Linda Willard

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#90014

NO.
STATE OF NEBRASKA
OFFICIAL
FEB 22 1990
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 21, 1990

SUBJECT: Constitutionality of legislation dealing with confirmation procedures for gubernatorial appointments.

REQUESTED BY: Senator William E. Barrett
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

In your opinion request to this office, you indicated that you are having a bill prepared which deals with legislative approval of gubernatorial appointments made while the Legislature is in session. Your bill would contain the following main provisions:

1. A gubernatorial appointee subject to legislative confirmation whose name was submitted to the Legislature during either a regular or special session would not begin serving until the Legislature approved his or her appointment.

2. If, by the end of the session during which the appointment was made, the Legislature had failed to approve the appointment by a majority vote, the appointee would not be approved and could not serve. In essence, failure to act on an appointment would constitute disapproval.

3. The Governor could not again appoint a person rejected during the session to the same office in the interim following that session.

You have asked if such a bill would be constitutional under pertinent provisions of our Nebraska Constitution. We believe that it would be, and our analysis is discussed below.

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There are two provisions in our Nebraska Constitution which deal with legislative approval of gubernatorial appointments. Article IV Section 10 provides, in pertinent part:

> The Governor shall appoint with the approval of a majority of the Legislature, all persons whose offices are established by the Constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such person shall be appointed or elected by the Legislature.

The pertinent provisions of Article IV Section 12 of the Nebraska Constitution also provide:

> If any nonelective state office, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment. If the Legislature is in session, such appointment shall be subject to the approval of a majority of the members of the Legislature. If the Legislature is not in session, the Governor shall make a temporary appointment until the next session of the Legislature, at which time a majority of the members of the Legislature shall have the right to approve or disapprove the appointment.

As noted in our recent Opinion No. 90010, Article IV Section 10 establishes the general appointment power of the Governor, and would presumably apply to situations where an appointment is not made as a result of a vacancy in office, eg., at the end of a fixed term. On the other hand, Article IV Section 12 applies to appointments made by the Governor when there is a vacancy, eg., incumbent in a particular office resigns. To determine the constitutionality of your proposed legislation, we must examine each of its provisions in light of Article IV Section 10 and Article IV Section 12.

First of all, your bill would provide that appointees whose names were submitted to the Legislature while it was in session could not serve until their appointment was confirmed. Neither Article IV Section 10 nor Article IV Section 12 of the Nebraska Constitution specifically speaks to the issue of when an appointee assumes office when his appointment must be confirmed by the Legislature and that appointment is made during a legislative session. However, where an appointment is made as a result of a nomination by one authority and confirmation by another, the appointment is not final and complete until the actions of all bodies involved have been taken. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 675 (1955); 67 C.J.S. Officers

§42; 63A Am.Jur.2d Public Officers and Employees, §117. This rule would seem to support the notion that under existing law, an appointee submitted for confirmation during a session could not serve until confirmed. Moreover, the Nebraska Constitution is not a grant of power, but a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution. Lenstrom v. Thone, 209 Neb. 783, 311 N.W.2d 884 (1981). Since the constitutional provisions at issue are silent on the subject of when an appointee during a session assumes the office except to provide that the appointment must be approved, it seems to us that the Legislature could legislate on this issue in the manner you have proposed.

We would note that Article IV Section 10 of the Nebraska Constitution provides that gubernatorial appointments shall be made "with the approval" of the Legislature, while Article IV Section 12 provides that vacancy appointments shall be made "subject to" approval by the Legislature. On this basis, it would be possible to argue that vacancy appointees whose appointments occur during a session could take office pending their confirmation. However, it is clear under the subsequent portion of Article IV Section 12 that vacancy appointees who are appointed while the Legislature is not in session do take office pending legislative confirmation. 1973-1974 Report of the Attorney General, No. 56 at 75. It seems to us that there would be little purpose in specifically differentiating between session and recess appointments if both groups of appointees could take office pending legislative approval. Since the obvious intent of Article IV Section 12 was to allow recess vacancy appointees to take office pending confirmation, the separate provision for session appointees would necessarily indicate a contrary intent. On this basis, we believe that the initial provision of your proposed bill would be constitutional.

Your proposed legislation would next provide that a gubernatorial appointment made during a particular session need be approved during that session. In other words, failure to approve a gubernatorial appointment made during a session would constitute a disapproval of that appointment. We have previously indicated that, under the language of Article IV Section 12, recess vacancy appointments must be approved or disapproved during the next legislative session, or the appointees to those offices serve the remainder of their terms. 1973-1974 Report of the Attorney General, No. 56 at 75. However, the provisions of Article IV Section 10 and Article IV Section 12 dealing with appointments made while the Legislature is in session do not contain the same language as the portion of Article IV Section 12 dealing with recess appointments. In fact, those sections again are silent as to when the Legislature must voice its approval of a gubernatorial appointment. Since, as noted above, the Legislature may act in the

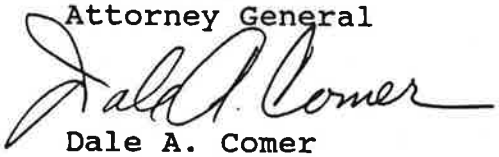
absence of a prohibition in the constitution, we believe your proposed legislation requiring approval in a given session would be constitutional.

Finally, your proposed statute would provide that the Governor could not again appoint a person rejected during a given session to the same office during the interim following that session. The last sentence of Article IV Section 12 of the Nebraska Constitution provides, "No person after being rejected by the Legislature shall be again nominated for the same office at the same session, unless at request of the Legislature, or be appointed to the same office during the recess or adjournment of the Legislature." We believe that your final proposal is in conformance with that constitutional language.

We would note that your proposed legislation would apply to appointments made during special or regular sessions of the Legislature, and this raises the issue of whether the Legislature can consider gubernatorial appointments made during a special session. Our Supreme Court has previously indicated that legislative approval of a gubernatorial appointment is an executive rather than a legislative function. State ex rel. Johnson v. Hagemeister, supra. Therefore, such a duty would presumably not be subject to restrictions involving the scope of the call for the special session, and would be appropriate for a special as well as a general session. We have previously indicated that this is the case. 1945-1946 Report of the Attorney General, opinion dated August 28, 1946 at 408. This appears to be the general rule. 67 C.J.S. Officers §42; 63A Am.Jur.2d Public Officers and Employees, §119. Consequently, we believe that the Legislature could consider gubernatorial appointments during either a special or a general session of that body.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



Dale A. Comer
Assistant Attorney General

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

APPROVED:

Attorney General
5-101-13