DEPARTMENT OF JUSTICE
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STATE OF NEBRASKA
OFFICIAL
MAR 28 1990
DEPT. OF JUSTICE

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DATE: March 28, 1990

SUBJECT: LB 1141; Constitutionality of Various Appointment Procedures for the Nebraska Higher Education Commission in Light of Article IV, Section 10 of the Nebraska Constitution

REQUESTED BY: Senator George Coordsen
Nebraska State Legislature

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

LB 1141 is legislation offered to implement LR 239CA, a proposed constitutional amendment which would abolish the present Board of Regents of the University of Nebraska and the present Board of Trustees of the Nebraska State Colleges in favor of a Board of Regents for Nebraska Higher Education. The new board would govern all public postsecondary educational institutions in Nebraska which offer undergraduate or graduate degrees.

Section 7 of LB 1141 creates a Nebraska Higher Education Commission consisting of 12 members. One member, the chairperson, would be a citizen-at-large appointed by the Governor. An additional eight members would be appointed by and from the Board of Regents for Nebraska Higher Education, the technical community college area boards, and the governing boards of independent colleges and universities in Nebraska. The final three members would be an owner, shareholder or board member of a proprietary school in this state, appointed by the Governor, and the Governor and Commissioner of Education or their designees. Two members of the Legislature would also be appointed by the Executive Board of that body to sit with the Commission and participate in discussions and recommendations, but those Senators could not vote or participate in any administrative function or decision of the new Commission. The members of the Nebraska Higher Education Commission would generally have three-year terms of office, and the Commission itself would have a number of duties with respect to postsecondary educational issues including developing plans and procedures for matters of statewide educational concern, facilitating communication and coordination among various educational institutions, establishing and maintaining a higher education information system, and administering the State Scholarship Award Program Act.

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You have requested our opinion as to whether Section 7 LB 1141 is constitutional under Article IV, Section 10 of our Nebraska Constitution. If there are any constitutional problems under Section 7, you have further inquired as to whether those problems can be cured if the voters approve the constitutional amendment set out in LR 239CA. We have reviewed the bills in question, and believe that there are constitutional objections which could be raised with regard to Section 7. Moreover, we do not believe that those objections can be remedied if LR 239CA is voted into law.

Article IV, Section 10 of our Nebraska Constitution 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.

Since Article IV, Section 10 applies to "offices," a threshold question in connection with your inquiry is whether positions on the proposed Nebraska Higher Education Commission are "offices" within the constitutional provision. We believe that they are.

Our supreme court has indicated that a public office is a place in government created by law which assigns to the incumbent the continuous performance of certain permanent public duties. Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923). Indicia of a public office include:

1. Creation by constitution or a statute,
2. A continuing position not occasional or contractual,
3. A fixed term of office, and
4. The official has an independence beyond that of employees.

63A Am.Jur.2d Public Officers and Employees §9. Under these criteria, we believe that LB 1142 would create public offices with respect to the Nebraska Commission on Higher Education. That body would be a continuing agency established by statute. Commissioners would have a fixed term and would have independent authority beyond that of employees. Consequently, appointments to the Nebraska Commission on Higher Education would be subject to Article IV, Section 10 of our state Constitution.

LB 1141 provides that various members of the Nebraska Higher Education Commission will be appointed by the Governor, by the Board of Regents for Nebraska Higher Education, and by other bodies. The initial question we must address in responding to your

opinion request is whether appointments may be constitutionally made by entities other than the Governor.

As noted above, Article IV, Section 10 of our state Constitution provides that the Governor shall appoint 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. . ." Nebraska Constitution, Article IV, Section 10 (Emphasis added). The language emphasized in this portion of Article IV, Section 10 seems to indicate that the Legislature could, by law, allow authorities other than the Governor to make some appointments. An early Nebraska case supports such a conclusion.

In State v. Holcomb, 46 Neb. 88, 64 N.W. 437 (1895), our supreme court discussed language found in Article V, Section 10 of the Nebraska Constitution of 1875, a section which was virtually identical to the current Article IV, Section 10. The court stated:

> However, a careful analysis of the above section [Article V, Section 10] discloses that power is thereby conferred upon the governor to appoint two classes of officers, viz., (1) those whose offices are established by the constitution itself, and (2) those whose offices are created by law and whose appointment or election is not otherwise provided for. The phrase, "whose appointment or election is not otherwise * * * provided for," is an apparent limitation upon the preceding general language, and read by itself impliedly authorizes the legislature to prescribe the manner of selecting all officers of its own creation.

As a result, we believe that, in proper instances, the Legislature can authorize governmental entities other than the Governor to make appointments. However, under Article IV, Section 10 of our Constitution, those appointments may not be made by the Legislature itself.

