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16-005
NO.
STATE OF NEBRASKA
OFFICIAL
MAR 04 2016
DEPT. OF JUSTICE

SUBJECT: Whether the Nebraska Legislature may permit the University of Nebraska and the Nebraska State College System to contract for their own credit cards, charge cards, or debit cards, without utilizing the Nebraska State Treasurer's contract for such services.

REQUESTED BY: Senator John Murante

WRITTEN BY: Douglas J. Peterson, Attorney General
Natalee J. Hart, Assistant Attorney General

You are the Chairperson of the Government, Military and Veterans Affairs Committee of the Nebraska State Legislature. Before your committee is a bill, 2016 LB 955, which would allow the University of Nebraska and the Nebraska State College System to contract for credit cards, charge cards, or debit cards without utilizing the contract for those services entered into by the Nebraska State Treasurer and the Director of the Department of Administrative Services for all state agencies.

You have requested an opinion from the Attorney General's Office regarding several questions relating to 2016 LB 955, as follows:

(1) Can the Legislature remove by statute a core function that is an inherent constitutional authority of the State Treasurer?

(2) Is the custody of state funds and the supervision of the State's relationships with state and national banks an inherent constitutional authority of the State Treasurer?

(3) Do the contracts that provide for the receipt of state funds through the processing of credit card transactions fall within the State Treasurer (sic) constitutional authority to supervise the State's relationship with state and national banks?

(4) Do the provisions of LB 955 which allow the University of Nebraska and the Nebraska State College System to enter into credit card processing contracts for the purpose of receiving payment of state funds without the involvement of the State Treasurer violate the inherent constitutional authority of the State Treasurer?

(5) Is LB 955 unconstitutional?

2016 LB 955 seeks to amend Neb. Rev. Stat. § 81-118.01(5) to specifically exclude the University of Nebraska and the Nebraska State College System from the requirement that all state agencies utilize the contract entered into by the State Treasurer and the Director of the Department of Administrative Services with a third-party merchant for credit card, charge card, and debit card processing services.[1] The University of Nebraska and the Nebraska State College System would be permitted to participate in the State Treasurer's contract for such services, at their discretion, but would also be permitted to seek such services and enter into separate contracts for credit card processing services. 2016 LB 955, § 1. We will respond to your fourth question first, as the analysis relating to that question will encompass the remainder of your questions.

Question 4. Do the provisions of LB 955 which allow the University of Nebraska and the Nebraska State College System to enter into credit card processing contracts for the purpose of receiving payment of state funds without the involvement of the State Treasurer violate the inherent constitutional authority of the State Treasurer?

The answer to your fourth question is grounded in several prior opinions of this office. Neb. Const. art. IV, § 1 establishes the executive officers of the state as the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and other heads of executive departments, and provides that "[o]fficers in the executive department of the state shall perform such duties as may

[1] For convenience, we will refer to this grouping of services as "credit card processing services." All references to credit cards and credit card processing also refer to charge cards and debit cards and processing thereof.

be provided by law." The duties of each of these offices is not further defined in the Constitution. On several occasions, this office has had occasion to address the topic of a constitutional officer's "core functions" inherent in Neb. Const. art. IV, § 1. In Op. Att'y Gen. 93012 (March 4, 1993), a lengthy discussion was had regarding the core functions of constitutional officers in general, and the auditor in particular. That opinion dealt with a bill that purported to remove the authority of the State Auditor of Public Accounts to audit the books of the Nebraska Legislature, transferring that authority to the Legislature. Ultimately, that bill was determined to be unconstitutional based upon the separation of powers doctrine. However, the "core functions" of the auditor were also at issue. We have stated that "the law" as referred to in Neb. Const. art. IV, § 1 refers not only to statutory law, but common law and the inherent functions of the constitutional officers. Op. Att'y Gen. No. 93012 at 6. These common law and inherent functions comprise the "core functions" of the constitutional officers.

The core functions of the State Treasurer have previously been determined to be

> [T]he duty to receive and keep all money of the State not expressly required to be received and kept by some other officer. Neb. Rev. Stat. § 84-602(1) (1994); Neb. Rev. Stat. 1866, c. 4, § 18. Moreover, since 1891, the State Treasurer has had authority to deposit the funds of the State in his keeping in state and national banks. Neb. Rev. Stat. § 77-2301 (1996), 1891 Neb. Laws, c. 50, § 1, 9. 347. It is also generally accepted that the Treasurer of a state has, by law, the custody of the monies of the State. 81A C.J.S. *States* § 135. Based upon those historical duties of the State Treasurer, it seems to us that the core functions of that office would clearly include maintaining custody of state funds. Arguably, those core functions would also include general supervision of [the] State's relationships with state and national banks.

