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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 7 1995
DEPT. OF JUSTICE

DATE: June 7, 1995

SUBJECT: LB 371; Validity of a Bill Which Will Increase Inmate Populations But Which Does Not Contain the Estimates or Appropriations Required by Neb. Rev. Stat. § 50-129 (1993)

REQUESTED BY: Senator Kate Witek
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General

LB 507 (codified at *Neb. Rev. Stat. §§* 50-129 and 59-130 (1993)) was passed by the Legislature in 1993. That bill provides, in pertinent part:

> (1) When any legislation is enacted after June 30, 1993, which is projected in accordance with this section to increase the total adult inmate population or total juvenile population in state correctional facilities, the Legislature shall include in the legislation an estimate of the operating costs resulting from such increased population for the first four fiscal years during which the legislation will be in effect. * * *
>
> (3) The Legislature shall provide by specific itemized appropriation, for the fiscal year or years for which it can make valid appropriations, an amount sufficient to meet the cost indicated in the estimate contained in the legislation for such fiscal year or years. The appropriation shall be enacted in the same legislative session in which the legislation is enacted and shall be contained in a bill which does not contain appropriations for other programs.

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> (4) Any legislation enacted after June 30, 1993, which does not include the estimates required by this section and is not accompanied by the required appropriation shall be null and void. * * *

LB 371, which contains a number of provisions affecting the criminal statutes, is now before the Legislature on Final Reading. The Fiscal Note for LB 371 indicates that the bill will increase inmate population if passed. Nevertheless, the bill does not contain any estimate of the operating costs resulting from such increased population. Moreover, LB 371A, the appropriations bill for LB 371, has been indefinitely postponed. In light of this situation, you first ask us, "[i]f LB 371 is passed on Final Reading in its current form and LB 371A remains indefinitely postponed at the end of the session, will the Legislature have complied with the provisions enacted by LB 507 of 1993?"

The obvious answer to your initial question is "no." LB 507, and now Section 50-129, require that legislation which is projected to increase inmate population must contain estimates of the operating costs resultant from such increases, and that there be an appropriation to cover such costs. Since LB 371 contains no such estimates, and since the appropriation bill for LB 371 does not appear destined for passage, we do not believe that the provisions of LB 507 from 1993 have been complied with.

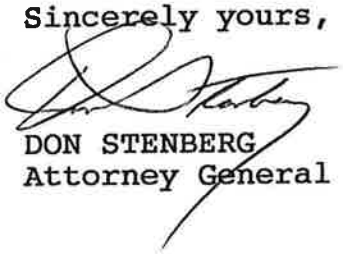
You next ask, "[i]f [LB 371 is] not [in compliance with LB 507], can LB 371 become a validly enacted law nevertheless (perhaps pursuant to Attorney General Opinion #93040, dated May 18, 1993)?"

In Op. Att'y Gen. No. 93040 (May 20, 1993), we concluded that LB 507 was "unconstitutional as legislation which would improperly attempt to bind or restrict the authority of future legislatures to pass legislation which might impact the inmate population in correctional facilities in Nebraska." *Id.* at 3. We have reviewed that opinion and the authorities cited therein, and we continue to believe that the analysis and conclusion stated in Op. Att'y Gen. No. 93040 (May 20, 1993) are correct. An act of the Legislature that is unconstitutional at the time of its passage is absolutely null and void. ***Jaksha v. State***, 241 Neb. 106, 486 N.W.2d 858 (1992). As a result, it continues to be our opinion that LB 507 or Section 50-129 are not effective to impose requirements on the current Legislature.

Nevertheless, acts of the Legislature, including LB 507, are presumed to be constitutional. The adoption of LB 507 by the Legislature and the Governor in 1993, and the current pending failure of the Legislature and the Governor to comply with that law, will create a legal cloud over LB 371 which will inevitably

lead to legal challenges of LB 371 which could and should have been avoided.

Sincerely yours,



DON STENBERG
Attorney General

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