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DOUGLAS J. PETERSON
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16-008

NO.
STATE OF NEBRASKA
OFFICIAL
APR 01 2016
DEPT. OF JUSTICE

SUBJECT: Constitutionality of LB 830—Requiring Cash Payouts of Accrued Vacation Leave Which Exceeds Maximum Limits in Lieu of Forfeiture

REQUESTED BY: Senator Jim Scheer
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office regarding the constitutionality of legislation "that would provide state employees with additional compensation in the form of payment for unused vacation leave that exceeds statutory limits in certain circumstances." You indicate that the current version of Legislative Bill 830[1] requires a payout in those instances where an employee has made a "reasonable written request" to use the leave prior to December 31, but was denied the ability to do so by the employing agency. You further state that LB 830 would apply to all state employees except those employed in the legislative and judicial branches.

QUESTIONS PRESENTED

Your first question deals with the applicability of LB 830 to "employees of other constitutional officers." You indicate that the Department of Administrative Services has the authority to adopt and promulgate rules and regulations governing the pay and hours of state employees within the State Personnel System. However, you point out that Neb.

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1 We note that LB 830 is on Final Reading. Nebraska Legislative Journal at 941 (March 10, 2016).

Rev. Stat. § 81-1316 (2014) exempts from the State Personnel System the personnel of constitutional offices and other at-will, discretionary agency heads.[2]

Your second question relates to LB 830 in the context of the State Employees Collective Bargaining Act, Neb. Rev. Stat. §§ 81-1369 to 81-1388 (2014) ("Act"). You indicate that under the Act, the executive branch is authorized to negotiate terms and conditions of employment, including compensation and vacation leave, with union contract-covered employees. However, you note that "the Legislature did not retain a right to approve or an ability to modify the resulting collectively bargained contracts." You state that you have been advised that the proposed legislation would conflict with the state employee bargaining agreements currently in place.

You have posed the following questions:

1. May the Legislature constitutionally mandate payout of unused vacation leave for the discretionary employees of these constitutional or elected officers or employees?

2. Whether LB 830 would violate or conflict with portions of the State Employees Collective Bargaining Act?

LB 830

The proposed language in LB 830 would add a new subsection to Neb. Rev. Stat. § 81-1328 (2014), as follows:

> (7) It is the responsibility of the head of an employing agency to provide reasonable opportunity for a state employee to use rather than forfeit accumulated vacation leave. If a state employee makes a reasonable written request to use vacation leave before the leave must be forfeited under this section and the employing agency denies the request, the employing agency shall pay the state employee the cash equivalent of the amount of forfeited vacation leave that was requested and denied. Such cash payment shall be made within thirty days after the requested and denied vacation leave is forfeited under this section. Such cash payment

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[2] Pursuant to Neb. Rev. Stat. § 81-1316(1) (2014), "[a]ll agencies and personnel of state government shall be covered by sections 81-1301 to 81-1319 and shall be considered subject to the State Personnel System . . . ." Section 81-1316 specifically excludes from the system the personnel of the constitutional officers (i.e., Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, and Auditor of Public Accounts); the personnel of the Legislature and the "court systems"; the personnel from other agencies created by the Nebraska Constitution (e.g., the University of Nebraska, State Department of Education); the personnel of other state agencies (e.g., Brand Committee); agency heads; and certain enumerated officers and personnel from the Departments of Banking and Finance, Correctional Services, Health and Human Services, and Insurance. Section 81-1316(2) also excludes a certain number of discretionary, nonclassified employees who serve at the pleasure of the agency head.

> shall be considered compensation for purposes of a state employee's retirement benefit in a defined contribution or cash balance benefit plan administered by the Public Employees Retirement Board but shall not be considered compensation for purposes of a state employee's retirement benefit in any other defined benefit plan administered by the Public Employees Retirement Board. In determining whether a state employee's request to use vacation leave is reasonable, the employing agency shall consider the amount of vacation leave requested, the number of days remaining prior to forfeiture during which the state employee may take vacation leave, the amount of notice given to the employing agency prior to the requested vacation leave, any effects on public safety, and other relevant factors. This subsection shall not apply to state employees who are exempt from the State Personnel System pursuant to subdivisions (1)(g) and (h) of section 81-1316.