Op. Att'y Gen. No. 98006 (January 21, 1998) at 6. *See also* Op. Att'y Gen. No. 10007 (March 18, 2010), Op. Att'y Gen. No. 15-010 (August 10, 2015).

The core functions of a constitutional office, including that of the State Treasurer, "may not be removed by legislative enactment." Op. Att'y Gen. No. 93012 at 10.

> "[T]he Legislature cannot relieve or preclude any executive officer from the performance of a duty enjoined on him by the Constitution, or, as otherwise expressed, it cannot take away from a constitutional officer the powers or duties given him by the Constitution; or vest such powers or functions in any other department or officer (footnotes omitted)." 16 C.J.S. § 130, page 545 (1956).

> Therefore, in addition to the inability of the Legislature to abolish the office entirely or to excessively diminish its statutory responsibilities when no duties of any significance remain, it is also impermissible to take away any of the duties constitutionally established for the office.

Op. Att'y Gen. No. 93012 at 10, quoting Op. Att'y Gen. No. 214 (March 4, 1982). "[T]he Nebraska Supreme Court has repeatedly recognized the principal that the legislature may not transfer duties vested under the Constitution in one officer or entity to another officer, body or jurisdiction." Op. Att'y Gen. No. 93012 at 14 (emphasis omitted) (citations omitted). "'[T]he duties of a constitutional officer may be added to by statute, but none, as they were known at common law, may be taken away.'" *Id.* at 15 (quoting *People ex. rel. Walsh v. Board of Commissioners of Cook County*, 74 N.W.2d 503, 507, 508 (Ill. 1947). *See also State ex. rel. Spire v. Beermann*, 235 Neb. 384, 399, 455 N.W.2d 749, 757 (1990) (if the Legislature could transfer one constitutional duty from a constitutional governing board, it could transfer all such duties, and the constitutional provision establishing that board would become nugatory); *Rivett Lumber & Coal Co. of Benson v. Chicago & N.W. Ry. Co.,* 102 Neb. 492, 167 N.W. 570 (1918).

Even when a duty has been prescribed by statute, if it is founded on one of the constitutional officer's core functions, that duty may not be revoked. The Minnesota Supreme Court, in ruling on that state's legislative attempt to remove most responsibilities from the state treasurer and transfer them to a statutorily created officer, under a constitutional provision nearly identical to that found in the Nebraska Constitution, held that the legislature could not strip the state treasurer of all its core functions.

> Functions relating to the receipt, care, and disbursement or state monies define the treasurer position and separate it from the other executive offices of state government established in our constitution. . . .
>
> Although the prescribed-by-law provision of Article V [of the Minnesota Constitution] affords the legislature the power, in light of public health and welfare concerns, to modify the duties of the state executive officers, it does not authorize legislation . . . that strips such an office of all its independent core functions. The [constitution] implicitly places a limitation on the power of the legislature, under Section 4 of Article V, to prescribe the duties of such offices. The limitation is implicit in the specific titles the drafters gave to the individual offices.
>
> That is not to say that the legislature could not name officials to perform some of the core functions of an executive office; core functions of such offices can be shared with statutory officials. The limitation implicit in

> Section 1 of Article V serves only to prevent the legislature from abolishing all of the independent functions inherent in an executive office.

State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 781-782 (Minn. 1986).

Further, the court in *Mattson* looked to an Arizona decision, which stated that "the legislature should have known that it could not denude the office of its inherent powers and duties, even though they had been prescribed by statute, and leave the office as an empty shell." *State ex rel. Mattson v. Kiedrowski*, 391 N.W. 2d at 781 (quoting *Hudson v. Kelly,* 263 P.2d 362, 368 (Ariz. 1953)). *See also Fergus v. Russel*, 110 N.W.130 (Ill. 1915) (the state legislature could revoke some duties that had been legislatively conferred upon constitutional officers, but could not remove those which were inherent in the offices under the common law.)

