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NO. STATE OF NEBRASKA
OFFICIAL
APR 1 1993
DEPT. OF JUSTICE

DATE: April 1, 1993

SUBJECT: Constitutionality of Free Parking for State Legislators

REQUESTED BY: John Breslow
State Auditor

WRITTEN BY: Don Stenberg, Attorney General

This opinion is in response to your correspondence of March 3, 1993, concerning the parking spaces in the Capitol area which are provided to members of the Nebraska Legislature free of charge by the Department of Administrative Services. You asked whether this free parking, which is provided legislators in addition to their per diem expense payment, is a perquisite in violation of Article III, Section 7 of the Nebraska Constitution. You apparently need this determination in connection with the audit which you are currently performing of the fiscal records of the Nebraska Legislature.

In our opinion, the Director of the Department of Administrative Services has the statutory authority to provide free parking space to State Senators at the Capitol Building and doing so does not violate the Nebraska Constitution. Under current law, the Director of the Department of Administrative Services could charge State Senators for their parking spaces if he finds it equitable to do so. However, in that event, the Senators might very well be able to claim reimbursement of that amount under Neb.Rev.Stat. §50-202 (1988) which provides that, "Each member of the Legislature shall be allowed necessary expenses incurred while performing in the official capacity as a member of the Legislature." The providing of a parking space is in the nature of an operational expense rather than a perquisite as that term has been interpreted by the Nebraska Supreme Court, and hence does not violate Article III, Section 7 of the Nebraska Constitution.

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Before discussing the legal precedents that apply to this issue, it is helpful to view this question in the overall context of the operations of State government. State Senators, constitutional officers and other State employees are provided an office, telephone, office supplies, and other essentials necessary to carry out their job duties. Generally speaking, State employees, whether they be State Senators, constitutional officers or other State employees, are entitled to be reimbursed for lodging, transportation, meals, parking fees, and other reasonable and necessary expenses incurred in carrying out their job duties when away from their homes in the line of duty. See Neb.Rev.Stat. §81-1174 (Cum.Supp. 1992).

For example, if a Department of Revenue auditor was on official business performing an audit in western Nebraska and was there for several days, he or she would be reimbursed for transportation expense, lodging, meals, and other necessary expenses. The same is true for members of the Legislature.

The Nebraska Supreme Court, as discussed later in this opinion, has specifically held that members of the Legislature are entitled to reimbursement for expenses incurred in connection with the performance of their duties. Certainly this includes reasonable and necessary lodging expense, transportation cost to and from Lincoln, meals while away from home, and similar expenses.

In our modern age, most people, at least in Nebraska, drive an automobile to work. A State Senator must be at the Capitol in order to carry on his or her work and must necessarily have some place to park his or her automobile. In our opinion, at least, a parking space for an automobile is no different, from a legal standpoint, than the State providing an office for the Senator to work in, or paying lodging expense for a Senator staying overnight in Lincoln while away from home. Having undertaken this general overview, let us now turn to the specific legal authorities concerning this issue.

From the materials you provided us, it appears that each member of the Legislature is provided a free parking space in the parking lot east of the Capitol or in the "horseshoe" at the north entrance of that building. This has apparently been the practice for at least the last 15 years, and State Senators may never have been billed for their parking spaces. On the other hand, all other elected State officials and judges are billed the standard $22 per month parking fee for their parking spaces at the Capitol. However, State employees who work at the Department of Corrections, Department of Roads, Department of Public Institutions, and a number of other State employees are provided free parking at their places of work.

Under *Neb. Rev. Stat.* § 81-1108.17 (1987), the Director of the Department of Administrative Services is required to develop a system of equitable billing and charges for parking facilities under his or her control and used by State employees and State vehicles. As a result, most State employees with reserved parking in the Capitol parking lots pay a monthly fee of $22 for parking privileges.

Article III, Section 7 of the Nebraska Constitution provides, in pertinent part,

> Each member of the Legislature shall receive a salary of not to exceed one thousand dollars per month during the term of his or her office. In addition to his or her salary, each member shall receive an amount equal to his or her actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay or perquisites other than his or her salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem.

Two recent Nebraska cases have dealt with aspects of this constitutional provision. In *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984), the Nebraska Supreme Court indicated that a statute which provided that each member of the Legislature should be allowed his or her necessary expenses incurred while performing duties in his or her official capacity did not violate Article III, Section 7 of the Nebraska Constitution as it existed at that time. In contrast, the Court held in *State ex rel. Spire v. Public Employees Retirement Board*, 226 Neb. 176, 410 N.W.2d 463 (1987), that a statute creating a pension program for State legislators was unconstitutional under Article III, Section 7 since it involved pay or perquisites in addition to the legislators' salary and expenses. As a result, under the constitutional provision in question, State Senators can receive payment for their necessary expenses, but they may not receive pay or perquisites additional to their salary. The pertinent question in the present instance, therefore, becomes whether the free parking afforded Senators is a perquisite or an expense.