Final Reading Version of LB 830, section 2, pp. 16-17.

DISCUSSION

You have inquired as to whether the Legislature can impose the proposed legislation on the "employees of other constitutional officers." Although not expressly articulated in your opinion request letter, we believe your first question relates to whether the proposed legislation violates the separation of powers provision in Neb. Const. art. II, § 1. That provision states, in pertinent part:

> 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 expressly directed or permitted in this Constitution.

"In other words, the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n*, 251 Neb. 517, 524, 557 N.W.2d 684, 690 (1997). "This aspect of the separation of powers clause serves as the beam from which our system of checks and balances is suspended." *Id.*; *State ex rel. Spire v. Conway,* 238 Neb. 766, 472 N.W.2d 403 (1991). "The federal separation of powers principle is inferred from the overall structure of the U.S. Constitution. In contrast, Neb. Const. art. II, § 1, prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution itself otherwise directs or permits." *State v. Phillips*, 246 Neb. 610, 614, 521 N.W.2d 913, 916 (1994). "The people of the state, by adopting a Constitution, have put it beyond the power of the Legislature to pass laws in violation thereof." *State ex rel. Randall v. Hall*, 125 Neb. 236, 242-243, 249 N.W. 756, 759 (1933).

The question presented by LB 830 is whether mandating a payout to state employees for vacation leave which would otherwise be forfeited would unduly encroach on the duties and prerogatives of the constitutional officers exempted from the State Personnel System by § 81-1316. Our analysis begins with the fundamental proposition that the Nebraska Legislature has plenary legislative authority except as limited by the state and federal Constitutions. *Lenstrom v. Thone*, 209 Neb. 783, 789, 311 N.W.2d 884, 888 (1981). "The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution." *Id.*; *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996).

With those principles in mind, we have examined the executive branch provisions in article IV of the Nebraska Constitution to ascertain those duties and prerogatives of the constitutional bodies at issue which may be affected by LB 830. Section 1 of article IV expressly provides:

> The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. . . . The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the Governor, with the consent of a majority of all members elected to the Legislature, but officers so appointed may be removed by the Governor. Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments.

While the Governor is authorized to present a "complete itemized budget of the financial requirements of all departments, institutions and agencies of the state" (Neb. Const. art. IV, § 7), we have identified no other constitutional provision which sets out the salaries and other fringe benefits to be provided to the *employees* of the executive officers enumerated above.[3]

However, we did identify a limited number of statutes involving the constitutional executive officers and their duties relating to salaries and fringe benefits for employees under their control. For example, Neb. Rev. Stat. § 81-107 (2014) authorizes the Governor to appoint "deputies, assistants, employees, and clerical help, . . . fix the

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[3] Neb. Const. art. IV does address, however, the salaries of the executive officers enumerated in § 1, who "shall receive such salaries as may be provided by law." Neb. Const. art. IV, § 25. Members of the Public Service Commission shall receive compensation as fixed by the Legislature. Neb. Const. art. IV, § 20. With respect to the members of the Tax Equalization and Review Commission, "[t]he terms of office and compensation of members of the commission shall be as provided by law." Neb. Const. art. IV, § 28.

salaries of such appointees and prescribe their duties." The Attorney General shall determine the salary of the deputy attorney general, whose salary, as well as the salaries of the assistant attorneys general, shall not be less than twenty thousand dollars. Neb. Rev. Stat. § 84-206 (2014). The Auditor of Public Accounts, the Secretary of State and the State Treasurer all have the power to appoint a deputy, and determine his or her salary. *See* Neb. Rev. Stat. §§ 84-314, 84-509, and 84-608 (2014). There are no specific provisions relating to the salaries for the other employees in the offices, or for fringe benefits, like sick or vacation leave.

