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STATE OF NEBRASKA
OFFICIAL
MAY 21 1991
DEPT. OF JUSTICE

DATE: May 20, 1991

SUBJECT: Constitutionality of Two-Part Amendment to LB 850, the State Claims Bill, Which Amendment Would Bypass the State Claims Board and State Courts and Appropriate $30,000,000 for Payment to Commonwealth Depositors and Amend the State Tort Claims Act to Authorize Such Bypass.

REQUESTED BY: Senator George Coordsen
District No. 32

WRITTEN BY: Don Stenberg, Attorney General
John R. Thompson, Deputy Attorney General

Amendment 1447 to LB 850 is in two parts. The first would appropriate $30,000,000.00 for the payment of the tort claim filed January 25, 1991, by representatives of the Commonwealth depositors without action by the State Claims Board or the state court system as required by the State Tort Claims Act. The second part proposes to amend the State Tort Claims Act to permit bypassing the Board and courts. You have raised several questions concerning the constitutionality of Amendment 1447.

Your first question is whether the appropriation of $30,000,000.00 would be constitutionally permissible in view of the recent decision in Haman v. Marsh, 237 Neb. 669, ___ N.W.2d ___ (1991). We believe that to the extent such an appropriation exceeds any actual tort liability of the state it would be subject to the same constitutional infirmities as found in Haman. We should point out that no valid appropriation may be made until appropriate authorizing legislation has been adopted.

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Your next two questions relate to germaneness of the two subjects in the amendment, the appropriation of money and substantive changes in the State Tort Claims Act. We believe there are serious constitutional problems in this regard. Article III, section 14, of the Nebraska Constitution provides:

> ". . .No bill shall contain more than one subject, and the same shall be clearly expressed in the title. . . ."

It appears that the inclusion of substantive changes to the State Tort Claims Act in the same bill which appropriates money for the payment of claims violates the above provision and would probably be unconstitutional. This conclusion is consistent with prior opinions of this office where we have consistently indicated that substantive language may not be placed in a legislative bill together with appropriations language. See Opinion No. 214 dated March 26, 1976 and Opinion No. 81 dated April 23, 1981.

Your next question relates to the proposed amendment to the State Tort Claims Act which provides for direct action by the Legislature on claims in excess of $5,000,000.00 without any prior review by the State Claims Board and the state courts. You ask whether the classification would be reasonable and constitutionally permissible. Our answer to this must necessarily be somewhat less precise. While we believe a plausible argument can be made that the classification is arbitrary and unreasonable, the courts generally give some deference to the policy findings of the Legislature. Under the present structure of the State Tort Claims Act, claims of $5,000.00 or less may be approved by the State Claims Board with no other review or oversight. Claims over $5,000.00 must be approved by the Lancaster County District Court as well as the Board. All claims exceeding $50,000.00 must also be reviewed by the Legislature and appropriation made before payment. In other words, additional review and oversight is required for each class of claims as they get larger in amount.

Under the proposed amendment that scheme would not be followed. In fact, the review by the Board and courts would be eliminated for the class of claims involving the most money. While this on its face seems somewhat odd, it can perhaps be justified on the basis that claims of this magnitude will be carefully reviewed by the Legislature while for smaller claims, the Legislature will generally rely on the decision of the State Claims Board and the courts.

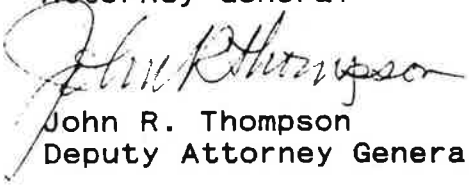
Finally, you question whether the amendment may violate the separation of powers provision of the Nebraska Constitution, Article II, section 1. Under Article IV, section 1, the Attorney General is an executive officer. The Attorney General is vested with broad common law and statutory powers, including the power to initiate and defend actions, to make decisions regarding strategy, and to negotiate and enter into settlements. See State v. State Board of Equalization and Assessment, 123 Neb. 259, 242 N.W. 609 (1932), cited with approval in State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984); and Neb.Rev.Stat. § 84-202 (Reissue 1987) and Neb.Rev.Stat. § 81-8,218 (1990 Cum.Supp.).

Also, Neb.Rev.Stat. § 81-8,218 specifically provides that the Attorney General is authorized to compromise or settle any suits brought under the State Tort Claims Act with the approval of the court in which the suit is pending.

Under the proposed legislation, the Legislature would, in effect, be substituted for the State Claims Board. This mechanism allows for settlement of claims by the State prior to the commencement of litigation and hence does not conflict with the authority of the Attorney General. The power to appropriate funds is, of course, a legislative power. Moreover, the proposed legislation still requires judicial approval of the settlement. Considering all of these points, we are of the opinion that Nebraska Constitution, Article II, Section 1 and Article IV, Section 1 are not violated by the proposed legislation.

Very truly yours,

DON STENBERG
Attorney General



John R. Thompson
Deputy Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature

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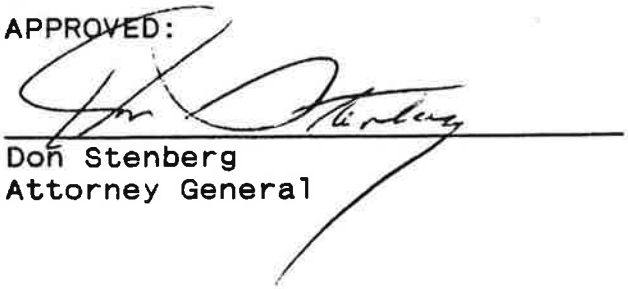

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