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

#93009

NO. STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATE: February 19, 1993

SUBJECT: LB 255; Constitutionality of a bill which would require non-union employees in a bargaining unit covered by a collective bargaining agreement to pay fees to the labor organization representing that unit to help cover the costs of representing those non-union employees in collective bargaining.

REQUESTED BY: Senator Curt Bromm
Nebraska State Legislature

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

You have requested our opinion as to the constitutionality of LB 255, a bill which would require non-union employees in a bargaining unit covered by a collective bargaining agreement to pay fees to the labor organization representing that unit in order to cover the costs of representing those non-union employees for purposes of collective bargaining. As is discussed below, we believe that there are constitutional difficulties with the bill under the applicable provisions of the Nebraska Constitution.

LB 255 would require certain non-union employees to pay for collective bargaining by labor organizations. Under the bill, employees who were not members of a labor organization would be required to make "fair share" payments to the organization for collective bargaining representation when the organization was established as the collective bargaining representative for the bargaining unit employing the non-union employees. The "fair share" amount would represent the proportionate share of the cost

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borne by the labor organization in representing the non-member employees, and could not exceed the amount of dues required by the organization of its members. If non-members refused to pay the labor organization the "fair share" amount, the organization would be authorized to bring a suit against the employees for payment of the "fair share," attorneys fees, and court costs. "Fair share" payments would be deducted monthly from the non-union employees' wages, and then paid by the employer to the labor organization.

LB 255 also provides that "payment or nonpayment of the fair share shall not be a condition of employment or continued employment," and no provision in the bill would require the employer to terminate non-union employees upon refusal by those employees to consent to "fair share" payments. However, the only avenue non-union employees would have to avoid making "fair share" payments would be to voluntarily discontinue employment.

Article XV, Section 13 of the Nebraska Constitution provides:

> No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

This constitutional provision is Nebraska's Right to Work law, and provides that an individual's right to enter employment or continue employment cannot lawfully be made dependent upon membership or non-membership in a labor union. ***Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.***, 149 Neb. 507, 31 N.W.2d 477 (1948).

In response to Right To Work laws passed by some States, labor organizations have occasionally entered into agency shop agreements with employers. An agency shop agreement is a device designed to ensure that a labor organization, which is engaged in collective bargaining with employers, receives payments from non-members equivalent to union dues and initiation fees in return for the benefits obtained by the labor organization through collective bargaining. Under such agreements, a non-member employee's refusal to pay the amount equivalent to union dues would require the employer to terminate the employee from employment.

Agency shop agreements are permissible under the Federal National Labor Relations Act, 29 U.S.C. § 158(a)(3), yet may be pre-empted by State Right To Work provisions, 29 U.S.C. § 164(b); ***Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn,,***

375 U.S. 96, 99-100, (1963); ***Int'l Union of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. of the United States and Canada, Local Unions Nos. 141, 229, and 706 v. Nat'l Labor Relations Board***, 675 F.2d 1257, 1259, 1261 (D.C. Cir. 1982), cert. denied 459 U.S. 1171 (1983). In some States that have enacted Right To Work provisions, agency shop agreements have been held to be violative of state law or the state constitution. For example, in ***Ficek v. Int'l Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #647***, 219 N.W.2d 860 (N.D. 1974), the North Dakota Supreme Court struck down a typical agency shop arrangement as being violative of North Dakota's Right To Work laws. In that case, the court stated that an agency shop arrangement requiring employees to pay union fees as a condition to employment is the practical equivalent of an agreement requiring membership in the union as a condition of employment. The court concluded that the state had adopted a policy, via its Right To Work laws, protecting the employee in his or her "right to work free of any interference and control by either employers or labor organizations." ***Id.*** at 871. Similarly, we have previously indicated that a typical agency shop agreement violates Article XV, Section 13 of the Nebraska Constitution. 1959-1960 Rep. Att'y Gen. 295 (Opinion No. 173, dated March 2, 1960).

LB 255 is somewhat different from the traditional agency shop arrangement in that non-union employees would pay their proportionate "fair share" of the costs of union representation rather than simply paying union dues and initiation fees. However, some courts have rejected such "fair share" arrangements as well. For example, in ***Florida Educ. Ass'n/United v. Public Employees Relations Comm'n***, 346 So.2d 551 (Fla. Dist. Ct. App. 1977), non-member teachers challenged an agreement between the Florida Education Association and the State Public Employees Relations Commission. The agreement would have required each non-member teacher "to contribute a fair share fee for services rendered" by the bargaining representatives. The employer school districts would have been obligated to "check off" (deduct) the fees from the employees' paychecks, and transmit the payments to the labor organization. The fair share amount was to be based on a pro-rata share of "the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." ***Id.*** at 552. The court ultimately determined that the fair share agreement was in substance no different than an agency shop arrangement. The court reasoned that both types of arrangements provide that "employees are free to refrain from union membership," but that in either case the "employee would have two choices, [to] accept and pay . . . the fair share assessment to the union or look for another job." ***Id.*** at 552-553. The court held that the fair share agreement violated Florida's Right To Work laws.

In 1979-80 Rep. Att'y Gen. 82 (Opinion No. 55, dated March 13, 1979), this office also determined that a fair share arrangement could well violate Nebraska's Right To Work provisions. The bill in that instance would have required all employees in the bargaining unit to pay the union a "service fee" equivalent to a member employees' proportionate share of collective bargaining and grievance processing costs. We stated that, "[i]t appears to us that the required payment of a service fee... while it is a less restrictive form of compulsory unionism, nevertheless, forces an employee to affiliate with a labor organization." *Id.* at 83. The opinion concluded that the "fair share" arrangement was "constitutionally suspect" under Article XV, Section 13 of the Nebraska Constitution. *Id.* at 83-84.

In light of the authorities cited above, we believe that the fair share provisions of LB 255 are also constitutionally suspect under Article XV, Section 13 of the Nebraska Constitution. We realize that, on its face, LB 255 purports to not condition employment or continued employment upon the making of "fair share" payments. In addition, sanctions for refusal to make those payments are enforced through judicial proceedings rather than through termination of the offending employee by the employer. Nevertheless, the practical effect of LB 255 would be the same as the typical agency shop agreement. In order to avoid making payments to a labor organization, a non-union employee would have to discontinue his or her employment. The Legislature cannot circumvent express provisions of the Nebraska Constitution by doing indirectly what it cannot do directly. ***Haman v. Marsh***, 237 Neb. 699, 467 N.W.2d 836 (1991). Consequently, in our view, the fair share provisions of LB 255 violate Article XV, Section 13 of the Nebraska Constitution.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer

Dale A. Comer
Assistant Attorney General

cc. Patrick J. O'Donnell
Clerk of the Legislature

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APPROVED BY:

Don Stenberg, Attorney General