In *State ex rel. Beck v. Young*, 154 Neb. 588, 48 N.W.2d 677 (1951), the Nebraska Supreme Court decided an action in *quo warranto* involving a member of the Liquor Control Commission. The governor, after notice and hearing, had determined that the commissioner should be removed from office for accepting commissions on insurance policies issued to liquor licensees, which violated the statute prohibiting members of the commission from soliciting or accepting gifts or gratuities from any person subject to the provisions of the liquor control act. The commissioner refused to surrender the office. In its analysis, the court stated:

> The power of the Legislature in the creation of an office, admittedly a legislative function, is limited to those matters which are defined as ingredients of the office. The general rule is that the power to appoint carries with it the power to remove, and even if the occupant may be subject to impeachment, the power of the Governor to remove remains wholly unaffected by such fact. *It is within the power of the Legislature to create an office, define its powers, limit its duration, and provide for the compensation of the occupant.* The power of appointment and removal is in the Governor except as limited by Article IV, section 12, of the Constitution, and the legislative or judicial branches may not properly trench upon the executive power thus granted.

Id. at 593-594, 48 N.W.2d at 680-681 (emphasis added). In entering its judgment of ouster, the court concluded that since the commissioner had received notice and a hearing, and that the specification of charges were supported by the evidence, the Governor's order to remove the commissioner was appropriate. *Id.* at 595, 48 N.W.2d at 681.

In *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970), the court considered whether the Legislature could impose annual limits on personal services expenditures on a biennial appropriation. At that time, the Legislature only convened biennially. The court indicated that

> [t]he Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within constitutional limits. There is one thing, however, which it cannot do, and this is inherent in Article II, section 1, Constitution of Nebraska. It

> cannot through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of the government. It cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed. Is the condition imposed an attempt to administer the appropriation?

Id. at 499-500, 176 N.W.2d at 926. The court noted that it was "impossible" to define exact limits when dealing with issues involving separation of powers, and that all states consider the problem on a "case-by-case basis." *Id.* at 500, 176 N.W.2d at 926. However, the court "realize[d] that the Legislature cannot be permitted to hamper the necessary operation of constitutional officers by unreasonable appropriation restraints." *Id.* Ultimately, the court found that since most governments operate on a fiscal year basis, and that public officials' salaries are determined on an annual basis, the Legislature's imposition of an annual personal services limitation was not unreasonable. "It is within the power of the Legislature to fix the amount it will appropriate for personal services in any state department or agency. . . . It has seen fit to divide that portion of the appropriation allocated for personal services by imposing an annual ceiling. This is within the legislative prerogative and is not an unlawful attempt to control the operation of the executive department or to administer the appropriation." *Id.*

In the present case, the proposed language would require a cash payout for earned vacation leave which would otherwise be forfeited or lost due to management's denial of an employee's request to use the vacation leave. The proposed legislation requires that the request for leave be "reasonable." As discussed above, there are no duties enumerated in the Nebraska Constitution which relate to salary or fringe benefits for the employees of the constitutional officers and few statutes address these items. It appears to us that the proposed language in LB 830 is not unlike other current provisions in § 81-1328, where cash payouts for earned vacation leave are mandated upon termination of state employment,[4] and upon death of the employee while employed by the state. We believe that these cases, together with the dearth of constitutional provisions relating to salary and vacation leave, lend support to conclude that the proposed language in LB 830 does not unduly impinge on the duties and prerogatives of the constitutional officers at issue here.

We find additional reasons to support this conclusion. First, the vacation leave statute—§ 81-1328—broadly defines "state employee" as any "person or officer employed by the state including the head of any department or agency, except when such a head is a board or commission, and who works a full-time or part-time schedule on an ongoing basis." "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Swift*

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4 *See* Neb. Rev. Stat. § 48-1229(6) (Cum. Supp. 2014)

and Company v. Nebraska Department of Revenue, 278 Neb. 763, 773 N.W.2d 381 (2009). The plain and unambiguous language defining state employee establishes that all full or part-time persons employed by the state, including agency heads, shall be eligible to receive vacation leave. The only individuals expressly excluded are members of Nebraska boards and commissions. Beyond that one exclusion, the definition does not differentiate between personnel in the State Personnel System, constitutional agencies, branches of government, or any other category of employee.

