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#95004
NO.
STATE OF NEBRASKA
OFFICIAL
JAN 18 1995
DEPT. OF JUSTICE

DATE: January 18, 1995

SUBJECT: Constitutionality of Proposal to Change Qualifications of Membership on the State Board of Education

REQUESTED BY: Senator C. N. "Bud" Robinson
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Lauren L. Hill, Assistant Attorney General

You have requested an opinion from this office regarding the constitutionality of legislation "that will prohibit a member of the State Board of Education from concurrently serving as a member of the board of education of any school district in Nebraska." You have inquired whether your proposal to add this qualification for membership on the State Board of Education would conflict with Article VII, § 3 of the Nebraska Constitution. As we have not been provided with a draft of the legislation which you are contemplating, our opinion as to the constitutionality of your proposal "is necessarily limited to a review of the general outline of the plan as set forth above, rather than a review of [specific legislation]." Op. Att'y Gen. No. 82-214 (March 15, 1982).

Applicable Law

Several well-established principles of law are applicable to our analysis of your inquiry. Foremost among these principles is the separation of powers doctrine contained within the Nebraska Constitution:

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> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Neb. Const. art. II, § 1.

Interpreting this provision, the Nebraska Supreme Court has determined that it is "an absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons. It has remained a part of the Constitution unchanged since 1875. It is more certain and positive than the provisions of the federal Constitution and those of some of the states, which merely definitely divided the three powers of government." ***Laverty v. Cochran***, 132 Neb. 118, 120-21, 271 N.W. 354, 356 (1937); ***See also State ex rel. Spire v. Conway***, 238 Neb. 766, 472 N.W.2d 403 (1991).

The court has also held that "The people of the state, by adopting a Constitution, have put it beyond the power of the legislature to pass laws in violation thereof." ***State ex rel. Randall v. Hall***, 125 Neb. 236, 243, 249 N.W. 756, 759 (1933). Therefore, as we noted in a prior opinion, "[t]he legislative authority of the Unicameral is extensive. However, it is not limitless." Op. Att'y Gen. No. 93-012 (March 4, 1993) at 5.

Two final precedents are significant to your inquiry. First is the rule that because the Nebraska Constitution "is not a grant but a restriction on legislative power, . . . the [L]egislature may legislate upon any subject not inhibited by the Constitution." ***Swanson v. State***, 132 Neb. 82, 90, 271 N.W. 264, 269 (1937); ***State ex rel. Quinn v. Marsh***, 141 Neb. 436, 3 N.W.2d 892 (1942). Second, "when a state [c]onstitution creates an office and names the qualifications of the incumbent, the legislature has no authority to prescribe additional qualifications or to remove any of the requirements provided for by the [c]onstitution." ***State ex rel. Brazda v. Marsh***, 141 Neb. 817, 830, 5 N.W.2d 206, 214 (1942); ***State ex rel. Quinn v. Marsh***, 141 Neb. at 439, 3 N.W.2d at 894.

State Board of Education Member Eligibility Requirements

Article VII, Section 3 of the Nebraska Constitution provides that

> [t]he State Board of Education shall be composed of eight members, who shall be elected from eight districts of substantially equal population as provided by the

> Legislature. Their term of office shall be for four years each. **Their duties and powers shall be as prescribed by the Legislature**, and they shall receive no compensation, but shall be reimbursed their actual expense incurred in the performance of their duties. **The members of the State Board of Education shall not be actively engaged in the educational profession** and they shall be elected on a non-partisan ballot.

Neb. Const. art. VII, § 3 (emphasis added).

Although Article VII has been amended several times since its inception, the text of this constitutional provision has remained essentially unchanged. *See* Laws 1965, c. 293, p. 834; Laws 1972, LB 1023.

In accordance with this constitutional provision, the Legislature has set forth the manner and method by which the eight State Board of Education members shall be elected. *See* Neb. Rev. Stat. § 79-322 - § 79-322.02 (Cum. Supp. 1992). Additionally, the Legislature has statutorily prescribed that

> [n]o person shall be eligible to membership on the State Board of Education (1) who is actively engaged in the teaching profession, (2) who is a holder of, or a candidate for any state office, board, or commission, or (3) unless he is a citizen of the United States, a resident of the state for a period of at least three years, and a resident of the district from which he is elected for a period of at least two years immediately preceding his election.

Neb. Rev. Stat. § 79-323 (1987). The requirements of this statute were enacted in 1953, following the adoption of a constitutional amendment which formally created the State Board of Education. *See* Laws 1953, c. 320, § 3, p. 1054. The qualification on membership to the State Board contained in subsection (1) of Neb. Rev. Stat. § 79-323 arises from the restriction imposed by Article VII, Section III. The qualification set forth in subsection (2) of Neb. Rev. Stat. § 79-323 was apparently incorporated from a provision of the Nebraska Constitution which pertained to officers appointed pursuant to Article IV. *See* Neb. Const. art. IV, § 2 (1953). We are uncertain of the basis for the qualification imposed by Neb. Rev. Stat. § 79-323(3).

Discussion

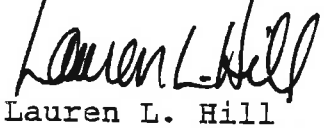
Based upon the foregoing, we now address whether you may legislatively impose the requirement upon State Board of Education

members that they not serve concurrently on local boards of education. At least one eligibility requirement for membership on the State Board of Education has been expressly set forth in Nebraska's Constitution. Article VII, Section 3 requires that State Board members "not be actively engaged in the educational profession." Given the current constitutional qualification, we find that the court's decision in ***State ex rel. Brazda v. Marsh***, 141 Neb. 817, 5 N.W.2d 206, is binding.

In ***Brazda***, the question before the court was whether the Legislature could impose a residency requirement, in addition to existing constitutional requirements, upon an individual who sought to file as a candidate for the office of Secretary of State. As previously noted, the court held that "when a state [c]onstitution creates an office and names the qualifications of the incumbent, the legislature has no authority to prescribe additional qualifications or to remove any of the requirements provided for by the [c]onstitution." ***Id.*** at 830, 5 N.W.2d at 214; ***See also State ex rel Quinn***, 141 Neb. at 442-43. Thus, the court determined that the additional residency requirement could not validly be imposed. ***Id.*** Likewise, in this instance, we find that the Legislature cannot, by statute, impose as an additional qualification for State Board of Education membership the requirement that State Board members not concurrently serve on a local board of education. A constitutional amendment to Article VII, Section 3 would be required to impose such an additional qualification to State Board of Education membership.

Sincerely,

DON STENBERG
Attorney General

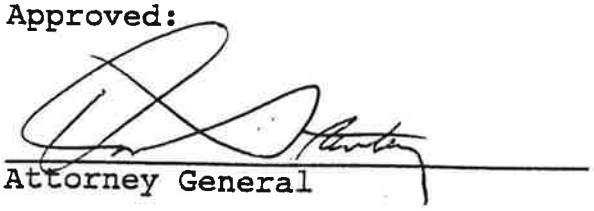


Lauren L. Hill
Assistant Attorney General

24-19-14.op

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

Approved:



Attorney General