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DATE: January 28, 1991

SUBJECT: Governor's Withdrawal of Pending Gubernatorial Appointments

REQUESTED BY: Senator Elroy Hefner
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

On January 11, 1991, the Third Day of the First Session of the 92nd Nebraska Legislature, Governor Nelson submitted a letter to the Legislature in which he stated that he was "recalling for further review" a number of appointments to various boards, commissions, and committees submitted earlier by Governor Orr, but not yet confirmed by the Legislature. Governor Nelson then went on to list some seventy-one appointments ranging from individuals named to the Environmental Control Council to individuals named to the State Electrical Board as appointments which were recalled. The appointments had been submitted to the Legislature over a period of time from May 8, 1990, through January 2, 1991. However, the Legislature had not acted to confirm any of them. You now raise several questions concerning the Governor's authority to recall appointments in this fashion. As discussed in detail below, we believe that the Governor may recall or withdraw gubernatorial appointments which have not yet been confirmed by the Legislature.

Two provisions of our Nebraska Constitution deal with gubernatorial appointments which must be confirmed or approved by the Legislature. Article IV Section 10 establishes the general appointment authority held by the Governor, and provides that various gubernatorial appointments shall be "with the approval of a majority of the Legislature." Article IV Section 12 deals with gubernatorial appointments to fill vacancies in particular non-elective offices, and those appointments again are either "subject to the approval" of the Legislature or the Legislature has the right "to approve or disapprove" them. The gubernatorial appointments in the present instance all required legislative approval. For purposes of this opinion, we also assume that they were appointments for a term of office, and not appointments at the pleasure of the Governor.

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Our research has disclosed no Nebraska cases which deal directly with the issue of withdrawal of gubernatorial appointments. However, the general rule from other jurisdictions appears to be that, while appointments once made and complete are irrevocable, appointments which are not final and complete may be revoked or withdrawn. 67 C.J.S. Officers §43; 89 ALR 132.

We have also reviewed a number of cases from other jurisdictions which deal more directly with the issue of the executive's authority to recall appointments requiring legislative approval. Burke v. Schmidt, 86 S.D. 71, 191 N.W.2d 281 (1971); McBride v. Osborn, 59 Ariz. 312, 127 P.2d 134 (1942); McChesney v. Sampson, 232 Ky. 395, 25 S.W. 584 (1930); Barrett v. Duff, 114 Kan. 220, 217 P. 918 (1923). While those cases arrive at varying conclusions, we believe that the holding in Burke v. Schmidt, supra, comports with the general rule above and is most appropriate. In the Burke case, the Supreme Court of South Dakota indicated that the Governor could not withdraw an appointment when that appointment placed the appointee in office without further action. On the other hand, if the Governor's appointment required additional action such as legislative approval, it was not final and complete and could be withdrawn.

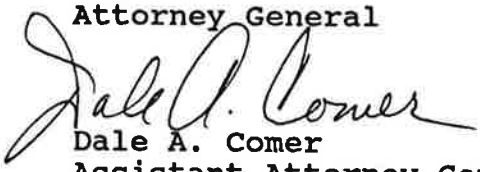
Where an appointment is made as a result of a nomination by one authority and confirmation by another, the appointment is not valid and complete until the actions of all bodies involved have been taken. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955); 67 C.J.S. Officers §42; 63A Am. Jur. 2d Public Officers and Employees §117; 1931-1932 Report of the Attorney General, Opinion dated February 5, 1931 at 120. In light of this rule and the authorities cited above, we believe that the appointments pending before the Legislature which were recalled by Governor Nelson were not complete and final at the time he withdrew them. Since they were not complete and final, and since those appointees in question were not actually placed in office, we believe those appointments could be recalled and withdrawn by the Governor. We would note that this conclusion is consistent with an earlier opinion of this office. 1967-1968 Report of the Attorney General, No. 12 at 19.

You also ask whether the Legislature can confirm the recalled appointments before the Governor names replacements so as to confirm the initial appointees in office. In view of our determination that the Governor can withdraw the appointments in question, it would seem that they are no longer before the Legislature for action. Therefore, the Legislature has no appointments to confirm until the Governor resubmits names.

Finally, you point out certain misstatements concerning the dates of the appointments withdrawn in the Governor's letter of January 11th, and you ask whether those misstatements have any legal effect on the Governor's letter. We believe that the intent of that letter is clear on its face. Since it specifically lists the appointments which the Governor has withdrawn, it is our view that the inconsistencies which you have noted would have no effect on the Governor's action.

Sincerely yours,

DON STENBERG
Attorney General



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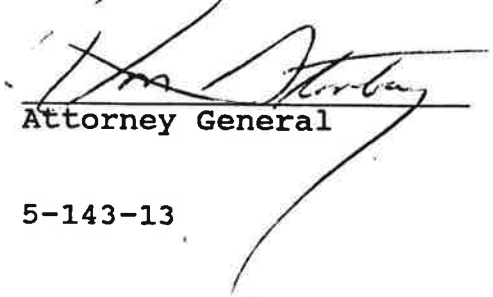

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