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STATE OF NEBRASKA
OFFICIAL
JAN 11 1994
DEPT. OF JUSTICE

DATE: January 7, 1994

SUBJECT: Mandatory Duties of Lieutenant Governor

REQUESTED BY: Dannie Trautwein, Executive Director
Nebraska Accountability and Disclosure Commission

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired whether certain duties of the Lieutenant Governor are mandatory since performance of these duties may include issues involving potential conflicts of interest. Specifically, you have inquired whether the Lieutenant Governor is required to preside over the Legislature. Secondly, you have inquired whether the Lieutenant Governor is required to cast a deciding vote if the Legislature is equally divided.

Article III, § 10, of the Constitution of the State of Nebraska provides, in part, "[t]he Lieutenant Governor shall preside [at legislative sessions], but shall vote only when the Legislature is equally divided . . . . the Legislature . . . shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor."

"In construing the Constitution, the same as with other written instruments, the main inquiry is: what was the intent? . . . 'The general rule is that constitutional provisions are to be construed as mandatory, unless by express provision or by necessary implication a different intent is manifest.'" (Citation omitted.) *Baker v. Moorhead*, 103 Neb. 811, 813, 174 N.W. 430, 431 (1919). In determining the intent "[t]he state Constitution, as amended, must be read as a whole." *Jaksha v. State*, 241 Neb. 106, 110, 486 N.W.2d 858, 863 (1992). *See also State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

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In considering statutory language, the supreme court has held that, "[a]s a general rule, in the construction of statutes the word `shall' is considered mandatory, and inconsistent with the idea of discretion." *State v. Stratton*, 220 Neb. 854, 857, 374 N.W.2d 31, 34 (1985). *See also Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982); *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950). However, in *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 372, 249 N.W.2d 468, 475 (1977), the supreme court held "[w]hile the word `shall' may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word `shall' be construed as permissive rather than mandatory, such will be done. . . ."

Article III, § 10, provides that the Lieutenant Governor shall preside over legislative sessions which appears to be a mandatory duty. However, this same section of the Constitution also provides that the Speaker of the Legislature is to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor. When read as a whole, it is clear that the Lieutenant Governor is not required to be present and preside over the legislative body when it is in session. However, based on the language of Article III, § 10, which states that the Lieutenant Governor shall preside, it is apparent that whenever the Lieutenant Governor is present in the legislative chambers during a session that he/she will have the duty of presiding over the legislative body. When the Lieutenant Governor is not present, the Speaker of the Legislature has the duty of presiding over the session.

Your second question is whether the Lieutenant Governor is required to cast a vote when the body is equally divided. The definitive case on this question is *Center Bank v. Dept. of Banking & Finance*, 210 Neb. 227, 313 N.W.2d 661 (1981). The *Center Bank* case arose after the Legislature had voted twenty-four legislators for, twenty-four legislators against, and one legislator abstaining on the question of whether a bill should be passed. The Lieutenant Governor, as presiding officer and acting supposedly in conformity with Article III, § 10, of the Constitution of the State of Nebraska, cast the deciding vote for the bill.

The Governor refused to sign the bill, returning it to the Legislature. The Governor indicated that his reason for returning the bill was because it had not been passed by the Legislature since only twenty-four senators had voted in the affirmative. The Governor's rationale was based on Article III, § 13, of the Constitution of the State of Nebraska which states in relevant part, "[n]o bill shall be passed by the Legislature unless by the assent of a majority of all members elected . . . ." The *Center Bank* case was subsequently filed to determine whether the bill had been duly passed by the Legislature.

In reaching its decision that the bill had not been passed, the supreme court considered Article III, §§ 10 and 13, of the Constitution of the State of Nebraska. The court held:

> The language of article III, § 13, is so clear that we believe there can be little doubt about its meaning. That provision requires "the assent of a majority of all members elected" to the Legislature. The Lieutenant Governor is not a member of the Legislature. . . .
>
> This interpretation does not destroy the meaning of article III, § 10, but harmonizes the two provisions and gives effect to both. The Lieutenant Governor is eligible to vote on all other questions before the Legislature, when it is equally divided.

The court bolstered its opinion by citing to earlier decisions of the court which reached similar conclusions in non-legislative cases. Neither provision of the Constitution has been amended since the *Center Bank* decision.

Therefore, based on the court's decision in the *Center Bank* case, it is our determination that the Lieutenant Governor may not vote on any bill on final reading even if the legislative vote is tied. On other matters before the body on which the vote is equally divided, the Lieutenant Governor is "eligible to vote." Thus, the Lieutenant Governor is in a position similar to members of the Legislature and, when the legislative vote is tied, may elect to vote for or against the issue or may elect to abstain from voting on the issue.

In conclusion, it is our determination that the Lieutenant Governor is required to preside over the legislative body when and if he/she is in the legislative chambers during a session and, on issues other than final reading of a legislative bill when the legislative vote is tied, the Lieutenant Governor may participate in the vote or elect to abstain from voting.

Sincerely,

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28-11-14.op
APPROVED:

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