STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#940600

NO.
STATE OF NEBRASKA
OFFICIAL
AUG 30 1994
DEPT. OF JUSTICE

DATE: August 26, 1994

SUBJECT: Effect of a purported late filing, under ***Neb. Rev. Stat. §*** 32-707.01 (1988), of ballot explanations for constitutional amendments proposed by the Legislature.

REQUESTED BY: Allen J. Beermann
Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

During the 1994 legislative session, the Nebraska Legislature passed several legislative resolutions which proposed amendments to the state constitution. Under the provisions of ***Neb. Rev. Stat. §*** 32-707.01 (1988), the Executive Board of the Legislative Council is to prepare an explanatory statement for each of those proposed constitutional amendments which "in clear, concise language, [explains on the ballot] the effect of a vote for and against" the proposal. Those explanatory statements are to be "submitted to the Secretary of State not less than four months prior to the general election for certification to the county clerks and election commissioners along with the ballot titles." On July 8, 1994, the Chairman of the Legislature's Executive Board filed the requisite explanatory statements for the proposed constitutional amendments with your office. The general election will be held on November 8, 1994.

We have now received a copy of a letter from a Grand Island attorney, dated August 11, 1994, and directed to you, Governor Nelson and Attorney General Stenberg. In that correspondence, the attorney presents various arguments supporting his position that

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Lisa L. Cabral
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Mary L. Hewitt
Lauren Lee Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard
Printed with soy ink on recycled paper

the ballot explanations prepared for the 1994 legislative resolutions proposing state constitutional amendments were filed with your office after the deadline established by Section 32-707.01. The attorney also argues that one specific constitutional change proposed by the Legislature, LR2CA dealing with arbitration, is unconstitutional. For these various reasons, the attorney asks you and the other constitutional officers involved to withhold the constitutional amendments proposed by the Legislature from the ballot. Alternatively, he also threatens a mandamus action should you and the other state officials place the proposed amendments on the ballot or otherwise not undertake a declaratory judgment action to litigate the matters raised in his letter. You have now asked for our views, in light of the attorney's correspondence, as to whether the constitutional amendments proposed by the Legislature should be placed on the ballot. We believe that they should be submitted to the voters in the November general election.

The attorney initially argues that the ballot explanations in question should have been filed with your office by July 6, 1994, in order to meet the requirements of a filing "not less than four months prior to the general election." This argument is based upon the notion that a minimum four-month time period must elapse from the filing of the statements to the date of general election, and on the application of ***Neb. Rev. Stat. §*** 25-2221 (1989) which generally governs the computation of time and provides that the first day of any statutory time period is excluded in time computation while the last day is included.

The argument based on Section 25-2221 notwithstanding, we believe that this situation is clearly governed by the previous decision of the Nebraska Supreme Court in ***State ex rel. Morris v. Marsh***, 183 Neb. 521, 162 N.W.2d 262 (1968). In that case, the court considered whether an initiative measure was timely filed on July 5, 1968, for the general election on November 5, 1968, under a constitutional provision which required that "the [initiative] petition shall be filed with the Secretary of State, who shall submit the measure . . . at the first general election held not less than four months after such petition shall have been filed." The court ultimately stated,

> There is little or no dispute that in terms of a full day and an exact date, November 5 is a date exactly 4 months after July 5. The respondent attempts to read the language of the Constitution as requiring the election to be held ***more*** than 4 months after the filing of the petition, instead of "not ***less*** than 4 months." (Emphasis ours.) The district court's computation was correct.
>
> We hold that a requirement than an initiated measure be submitted at the first general election held not less

> than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5.

Id. at 526, 527, 162 N.W.2d at 266, 267. (Emphasis in original). In a similar fashion, we believe that the filing by the Executive Board on July 8 for a general election on November 8 satisfies the requirements of Section 32-707.01.

Apart from the question of whether the filing of ballot explanations by the Executive Board was timely under the statutes, there is a greater question as to the effect of a late filing. In other words, if we assume, for the sake of argument, that the July 8 filing was late under Section 32-707.01, does that late filing authorize you to refuse to place the constitutional amendments proposed by the Legislature on the November ballot? Based upon our research, we do not believe that such a late filing would warrant that result.

The Nebraska Supreme Court has stated that,

> The two important, vital elements in any constitutional amendment are the assent of two-thirds of the Legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials in secured. But they are not themselves the essentials.

State ex rel. Thompson v. Winnett, 78 Neb. 379, 388, 110 N.W. 1113, 1116 (1907). Based, in part, upon this reasoning, the Nebraska Supreme Court has indicated that substantial compliance with the constitutional requirements regarding amendment of the state constitution is sufficient to amend that document. ***Duggan v. Beermann***, 245 Neb. 907, ___ N.W.2d ___ (1994); ***Swanson v. State***, 132 Neb. 82, 271 N.W. 264 (1937); ***State ex rel. Hall v. Cline***, 118 Neb. 150, 224 N.W. 6 (1929); ***State ex rel. Thompson v. Winnett, supra***. For example, in the ***Swanson*** case, the court indicated that notice of a constitutional amendment was sufficient even though newspaper publications in one county of the state were not made on the correct dates and newspaper publications in three other counties were not made the required number of times.

The filing requirements in Section 32-707.01 are statutory rather than constitutional. If substantial compliance with constitutional requirements is sufficient for amendment of the state constitution, then surely substantial compliance with statutory requirements is satisfactory as well. Given that premise, we believe that filing ballot explanations two days late is substantial compliance with Section 32-707.01, and would not

justify removing the proposed constitutional amendments from the ballot.

Finally, the attorney from Grand Island takes specific issue with LR2CA, a proposed constitutional amendment which would permit arbitration in Nebraska. He argues that this constitutional amendment would, in itself, be unconstitutional in several respects. On that basis, he asks that you exercise your authority and refuse to place that proposed amendment on the ballot.

The Nebraska Supreme Court has indicated that, unless the subject of a proposed initiative or referendum petition is invalid or unconstitutional on its face, the Secretary of State cannot pass upon the validity or construction of any proposed law when the petition is presented for filing and placement on the ballot. ***State ex rel. Brandt v. Beermann***, 217 Neb. 632, 350 N.W.2d 18 (1984). This rule includes initiatives to amend the state constitution. By analogy, we believe that this rule applies equally in the present situation where the Legislature has presented duly enacted resolutions amending the constitution for placement on the ballot. In our view, unless those legislative resolutions exhibit some facial flaw, you do not have the authority to pass upon their constitutionality and to refuse to place them on the ballot. In that regard, we do not believe that LR2CA is unconstitutional on its face. Consequently, you should place it on the ballot for consideration by the people of Nebraska.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

05-21-14.op

Approved by:

Attorney General