



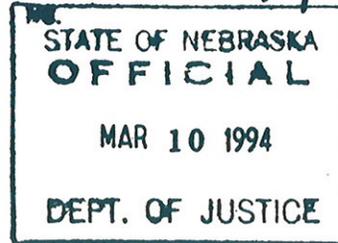
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94014



DATE: March 10, 1994

SUBJECT: Constitutionality of Statutory Ban on Smoking in State Facilities

REQUESTED BY: Senator Floyd Vrtiska

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested the opinion of this office as to the constitutionality of LB 1064, a bill to prohibit smoking in all buildings, facilities, and vehicles that are owned, leased, or occupied by the State, effective on September 1, 1994. Specifically, you have asked whether the provisions of LB 1064 would violate the constitutionally mandated separation of powers since the smoking ban would apply to buildings and facilities controlled or occupied by agencies and officials of the Executive and Judicial branches, as well as the Legislature.¹

The Separation of Powers

The Constitution of the State of Nebraska provides for the separation of powers and strictly forbids encroachment by one branch of government upon the powers of another branch:

¹Although this opinion addresses only the separation of powers question, we note that nonsmoking regulations have survived constitutional challenges based on the equal protection clause, the due process clause, the fundamental rights of liberty, privacy, property, and education, and the guarantee against impairment of contract obligations. See 65 ALR 4th 1205.

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The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Neb. Const. Art. II, §1 (emphasis added).

The doctrine of separation of powers has been strictly construed in the State of Nebraska. See *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403, 413 (1991). In interpreting Article II, section 1, the Nebraska Supreme Court has stated, "Nebraska's Constitution contains an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the federal Constitution and those of some of the states, which merely definitely divided the three powers of government." *Laverty v. Cochran*, 132 Neb. 118, 120-121, 271 N.W. 354 (1937). Thus, the Legislative Branch may not exercise any power properly belonging to the Executive or Judicial Branch. See *State ex rel. Spire v. Conway*, 238 Neb. at 773 ("The language of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others. . .").

The question presented by your request, therefore, can be framed as follows: Whether the regulation of smoking, by the Legislative branch, constitutes the exercise of a power properly belonging to either the Executive or Judicial branches within the context of buildings or facilities occupied or controlled by those respective branches of state government.

Classification of the Power to Regulate Smoking

The underlying question, then, is whether the regulation of smoking, in the context of buildings or facilities occupied or controlled by the respective branches of state government, is properly classified as a legislative, executive or judicial function.

The Nebraska Constitution is silent on this question, and our research reveals no case law or commentary discussing a separation of powers problem arising from a nonsmoking regulation affecting the internal management of the separate branches of government. However, in *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937), the Nebraska Supreme Court discussed the inherent powers of the various branches of government.

In the absence of an express grant of . . . power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "It is a fundamental principle of constitutional law that each department of government, whether federal or state, has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." . . . "All governmental powers are in their natures either legislative, executive, or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned."

Id. at 266 (Emphasis added).

We believe the regulation of smoking is in the nature of a generally applicable public health and safety regulation. See, e.g., the Clean Indoor Air Act, Neb. Rev. Stat. § 71-5702 ("the purpose . . . is to protect the public health, comfort, and environment. . . ."). Such regulation does not appear to be an inherently executive or judicial function. The Legislature, on the other hand, has an unlimited field within which to legislate, subject only to the initiative, referendum and constitutional inhibitions, and provided that legislation is for a public purpose. *Power Oil Co. v. Cochran*, 138 Neb. 827, 839, 295 N.W. 805 (1941).

Under Nebraska law, "the Legislature has plenary legislative authority limited only by the state and federal Constitutions." *Lenstrom v. Thone*, 209 Neb. 783, 789, 311 N.W.2d 884 (1981). "Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. It is for the Legislature to decide in the first instance what is and what is not a public purpose. . . ." *Id.* See also *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 687, 353 N.W.2d 267 (1984). The regulation of smoking, even in facilities controlled or occupied by

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the Executive and Judicial branches, would not appear to prevent the affected branch from accomplishing its constitutionally assigned functions, nor would such regulation encroach on the duties and prerogatives of the Executive or Judicial branches.²

Consequently, we conclude the regulation of smoking in State buildings, facilities and vehicles is within the prerogative of the Legislature, and no separation of powers conflict exists under the provisions of LB 1064.

Sincerely yours,

DON STENBERG
Attorney General


Steve Grasz
Deputy Attorney General

Approved By:


Attorney General

3-1490-3

²We note that existing law already generally prohibits smoking in a public place or at a public meeting except in designated smoking areas. Neb. Rev. Stat. § 71-5707 (1990).