The *Beermann* case contains the following definition of "perquisite":

> "Perquisite" is defined in Webster's Third New International Dictionary, Unabridged (1968), as casual income or profits; a privilege, gain or profit incidental to an employment in addition to regular salary or wages;

> a gratuity or tip; something held or claimed as an exclusive right or possession. Black's Law Dictionary 1027 (5th ed. 1979) defines the word as meaning emoluments, fringe benefits, or other incidental profits or benefits attaching to an office or position. We have previously, in *State v. Sheldon*, 78 Neb. 552, 111 N.W. 372 (1907), defined perquisite as a gain or profit incidentally made from employment in addition to regular salary or wages. ***In that case we held that a residence provided by the State for occupancy by the Governor, at the place he was required by law to live, was not a "perquisite" within the meaning of a constitutional provision that the Governor might not receive any "perquisites of office or other compensation" in addition to his salary.*** We concluded that perquisite meant a compensation or reward for the performance of an official duty.

216 Neb. at 855, 347 N.W.2d at 301, 302 (emphasis supplied). The *Beermann* opinion also defines "expense":

> An "expense" is something expended in order to secure a profit or bring about a result. Expenses are the charges incurred by an employee in connection with the performance of his duties, and typically include transportation, meals, and lodging while traveling. Expenses are the money given to an employee as reimbursement for such charges. Webster's Third New International Dictionary, Unabridged (1968). Black's Law Dictionary 518 (5th ed. 1979) defines an expense as that which is "expended, laid out or consumed. An outlay; charge; cost; price."

216 Neb. at 856, 347 N.W.2d at 302. The Court then went on to state:

> The meaning of the third sentence [of Article III, Section 7 of the Nebraska Constitution], interpreting the terms and words used in their natural and obvious senses, is: Members of the Legislature shall receive no wages, remuneration, compensation, fees, profit, or gain other than the salary mandated in the first sentence above and ***reimbursement for expenses incurred in connection with the performance of their duties.***

216 Neb. at 857, 347 N.W.2d at 302 (emphasis supplied).

The Nebraska Supreme Court has said that a Senator may be reimbursed for transportation expense. Part of transportation expense is parking the vehicle upon arrival. If a Senator parked his or her automobile at a commercial garage near the Capitol Building, §50-202, which has specifically been held constitutional by the Nebraska Supreme Court, would appear to allow the Senator to claim and receive reimbursement for that expense.

Therefore, since the Nebraska Constitution allows a State Senator to pay for parking and receive reimbursement for that expense, we see no constitutional difficulty in the Director of Administrative Services eliminating the paperwork of refunding parking fees by simply providing parking for free in the first instance. While some argument might be made that Lincoln Senators are not away from home and hence, might not qualify for reimbursement, we do not see a constitutional significance because whether you drive from Scottsbluff or 70th & A Streets in Lincoln, a Senator still needs a parking place in a reasonable vicinity of the Capitol in order to be in attendance at the Capitol. Moreover, §50-202, which provides for reimbursement of expenses to State Senators, does not contain the various restrictions (such as being away from home) that apply to other State employees under §81-1174.

Does this mean that every State employee is entitled to free parking at State expense? No. A State employee is only entitled to such reimbursement of expense as the law provides for. In this case, authority has been delegated to the Department of Administrative Services to develop a system of equitable billing for parking. The Department has determined that other State constitutional officers, Supreme Court judges, and other State employees who, generally speaking, are paid more (often several times more) than State Senators, should pay for their parking while State Senators should not. We cannot say as a matter of law that the Department of Administrative Services has abused its discretion in making such determination. In this regard, it should be noted that employees of the Department of Corrections, Department of Roads, and certain other State agency employees also do not pay for their parking.

Finally, does the fact that Senators are receiving per diems to cover housing, transportation, and other expenses create a constitutional problem in so far as the parking issue is concerned. We think not, so long as the Senators' actual expenses equal or exceed the per diem reimbursements they are receiving. See ***Beermann***.

In sum, although the Director of the Department of Administrative Services is not required to provide free parking to State Senators, he has the legal authority to do so and the exercise of that authority does not violate Article III, Section 7 of the Nebraska Constitution.

Yours truly,

Don Stenberg
Attorney General

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cc: Clerk of the Legislature