A fundamental principle of statutory construction is to attempt to ascertain legislative intent and to give effect to that intent. *Spence v. Terry*, 215 Neb. 810, 814, 340 N.W.2d 884, 886 (1983). "To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson,* 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). The statute governing vacation time for state employees was enacted by 1973 Neb. Laws LB 469. When asked about the extent of the proposed legislation during the committee hearing on LB 469, the then director of State Personnel, William C. Peters, testified that it would encompass "approximately 22,000 employees. We're talking about all the employees of the state government. . . . Both the constitutional bodies, the Universities, state and so forth." Committee Records on LB 469, 83rd Neb. Leg., 1st Sess. 17 (March 1, 1973).

While our review of the legislative history of the vacation leave statute for state employees indicates a legislative intent to apply its provisions to all state employees, including all "constitutional" bodies, subsequent case law addressing the Legislature's power to enact legislation affecting the governance of the University of Nebraska precludes applying the statute to the University. In *Board of Regents v. Exon,* 199 Neb. 146, 149, 256 N.W.2d 330, 333 (1977), the Nebraska Supreme Court held that "the general government of the University must remain vested in the Board of Regents and the powers or duties that should remain in the Regents cannot be delegated to other officers or agencies." Application of § 81-1328 to the University is foreclosed by specific language set out in *Exon*, where the court stated: "We believe the finding by the trial court that the Legislature may fix and determine the manner in which raises are to be given to employees of the Board of Regents was erroneous. The determination of salary schedules and the compensation to be paid to the employees of the Board of Regents is an integral part of the general government of the University." *Id.* at 153, 256 N.W.2d at 335. Accordingly, § 81-1328 does not apply to University employees.[5]

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[5] In Op. Att'y Gen. No. 98006 (January 21, 1998), we discussed whether the University was subject to legislation which authorized state agencies and other governmental entities "to accept credit card payments as cash payments in certain instances." *Id.* at 1. We concluded that the credit card legislation applied to the University, stating in part "that statutes which pertain generally to state agencies and which do not purport to direct the Board of Regents as to matters which are central to the University's educational function or its 'government,' can have application to the University, even under *Exon*." *Id.* at 3. While the vacation leave statute could be viewed as one which pertains generally to state agencies, and is not, therefore, precluded by *Exon*, the specific language in *Exon* stating the determination of compensation paid to employees of the Board of Regents is an "integral part of the general government of the University" forecloses application of the vacation leave statute to University employees.

In Op. Att'y Gen. No. 89015 (March 20, 1989), we noted that the language creating the Board of Trustees of the State Colleges in Neb. Const. art. VII, § 13 was virtually identical to the language creating the Board of Regents in Neb. Const. art. VII, § 10. *Id.* at 6. We indicated that, by analogy, it would seem that "the court's language in the *Exon* case would apply equally to section 13 of Article VII." *Id.* Accordingly, the Board of Trustees would likely be in the same position as the University with respect to the ability to determine salary and other compensation for its personnel. However, unlike the Board of Regents, we have identified no decision from any Nebraska court which has conclusively applied *Exon* to the Board of Trustees. As a result, whether an exemption applies to the Board of Trustees in this instance is not clear. Apart from the University and, potentially, the state colleges, we see no impediment to applying § 81-1328 to employees of other constitutional bodies or officers, subject, of course, to the right of those bodies or entities to negotiate terms and conditions of employment through collective bargaining or, alternatively, to adjust terms and conditions of employment under the authority in § 81-1317.01.

We now turn to your second question which seeks our opinion as to whether LB 830 would violate or conflict with the State Employees Collective Bargaining Act. Your question arises out of concern that LB 830, which mandates a new process relating to vacation leave "buyouts," would conflict with the current labor contracts, which do not contain such a provision. You indicate that the Legislature has retained no right to approve or modify current contracts.