LB 1141 also provides the certain members of the Nebraska Higher Education Commission shall be "from" the Board of Regents for Nebraska Higher Education, the technical community college area boards and the governing boards of independent colleges and universities in the state. We assume that the intent of this provision is that members of each of these various governing boards shall also serve on the Commission. Certain aspects of this provision are of suspect constitutionality under Article IV, Section 10 of our state Constitution.

In Neeman v. Nebraska Natural Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974), our supreme court considered the

constitutionality of Neb.Rev.Stat. §2-1504 (Cum.Supp. 1972) which provided for certain appointments to the Nebraska Natural Resources Commission. Specifically, that statute provided that the Natural Resources Commission would include members who were the deans of various colleges at the University of Nebraska and the state Director of Water Resources. The court stated that the state Director of Water Resources could serve on the Commission since he was a state officer and the Legislature could impose additional duties upon him. On the other hand, the University officials in question were not state officers, and their appointments by statute violated the state Constitution. The court stated,

> The members of the commission who are officers of the University of Nebraska are not state officers. Their designation by the Legislature as members of the Commission was a legislative appointment in violation of Article IV, section 10, Constitution of Nebraska.

Neeman v. Nebraska Natural Resources Commission, 191 Neb. 676, 217 N.W.2d at 170 (citations omitted).

In the present instance, members of the Board of Regents for Nebraska Higher Education and members of the technical community college area boards appear to be state officers. As such, the Legislature could require them to serve on the Nebraska Higher Education Commission as an additional part of their duties. In contrast, members of the governing boards of the independent colleges and universities of the state are not governmental officers, and it appears to us that a statutory appointment from those boards to the Commission could constitute an impermissible legislative appointment for the reasons stated in the Neeman decision.

Finally, we believe that there is one additional constitutional problem with those provisions of Section 7 of LB 1141 which require that certain members of the Nebraska Higher Education Commission be "from" various institutional governing bodies. We have noted similar problems in previous opinions of this office dealing with limited appointment provisions. See, Opinion of the Attorney General No. 87045, April 7, 1987; Opinion of the Attorney General No. 95, June 3, 1985; Opinion of the Attorney General No. 204, February 26, 1982; Report of the Attorney General, 1977-1978, No. 227 at 347. In Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966), our supreme court held that a statute providing that the Board of Directors for a public electric corporation would be selected from members residing in nine regions violated Article IV, Section 10 of the Nebraska Constitution when five of those regions contained only one person qualified to receive the appointment. The court stated:

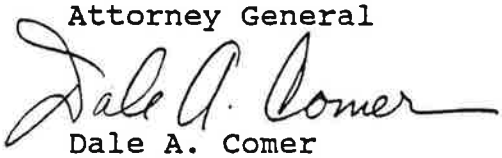
> The right of the Legislature to prescribe reasonable qualifications of one to be appointed to office is not disputed. But the Legislature is prohibited by constitutional provision from appointing officers whose offices are created by law, either directly or indirectly. The provisions of the Act which limit the appointment of grid system directors by the Governor to a certain unnamed individual <u>or to a limited few</u>, is an encroachment by the Legislature upon the powers of the Governor and is void as violative of Article IV, section 10, of the Constitution of Nebraska.

<u>Wittler v. Baumgartner</u>, 180 Neb. at 460, 144 N.W.2d at 71 (Emphasis added). Section 7 of LB 1141 provides that eight members of the Nebraska Higher Education Commission shall be appointed from the limited membership of the various boards listed in the bill. For the reasons set out in the <u>Wittler</u> case, we believe this limited appointment provision violates Article IV, Section 10.

In sum, we believe that there are two possible constitutional problems with Section 7 of LB 1141 under Article IV, Section 10 of our Nebraska Constitution. First, the appointment of individuals "from" the governing boards of private institutions who are not state officers may be considered an impermissible legislative appointment. More importantly, the limited nature of the appointments possible from the various boards listed in the bill appears to create a clear violation of Article IV, Section 10. We have reviewed LR 239CA, the bill which proposes a constitutional amendment to reorganize the state's higher education system. The main provisions of that resolution simply describe the reorganized governing bodies involved, and do not mention either the Nebraska Higher Education Commission or Article IV, Section 10 of the Constitution. Therefore, we do not believe that passage and voter approval of LR 239CA would cure the constitutional defects which we have noted.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



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cc: Patrick J. O'Donnell
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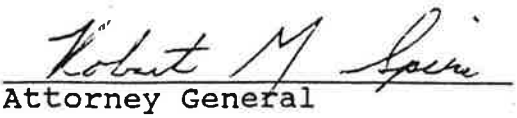

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