It is clear that the Legislature may not entirely remove any one of the State Treasurer's core functions, including establishing a banking relationship on behalf of the State of Nebraska and all of its agencies. As a contract for credit card services inherently involves establishing a banking relationship with one or more merchant banks, the credit card contracts are a part of the Treasurer's duties to establish banking relationships for the State of Nebraska.[2] However, what is not entirely clear is whether any of those duties may be diminished by the Legislature. Allowing the University and the State College System to enter into their own credit card processing contracts would not entirely remove a function from the State Treasurer, but would reduce the Treasurer's duties in that regard.

We previously have opined that under the current statutory language, the University of Nebraska is required to abide by the contract entered into by the State Treasurer for credit card services.[3] In determining whether Neb. Rev. Stat. §§ 13-609 and 81-118.01, generally authorizing governmental subdivisions and state agencies to accept credit card payments, applied to the University of Nebraska, we determined that the University was a state agency subject to the requirements of Neb. Rev. Stat. § 81-118.01, which 2016 LB 955 seeks to amend. We stated that

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[2] *See* Op. Att'y Gen. 98006 at 6. *See also State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333, 338, 37 N.W.2d 502, 506 (1949) ("[a] Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable."

[3] You have only asked us to opine as to the constitutionality of this bill as it relates to "state funds." As is discussed in Op. Att'y Gen. No. 98006 at 8-12 and *Board of Regents of the University of Nebraska v. Exon*, 199 Neb. 146 (1977), the University has other funds, which are not "state funds," and for which it is permitted to establish its own banking relationship. We will not discuss those funds herein.

> [t]he general government of the University vested in the Board of Regents under the Nebraska Constitution may only be exercised in such a way as to preserve the Treasurer's general authority over the custody of state funds and the supervision of the State's relationship with state and national banks. Therefore, the credit card provisions of [1997] LB 70 appear acceptable under the [*Board of Regents of the University of Nebraska v. Exon,* 199 Neb. 146, 256 N.W.2d 330 (1997)] case because they involve the Treasurer's general supervision of matters related to the State's business with banks. On the other hand, it remains clear under *Exon* that the Treasurer's authority with respect to state funds and general supervision of the State's relationship with banks cannot be used to intrude upon the authority of [the] Board of Regents in the general government of the University.

Op. Att'y Gen. 98006 at 6-7.

The answer as to whether the Legislature may diminish any of the constitutional duties of a constitutional officer such as the State Treasurer has not been taken up by the Nebraska Supreme Court. While it is not clear how the Nebraska courts would rule on this topic, we believe the better answer in this matter to be that the Legislature may not diminish the State Treasurer's "core functions," and allowing the University and State College System to enter into their own contracts for credit card processing would do just that.

The Utah Supreme Court has taken up a similar question to the one you have presented to this office. Utah's constitutional provision provides that its treasurer "shall be the custodian of public moneys, and . . . shall perform such other duties as may be provided by law." *Preece v. Rampton*, 492 P.2d 1355, 1356 (Utah 1972). "While the Constitution provides that additional duties may be imposed . . . the language cannot be tortured into meaning that any of the duties and responsibilities which they had at the time [the constitution was adopted] can be diminished." *Id.* The Utah Supreme Court distinguished between ministerial duties, such as the typing out of warrants, which can be assigned to other state officers; and discretionary functions, such as verifying the correctness of accounts before they are paid, which cannot be taken away from the constitutional officer. *Id.* at 1357. Establishing banking relationships for the state of Nebraska, including making a determination as to the third-party merchant bank which is to be awarded a contract with the State of Nebraska for credit card payment processing, is a discretionary function. We do not believe that this function can be transferred, even in part, to another state agency.

Our opinion that the Nebraska Supreme Court would determine that 2016 LB 955 is unconstitutional is also based upon our reading of *Board of Regents of the University of Nebraska v. Exon*, 199 Neb. 146, 256 N.W.2d 330 (1977). In this case, the Board of

Regents of the University of Nebraska asked the Court to rule on whether acts of the Legislature were in contravention to the constitutional authority of the Board of Regents as found in art. VII, § 10 of the Nebraska Constitution. The Nebraska Supreme Court stated that "although the Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers or duties that should remain in the Regents cannot be delegated to other officers or agencies." *Id.* at 149, 256 N.W.2d at 333. We believe this reasoning may be applied equally to any officer vested with constitutional authority. The Legislature may not delegate any of the core functions of a constitutional officer to any other office. This would include the responsibilities of the State Treasurer to establish banking relationships on behalf of the State of Nebraska and enter into credit card processing contracts for the State.

