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STATE OF NEBRASKA
OFFICIAL
MAR 20 1992
DEPT. OF JUSTICE

DATE: March 18, 1992

SUBJECT: Constitutionality of subsections 11 and 13 of section 4 of the Proposed Amendments to LB514

REQUESTED BY: Honorable Senator Don Wesely

WRITTEN BY: Don Stenberg, Attorney General
Melanie J. Whittamore-Mantzios, Assistant Attorney General

You have requested an opinion regarding the Constitutionality of subsections 11 and 13 of section 4 of the proposed amendments to LB514. We have come to the conclusion that both subsections 11 and 13 of section 4 of the proposed amendments of LB514 would constitute an unconstitutional delegation of legislative authority to the Department of Health.

The Nebraska Supreme Court has said "[i]t is fundamental that the legislature may not delegate legislative power to an administrative or executive authority." Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 780, 104 N.W.2d 227, 230 (1960). Legislative authority is the power to make laws. The Nebraska Constitution categorically denies the power to make laws to any person or collection of persons belonging to the executive or judicial departments. Neb. Const. art. II § 1. The Department of Health is an administrative agency in the executive department and therefore cannot pass laws.

The Nebraska Supreme Court has held as follows:

> The exercise of a legislatively delegated authority to make rules and regulations to carry out an expressed

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> legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power . . . Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient and definite for the guidance of the agency in the exercise of the power conferred upon it . . .

Bosselman, Inc. v. State, 230 Neb. 471, 477, 432 N.W.2d 226, 230 (1988).

The issue to be addressed is whether the proposed amendments to LB514 have given clearly designated limitations and standards that are reasonably adequate, sufficient and definite for the guidance of the Department of Health in promulgating rules and regulations to carry out the legislative purpose. Subsection 11 of section 4 of the proposed amendments to LB514 provide that the Department of Health upon the recommendation of the Board of Examiners in Pharmacy shall adopt and promulgate rules and regulations: "To establish minimum standards for written control procedures and guidelines governing the training, functions and qualifications of supportive pharmacy personnel." Nothing in the language of subsection 11 provides the Department of Health with any standards within which to exercise its discretion. In fact, the language of this section suggests that the Department may exercise total discretion to set minimum standards.

The term "written control procedures and guidelines" is not defined in the proposed amendments to LB514. Each pharmacy that employs supportive pharmacy personnel is to develop written control procedures and guidelines prior to instituting the use of supportive pharmacy personnel. Proposed Amendments to LB514, § 6(3). The written control procedures and guidelines are to govern the functions of supportive pharmacy personnel. Proposed Amendments to LB514, § 6(2).

The proposed amendments to LB514 do not address what type of training or qualification is required for supportive pharmacy personnel. The proposed amendments to LB514 appear to leave it up to the individual pharmacies to determine what the qualifications and training will be for supportive pharmacy personnel with the approval of the Board of Examiners in Pharmacy. Proposed Amendments to LB514, § 6(2) and (3).

There is some standard indicated for the functions of supportive pharmacy personnel. "Supportive pharmacy personnel may perform routine functions to assist a pharmacist in connection with the preparation, compounding, dispensing, and distribution of drugs under the supervision of a licensed pharmacist on duty in the facility when such functions do not require the use of professional judgment and are subject to verification." Proposed Amendments to LB514, § 2(23).

Subsection 11 fails to give adequate, sufficient and definite standards for the guidance of the Department of Health in promulgating rules and regulations. The proposed amendments to LB514 do not give any limitations or standards regarding what the qualification and training requirements are for supportive pharmacy personnel or a clear definition of what is meant by "written control procedures and guidelines." Subsection 11 would constitute an unconstitutional delegation of legislative authority to an administrative agency.

Subsection 13 of section 4 of the proposed amendments to LB514 provides that the Department of Health, upon the recommendation of the Board of Examiners in pharmacy shall adopt and promulgate rules and regulations:

> To establish a central state record of supportive pharmacy personnel including names, employing pharmacies, the length of employment, including hiring and termination, of individuals, and other data deemed pertinent and relevant, to require employing pharmacies to provide such information, <u>and to provide the penalties for failure to comply</u> . . .

(Emphasis added). Subsection 13 does not specify if the penalties are to be civil or criminal in nature. The fact that subsection 13 fails to note whether the penalties are to be civil or criminal in nature is indicative that the proposed amendments fail to set limitations and standards for the Department of Health to follow in promulgating rules and regulations.

The legislature under no circumstances may delegate its power to prescribe punishment for criminal offenses. <u>Lincoln Dairy Co. v. Finigan</u>, 170 Neb. 777, 784, 104 N.W.2d 227, 232 (1960). The

legislature cannot delegate its authority to declare what constitutes a crime. State v. Cutright, 193 Neb. 303, 226 N.W.2d 771, 773 (1975).

Subsection 13 would also constitute an unconstitutional delegation of legislative authority to the Department of Health.

Sincerely,

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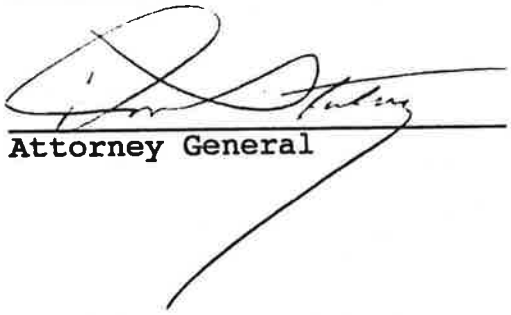
36-006.10

APPROVED:



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