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STATE OF NEBRASKA
OFFICIAL
AUG 26 1993
DEPT. OF JUSTICE

DATE: August 26, 1993

SUBJECT: Authority of Constitutional Offices and Officers to Establish Committees; Entitlement to Reimbursement and Protection as Employees or Officers of the State.

REQUESTED BY: Lawrence S. Primeau, Director
Department of Administrative Services

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

This is in response to your request for an opinion of the Attorney General regarding reimbursement of expenses for individuals serving on committees established by constitutional agencies and offices.

The first question you have asked is whether "the Department of Education or other constitutionally created agencies may create committees and pay for the members' expenses." It is our opinion that constitutional officers and offices, including the Department of Education, may establish or appoint committees and reimburse the members' expenses incurred in serving on the committees. Actual employees of the agency who are members of committees would be entitled to reimbursement in their capacity as employees in the exercise of their official duties and responsibilities. Further, reimbursement of committee members who are not state employees is expressly authorized by statute.

Neb. Rev. Stat. § 81-1178 (1987) authorizes reimbursement for members of committees created by statute in the same manner as provided for state employees. Neb. Rev. Stat. § 81-1179 (1987)

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provides for reimbursement for members of committees necessary for compliance with "acts of Congress" and rules and regulations resulting from such acts to the extent federal funds are available to pay expenses. All other appointees of committees not entitled to reimbursement pursuant to sections 81-1178 and 81-1179 may be reimbursed in the same manner as state employees if certain formalities are complied with. Neb. Rev. Stat. § 81-1180 (Cum. Supp. 1992) provides for reimbursement of other committee members with the approval of the Governor and if appropriation of funds has been made. Thus, reimbursement for all appointees of committees is statutorily authorized subject to approval and appropriation of funds.

The second question or issue you raise regards the impact reimbursement may have "as to the protections offered these appointees under the State Tort Claims Act {Section 81-8,210(3)}, indemnification provisions {Section 81-8,239.06} and the Nebraska Workers Compensation Act {Section 48-193} while they are on state business." We believe that entitlement for reimbursement to appointees of committees has little or no bearing on whether committee members are covered under the provisions of the State Tort Claims Act, Neb. Rev. Stat. §§ 60-1008 and 81-8,209 to 81-8,235 (1987 and Cum. Supp. 1992), the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,110 (1988 and Cum. Supp. 1992) and the indemnification provisions of Neb. Rev. Stat. §§ 81-8,239.05 and 81-8,239.06 (Cum. Supp. 1992). Whether coverage or protection is afforded to appointees is dependent on whether the committee member is an employee or officer as those terms are defined and used in the Acts and the indemnification statutes.

The definitional provisions of the Acts afford protection to a committee member if the member is an officer or employee of the state or state agency. The indemnification statutes, briefly summarized, authorize indemnification for certain money damages and costs incurred by officers, officials, or employees of the state in the course and scope of their employment. Legal representation is authorized under certain circumstances.

There are no specific definitional provisions for the terms, "officer," or "employee" in the indemnification statutes. The term "official" is generally synonymous with the term officer. In its plain and commonly accepted meaning, an official is one who holds office, especially public office. Webster's Unabridged Dictionary (2d ed. 1979). Accordingly, a committee member would be entitled to the protection of the Acts and indemnification provisions only if the appointee would be an employee or officer of the state or any state agency.

The term "employee" for purposes of the State Tort Claims Act is defined in Neb. Rev. Stat. § 81-8,210(3) (Cum. Supp. 1992) which states:

> Employee of the state shall mean any one or more officers or employees of the state or any state agency and shall include duly appointed members of boards or commissions when they are acting in their official capacity. State employee shall not be construed to include any employee of an entity created by local public agencies pursuant to the Interlocal Cooperation Act or any contractor with the State of Nebraska;

(emphasis added).

The definition of the term "employee" is similarly defined in the Workers' Compensation Act. Neb. Rev. Stat. § 48-193(3) (Cum. Supp. 1992) states:

> Employee of the state shall mean any one or more officers or employees of the state or any state agency and shall include duly appointed members of boards or commissions when they are acting in their official capacity. State employee shall not be construed to include any employee of an entity created by local public agencies pursuant to the Interlocal Cooperation Act or any contractor with the State of Nebraska unless such contractor comes with the provisions section 48-116;

(emphasis added).

It is clear that appointed members of boards and commissions are deemed employees for purposes of the State Tort Claims Act and the Workers' Compensation Act since the statutory definitions of the term "employee" include duly appointed members of boards or commissions acting in their official capacity. However, the statutes do not include appointed members of committees within the definition of employee.

If the committee appointee is an actual employee of the state, the appointee would be afforded the protections. If the appointee is not a state employee, the question is whether the appointee is an officer of the state or any state agency. This question is highly factual in nature and the conclusion is dependent on the makeup of the committees and its functions and duties. These factors would necessarily be considered to determine whether a member of a committee is an officer, that is, the holder of a state office. The Attorney General has previously considered this

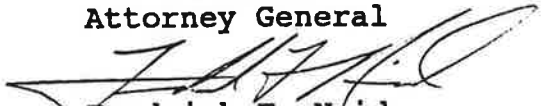
question and concluded that public office is a duty, charge, or a place of trust conferred by law and the holder of the office is vested with some portion of the sovereign functions of government. Opinion of the Attorney General No. 86070, September 3, 1986. *See also* 1979-80 Report of the Attorney General, No. 134 at 189. This office has also commented that a planning committee created by legislative enactment to establish a plan for educational service units has no executive duties; and arguably, membership would not be a state office. Opinion of the Attorney General No. 86038, March 21, 1986.

The courts have reviewed similar questions concerning whether an individual is a government officer and concluded that the incumbent would need to perform or exercise some duty or function of sovereign power. In *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991), the Nebraska Supreme Court considered the term "public office" and determined it is a governmental position which invests the incumbent with some aspect of sovereign power. Also, public office has been defined by our Supreme Court to be a public station or employment conferred by appointment of government and embraces the idea of tenure, duration, and duties. In discussing the attributes of a public office, the Court related that some of the most important criteria of a public office is that the incumbent be vested with some of the functions pertinent to sovereignty, for it has frequently been decided that in order to be in an office, the position must be one to which a portion of the sovereignty of the state, either legislative, executive, or judicial attaches. *See State ex rel. O'Connor v. Tusa*, 130 Neb. 528, 265 N.W. 524 (1936).

In applying these standards, it is our conclusion that appointees of committees would not be officers of the state in the absence of specific duties which involve exercise of the sovereign power. Consequently, it is unlikely that members of advisory committees would be state officers as that term is interpreted by the courts and used in the statutes.

Sincerely yours,

DON STENBERG
Attorney General



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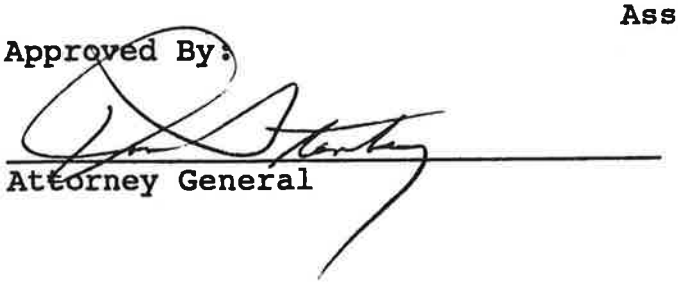

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