For these reasons, we believe that 2016 LB 955 improperly infringes upon the constitutional authority of the Nebraska State Treasurer.

Question 1. Can the Legislature remove by statute a core function that is an inherent constitutional authority of the State Treasurer?

As explained in our response to question four, the Legislature cannot deprive a constitutional office of any of its "core functions." The Legislature may not remove all or part of the State Treasurer's function of establishing and maintaining banking relationships, including contracting with credit card providers, for funds for which the Treasurer is responsible to maintain. *See* Op. Att'y Gen. No. 98006 at 6. *See also* Op. Att'y Gen. No. 10007, Op. Att'y Gen. No. 15-010.

Question 2. Is the custody of state funds and the supervision of the State's relationships with state and national banks an inherent constitutional authority of the State Treasurer?

As previously stated by this office in prior opinions, yes, the supervision of the State's relationship with state and national banks is one of the State Treasurer's "core functions" granted to it by the Nebraska Constitution and the common law. Op. Att'y Gen. No. 98006 at 6. *See also* Op. Att'y Gen. No. 10007, Op. Att'y Gen. No. 15-010.

Question 3. Do the contracts that provide for the receipt of state funds through the processing of credit card transactions fall within the State Treasurer's constitutional authority to supervise the State's relationship with state and national banks?

As we explained above, the contracts that are entered into by the State Treasurer and the Director of the Department of Administrative Services for credit cards, charge cards, or debit cards, pursuant to Neb. Rev. Stat. § 81-118.01, fall within the State Treasurer's responsibility to supervise the State's relationship with state and

national banks. In order to contract for these services, there must be a banking relationship established between the State of Nebraska and the merchant bank which issues the card.

Question 5. Is LB 955 unconstitutional?

In the context of opinion requests from members of the Legislature, we have stated in the past that a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. Op. Att'y Gen. No. 98040 (September 11, 1998), Op. Att'y Gen. No. 94023 (March 23, 1994). We will address two potential constitutional problems with this proposed legislation, but have no indication from you as to whether you believe there could be other potential constitutional impediments to this legislation. In terms of whether 2016 LB 955 interferes upon the State Treasurer's constitutional "core functions," as discussed herein, we believe 2016 LB 955 to be an unconstitutional infringement thereupon.

We also have concerns about whether 2016 LB 955 would constitute unconstitutional special legislation. As we believe this bill to be an unconstitutional infringement upon the State Treasurer's core duties, we will not discuss whether this bill is special legislation at length. However, we do believe 2016 LB 955 creates an arbitrary classification of two state agencies, with no reasonable distinction which would allow only these two state agencies to enter into their own contracts for credit card services.

Under Neb. Const. art. III, § 18, a legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification, or (2) it creates a permanently closed class. *Gourley v. Nebraska Methodist Health System, Inc.,* 265 Neb. 918, 663 N.W.2d 43 (2003). With respect to what constitutes an arbitrary and unreasonable classification, the Nebraska Supreme Court has stated "[a] legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified." *Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003) (citations omitted). Ultimately, "the analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation." *Id.* at 939, 663 N.W.2d at 66.

While the University of Nebraska and the State College System may argue that they are different from all other state agencies, having more autonomy due to their constitutionally created governing bodies, and providing differing services from all other state agencies, we do not believe that is sufficient to separate them for the purposes of a credit card contract relating to the expenditure of state funds. In this regard there are other constitutionally created state offices which could argue they are not substantially

different from the University of Nebraska and the State College System for purposes of establishing their own credit card processing. We do not believe that allowing the University of Nebraska and the State College System to contract for credit card processing, separate from the contract entered into by the State Treasurer, passes the test of a "substantial difference of situation or circumstance" under *Gourley.* For these reasons, we believe 2016 LB 955 to be unconstitutional special legislation.

Conclusion

For the reasons found herein, we believe 2016 LB 955 to be an unconstitutional infringement upon the State Treasurer's core functions. We do not believe that the State Treasurer's duties to supervise the state's banking relationships, which includes entering into contracts for credit card processing services, can be eliminated or diminished by legislative enactment. We also believe 2016 LB 955 to be unconstitutional special legislation as to the University of Nebraska and the State College System.

Sincerely,

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Approved:

Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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