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STATE OF NEBRASKA
OFFICIAL
FEB 18 1992
DEPT. OF JUSTICE

DATE: February 13, 1992

SUBJECT: Impact of the Separation of Powers Doctrine as explained in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991) upon employment of a State Senator by the University of Nebraska.

REQUESTED BY: Senator Jessie Rasmussen, Nebraska State Legislature

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

In July, 1991, the Nebraska Supreme Court issued its opinion in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991) in which the court indicated that Gerald Conway, a member of the Nebraska Legislature, could not continue to serve both in the legislature and as an assistant professor at Wayne State College on the basis of Article II Sec. 1 of the Nebraska Constitution which requires the separation of governmental powers. The court indicated that the situation with Senator Conway violated Article II Sec. 1 because the Senator was an officer in the legislative branch of government and also a member of the executive branch of government through his employment at the college.

We understood that you were employed by the University of Nebraska Medical Center, and that you provided certain rehabilitative services. After the Conway decision became final, we were concerned that your employment with the University could also violate the Conway rule, and, consequently, we requested information from you concerning that employment and your analysis of how Conway might impact your situation. You have now responded to our request for information. We have reviewed that response, and we believe your employment with the University violates the

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rule set out in Conway.

From your correspondence, we understand that you are employed part-time with the Meyer Rehabilitation Institute (MRI) which is affiliated with and a part of the University of Nebraska Medical Center (UNMC). Your position with MRI is in the Special Education Department and is funded entirely by grants and contracts. You are an early childhood special educator, and you work with children between birth and three years of age. You also work on various special projects.

The number of hours you work for MRI depends upon the number of contracts and grants received and whether the Legislature is in session. During the legislative session, you are only working about 8 hours a week on evenings and weekends doing writing and coordination activities for the respite care grant for which you are currently employed. You have no faculty status or teaching responsibilities. However, you are on the University payroll, and you receive a paycheck from the University.

In the course of the Conway opinion, the court stated the following rule with respect to the prohibitions contained in Article II Sec.1 of the Nebraska Constitution:

> ...article II prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch.

Id. at 782, 472 N.W.2d at 412. This rule must be applied to your situation to determine if there are problems with your position in the Legislature and your duties at the University.

Obviously, because you are a State Senator, you are an officer in the legislative branch of state government. Therefore, under the Conway rule stated above, you cannot be an officer or employee of the University since it is in the executive branch of state government.

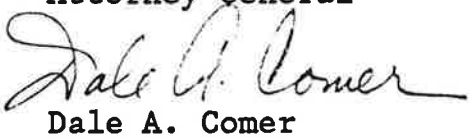
We believe that the facts surrounding your situation indicate that you are an employee of the University of Nebraska. In Home Savings and Loan Association v. Carrico, 123 Neb. 25, 241 N.W.2d 763 (1932), the court indicated that "employees" are subject to the employer's direction as to how to do the work, are under some form of contract for hire, and generally work for a salary or wage. While your salary may be paid out of grant funds, you are on the University payroll by appointment, and you receive a paycheck for wages from UNMC. Moreover, we understand that Social Security and other taxes are withheld from your paycheck. You also conduct your

duties under the general supervision of MRI and UNMC officials.

As a result, we believe that you are currently an officer in the legislative branch of government and an employee in the executive branch of government in contradiction of the rule set out in the Conway decision. To avoid difficulties under the Separation of Powers doctrine, you should resign one of those positions.

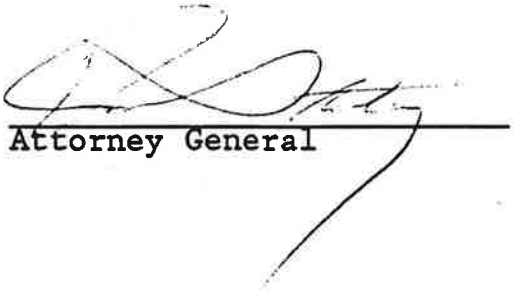
Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

Approved by:



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