Under Neb. Rev. Stat. § 81-1376 (2014), the Chief Negotiator of the Division of Employee Relations within the Department of Administrative Services "shall be responsible for negotiating and administering all labor contracts entered into by the State of Nebraska," except for the contracts entered into by the constitutional offices, the Board of Regents of the University of Nebraska, and the Board of Trustees of the Nebraska State Colleges. The Chief Negotiator is charged with negotiating or supervising the negotiation of labor contracts on a statewide basis for those agencies within the division's jurisdiction. § 81-1376(1). As defined in Neb. Rev. Stat. § 81-1371(9) (2014), "[m]andatory topic or topics of bargaining shall mean those subjects of negotiation on which employers must negotiate pursuant to the Industrial Relations Act, *including terms and conditions of employment which may otherwise be provided by law for state employees*, except when specifically prohibited by law from being a subject of bargaining . . . ." (Emphasis added.) Vacation leave is a mandatory subject of bargaining under Neb. Rev. Stat. § 48-824(1) of the Industrial Relations Act. *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001*, 286 Neb. 755, 839 N.W.2d 290 (2013).

The Act expressly provides that bargained-for terms and conditions of employment can supersede state statute. A comparison of the vacation leave provisions in § 81-1328 with the current labor contract between the State of Nebraska and the Nebraska Association of Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME) (July 1, 2015 through June 30, 2017)

("Agreement") indicates substantive differences. For example, the statute provides that the amount of leave an employee may accumulate as of December 31 of each year shall be "the number of hours of vacation leave which he or she earned during that calendar year." Any vacation hours over that amount shall be lost when the account is balanced. Under § 81-1328, the maximum amount of hours that could be earned by a state employee in a calendar year is two hundred hours. In contrast, the Agreement provides that "[a]n employee's accumulated vacation time in excess of *thirty-five days* [280 hours] shall be forfeited as of the end of business on December 31st of each calendar year." Agreement, § 14.7 (emphasis added). In addition, the statute allows an employee to carry over vacation leave in "special and meritorious cases," in instances where forfeiture "would work a peculiar hardship," and the carryover is approved by the Governor or the Executive Board of the Legislative Council, as applicable. There is no such corresponding provision in the Agreement.

Upon review, we do not believe that LB 830 violates the State Employees Collective Bargaining Act. Since there are collective bargaining contracts currently in place, LB 830 would likely impact only those state employees not covered under a labor agreement. In the course of our research, we learned that based on the principle of past practice, employees under the Agreement have been allowed to carry over vacation leave in the manner described in the statute. Generally, "[a] past practice that does not derive from the parties' collective bargaining agreement may become a 'term or condition of employment' which is binding on the parties. Such practices must be mutually accepted by both parties . . . ." 51 C.J.S. Labor Relations § 217 (2010). It is unclear to what extent LB 830 may be applied to employees covered under current collective bargaining agreements based on past practice. Going forward, the impact of LB 830 would depend on whether its provisions are agreed to in the course of future collective bargaining. And as noted above, the Act does not require that the process contemplated by LB 830 shall be made a part of any collective bargaining agreement unless negotiated and agreed to by the parties.

CONCLUSION

In conclusion, we believe that LB 830, which seeks to amend the general statute relating to vacation leave for state employees, does not unduly encroach on the duties and prerogatives of the constitutional officers exempted from the State Personnel System by § 81-1316. However, our conclusion in this regard does not apply to the University of Nebraska and, potentially, the state colleges, based on express language set out in *Board of Regents v. Exon*. Legislative Bill 830, if enacted, would conflict with collective bargaining agreements currently in place. The bill, however, would not apply to employees covered under current collective bargaining agreements. Finally, LB 830 does not violate the State Employees Collective Bargaining Act, which authorizes that mandatory terms and conditions of employment may be negotiated in a manner which may be otherwise provided by statute.

Sincerely,

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Approved by:

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Clerk of the Nebraska Legislature

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