish to have the election commissioner "responsible" to any other entity in a specific sense, we suggest that you may wish to consider some form of amendments to the bill.

Your second question goes directly to the authority of the county board over the election commissioner. Specifically, you

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[1] Under the current statute, *Neb. Rev. Stat.* § 32-209 (1988), the Governor may also remove the election commissioner for specified breaches of duty. However, that statute goes further than Section 36 of LB 76 in that it also allows any citizen of the county to "institute an action to order the Governor to remove the commissioner or his deputy, or both."

ask, "[s]ince the bill [LB 76] designates the election commissioner, deputy and staff as county employees, does the county board have the necessary authority under this legislation to require them to comply with established county personnel policies and procedures?"

One case from the Nebraska Supreme Court is helpful with respect to your second question. In ***Sarpy County Public Employees Association v. County of Sarpy***, 220 Neb. 431, 370 N.W.2d 495 (1985), the Court considered whether the Sarpy County Board or various county officials including the register of deeds, county clerk, county assessor, ***election commissioner***, and county surveyor had authority to bargain collectively with the labor union representing the Sarpy County employees in those offices. The Court ultimately held that, ". . . each publicly elected official, with the exception of the county assessor, is the person authorized to speak on behalf of the county with regard to those employees working in that public official's individual office." ***Id.*** at 434, 370 N.W.2d at 497. The Court based its decision, in part, on ***Neb. Rev. Stat. §*** 23-1111 (1983) which provided that county officers in all counties had the authority to hire necessary clerks and assistants for such periods and at such salaries as those officers determined with the approval of the county board. The Court also stated,

> . . . the statutes make it relatively clear that in most instances the elected officials are authorized in the first instance to hire their own employees, set their salaries and ***prescribe their terms and conditions of employment***. See § 23-1111. While § 23-1111 speaks only about salary, it seems obvious that the body or official authorized to set the salary has, by necessary implication, the authority to prescribe the manner in which the work must be done in order to entitle the employee to the salary set by the county official.

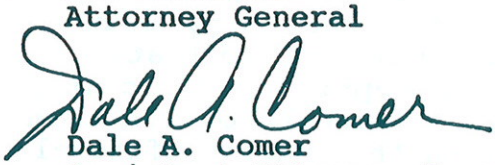
Id. at 435, 370 N.W.2d at 498, (emphasis added).

It appears to us that the election commissioner for counties over 50,000 in population created by LB 76 would be a county officer because the bill provides that the election commissioner is employed by the county, and because the position created by the bill entails many of the indicia of public office, e.g., the election commissioner is appointed for a specific term, the position is created by statute, and the position has duties and authority beyond that of a mere employee. ***See Eason v. Majors***, 111 Neb. 288, 196 N.W. 133 (1923). Since the current version of Section 23-1111 remains the same as the language discussed in the ***Sarpy County Public Employees Association*** case, and since Section 34 of LB 76 also gives the election commissioner the authority to

hire assistants and other election personnel, we believe that the holding of the *Sarpy County Public Employees Association* case would apply to the election commissioners established by LB 76 for counties over 50,000 in population. Those officials would be county officers, and under that case, the election commissioner and not the county board would be the official to establish personnel policies and procedures for his or her employees.[2] If you wish a different result, you may wish to consider appropriate amendments for LB 76.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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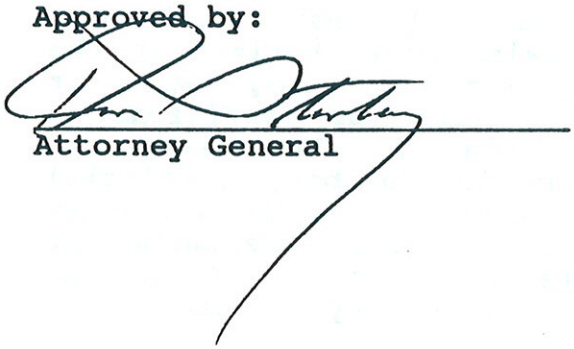
cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:



Attorney General

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[2] This conclusion applies to counties over 50,000 in population which are under 150,000 in population. Personnel policies and procedures for counties over 150,000 in population are governed by separate statutory civil service systems. *See Neb. Rev. Stat. §§* 23-2501 to 23-2516 and 23-2517 to 23-2533 (1991).