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

#93020

STATE OF NEBRASKA
OFFICIAL
MAR 25 1993
DEPT. OF JUSTICE

DATE: March 23, 1993

SUBJECT: Constitutionality of Legislative Bill 292 and Proposed Amendments Relating to Adjustments of Retirement Benefits of the School Employees Retirement System.

REQUESTED BY: Senator Thomas R. Horgan, District No. 4
Chairperson, Nebraska Retirement Systems Committee

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

You have posed various questions regarding the constitutional validity of certain provisions of Legislative Bill 292 and proposed amendments, AM 0349 and AM 0879. By letter under date of March 18, 1993, you have indicated that the "cost-of-living benefit language included in AM 0879 was advanced from the Nebraska Retirement Systems Committee."

The first question you have asked is whether Legislative Bill 292 or the amendments provide an unconstitutional delegation of legislative authority to the Public Employees Retirement Board by requiring it to provide a cost of living adjustment "in the discretion of the board" or "when amounts accumulated are sufficient"? It is our opinion that the provisions for cost of living increases do not constitute an improper delegation of legislative authority to the Public Employees Retirement Board.

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Section 4 of LB 292 states:

> There is hereby created the School Employees Retirement System Reserve Fund. The Board may use the fund to provide a three-percent cost-of-living adjustment to benefits provided pursuant to the School Employees Retirement Act. The terms of such cost-of-living adjustments shall be in the discretion of the board. The board may make transfers to the fund for the purpose stated in this section from any other fund administered by the board pursuant to the act.

Section 4 of LB 292 is modified by the provisions of AM 0879 which generally authorize cost-of-living adjustments for benefits of retired persons "whenever funds are sufficient for such a benefit and the increase in the cost-of-living or wage levels justifies the adjustment as provided by this section." Based on these statutory provisions, the Public Employees Retirement board is authorized to fund and implement a three percent cost-of-living adjustment when fund amounts in the Retirement System Reserve Fund are sufficient for this purpose. It would seem that the discretion afforded the Board is very limited and that discretion is limited as to amount and purpose. Our Supreme Court has concluded that delegation of legislative authority is permissible when that authority is limited as to amount and purpose. ***City of Lincoln v. Lesoing***, 221 Neb. 823, 381 N.W.2d 130 (1986); ***Banks v. Board of Education of Chase County***, 202 Neb. 717, 227 N.W.2d 76 (1979).

You next inquire whether legislation mandating cost of living adjustments requires language which specifies that the adjustment is being made to reflect changes that have occurred in the cost of living and wage levels after retirement. We are not aware of any requirement that certain specific language be utilized. This question appears to be related to the constitutional prohibition which precludes the granting of additional compensation to public officers or employees after services have been rendered. Article III, Section 19 of the Nebraska Constitution in relevant part states:

> The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, <u>except that retirement benefits of retired public officers and employees may be adjusted to reflect changes in the cost of living and wage levels that have occurred subsequent to the date of retirement</u>, . . .

(Emphasis added).

This express exception to the constitutional prohibition permits adjustments to reflect changes in the cost of living and wage levels which have occurred subsequent to retirement. The amendatory provisions of AM 0879 appear to be in accordance with the constitutional provision permitting cost of living adjustments.

The third question you have asked is whether a specified percentage increase is necessary for legislation which provides a cost of living increase, and must this percentage be associated or based on a cost of living index. We are not aware of any requirements that a specific percentage be stated in legislation which provides a cost of living increase. However, the percentage of increase implemented would necessarily be based on a cost of living index. As a practical matter, the basis for any adjustment would be a cost of living index or computation of the amount of adjustment would not be possible.

The fourth and last question you have raised is "[w]hat constitutional problems are associated with the creation of a fund which provides an on-going cost of living adjustment to retired school employees without a specific legislative enactment for each adjustment which is provided?" For the reasons that are set forth above, we do not perceive any "constitutional problems" with the proposed legislation providing cost of living adjustments for retirement benefit amounts. Such adjustments are expressly authorized by the Constitution and the legislative delegation of authority to the Board is limited both as to amount and purpose. We are aware of no problems created because each adjustment is not the subject of a separate and specific legislative enactment. With regard to retirement plans, statutory or otherwise, it is customary that a plan provision authorizing adjustments based on changes that have occurred in the cost of living not be formalized on a year to year basis. Rather, a provision authorizing cost of living adjustments on a continuing basis is the normal and commonly-accepted practice for retirement plans and programs.

Sincerely yours,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

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

Approved By:

Attorney General

21-412-6.93d