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#95020
NO.
STATE OF NEBRASKA
OFFICIAL
MAR 13 1995
DEPT. OF JUSTICE.

DATE: March 13, 1995

SUBJECT: Constitutionality of LB 735, Legislation Mandating the Establishment of a College of Engineering at the University of Nebraska at Omaha

REQUESTED BY: Senator Ardyce L. Bohlke
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 LB 735, legislation introduced on January 19, 1995, which would establish a College of Engineering at the University of Nebraska at Omaha. Specifically, you have asked us to address whether LB 735 violates Article VII, § 14 of the Nebraska Constitution. We emphasize that the analysis and reasoning herein are limited to the legal questions raised by the proposal set forth in LB 735. The public policy question of whether a College of Engineering should be established at the University of Nebraska at Omaha is a separate issue beyond the scope of your inquiry and, therefore, not addressed in our opinion.

Facts

In April, 1994, University of Nebraska President Dennis Smith appointed a task force to study the issue of engineering education in Nebraska. *See* Board of Regents of the University of Nebraska, ***Minutes***, 59, p. 191 (December 9, 1994). The task force transmitted its final report to the University President on November 11, 1994. *Id.* At its December 9, 1994, meeting, the University of Nebraska Board of Regents reviewed the task force

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findings and the recommendations submitted by the University President. While the Board of Regents adopted several recommendations to bolster engineering education in Nebraska, it rejected a motion to establish an independent College of Engineering at the University's Omaha campus. *Id.* at 198. Five of the eight Board of Regents members voted against the motion. *Id.*

On January 19, 1995, Senator Chris Abboud and 13 cosponsors introduced legislation which, in pertinent part, provides:

> The Legislature finds that a College of Engineering should be established at the University of Nebraska at Omaha. The University of Nebraska at Omaha shall offer an engineering program leading to a bachelor's degree through *its* College of Engineering. The Legislature shall appropriate money necessary to offer the engineering program. The appropriation shall be made to the Board of Regents of the University of Nebraska for the sole purpose of funding the engineering program.

LB 735, Ninety-Fourth Legislature, First Session (emphasis added).

<u>Coordinating Commission For Postsecondary Education</u>

Our review begins with a brief overview of the constitutional and statutory provisions governing Nebraska's Coordinating Commission for Postsecondary Education ["Commission"]. The Commission has been established under the Nebraska Constitution as the entity "which shall, under the direction of the Legislature, be vested with the authority for coordination of public postsecondary educational institutions." Neb. Const. art. VII, § 14. The Constitution expressly defines the term "coordination" to include:

> (1) [a]uthority to adopt, and revise as needed, a comprehensive statewide plan for postsecondary education . . . [and]
>
> (2) [a]uthority to review, monitor, ***and approve or disapprove*** each public postsecondary educational institution's ***programs*** and capital construction projects which utilize tax funds designated by the Legislature. . . .

Id. (emphasis added). The Constitution specifies that such authority is vested in the Commission "in order to provide compliance and consistency with the comprehensive [statewide] plan [for postsecondary education] and to prevent unnecessary duplication. . . ." *Id.*

In accordance with this constitutional mandate, the Legislature has enacted the "Coordinating Commission for Postsecondary Education Act," Neb. Rev. Stat. § 85-1401 to § 85-1420 (1994). The Act details and expands upon the powers and duties vested in the Commission by the state constitution.

The Act directs that, in developing its comprehensive statewide plan, the Commission is to include "role and mission statements for each public institution within any general assignments of role prescribed in sections 85-121.05 [pertaining to the Nebraska College of Technical Agriculture at Curtis] and 85-917 to 85-966 [pertaining to the University of Nebraska campuses, the State Colleges, and the Community Colleges]. . . ." Neb. Rev. Stat. § 85-1413(1) (1994).

Specific to our analysis are the program review duties set forth in Neb. Rev. Stat. § 85-1414 (1994). The statute dictates the process and procedures which the Commission is to utilize in its review, monitoring, approval, or disapproval of new and existing programs. For purposes of the Act, the term "program" is defined as "any program of instruction which leads directly to a degree, diploma, or certificate. . . . Program shall also include the establishment of any new college, school, major ivision, education center, or institute but shall not include easonable and moderate extensions of existing curricula which have a direct relationship to existing programs." Neb. Rev. Stat. § 85-1402(5) (1994).

The Commission's program approval authority extends to public postsecondary educational institutions including "each postsecondary educational campus or institution which is governed by the Board of Regents of the University of Nebraska." Neb. Const. art. VII, § 14. The statute expressly provides that "[a]ny program which is authorized by action of the Legislature or a governing board and which is not in existence prior to January 1, 1992, [date of the Commission's establishment] shall not become operative unless and until such program has been approved by the commission pursuant to this section." Neb. Rev. Stat. § 85-1414(12) (1994). These provisions would clearly apply to a proposed College of Engineering established upon the University of Nebraska at Omaha campus.

In order to ensure enforcement of the coordination provisions of the Act, the Legislature has provided that "[n]o state warrant shall be issued by the Department of Administrative Services or used by any public institution for the purpose of funding any program . . . which has not been approved or which has been disapproved by the [C]ommission pursuant to the Coordinating ommission for Postsecondary Education Act." Neb. Rev. Stat. § 85-418(1) (1994).

Discussion

Based upon the preceding constitutional and statutory provisions, we now address your inquiry. Several tenets of statutory construction direct our analysis.

First, the Nebraska Supreme Court has determined that constitutional provisions are to be construed more liberally than statutory provisions. ***Nebraska P. P. Dist. v. Hershey School Dist.***, 207 Neb. 412, 299 N.W.2d 574 (1980). A second principle of statutory construction requires that before interpretation of the language of a constitutional provision may be engaged in, "it must be demonstrated that the questioned language is unclear or ambiguous and, therefore, requires judicial construction. . . ." ***State ex rel. Spire v. Beermann***, 235 Neb. 384, 389, 455 N.W.2d 749, 752 (1990). If the plain meaning of a constitutional provision cannot be ascertained, then

> [t]he intent and understanding of [the] framers [of a constitutional amendment] and the people who adopted it as expressed in the instrument is the main inquiry in construing it. . . . The words of a constitutional provision will be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests they are used in a technical sense. The court may not supply any supposed omission, or add words to or take words from the provision as framed. It must be construed as a whole, and no part will be rejected as meaningless or surplusage, if it can be avoided. . . . It is permissible to consider the facts of history in determining the meaning of the language of the Constitution. . . . It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.

Id. at 389-90, 455 N.W.2d at 752 (quoting ***State ex rel. State Railway Commission v. Ramsey***, 151 Neb. 333, 340-41, 37 N.W.2d 502, 507 (1949)) (citations omitted). ***See also State ex rel. Douglas v. Beermann***, 216 Neb. 849, 347 N.W.2d 297 (1984); ***Dwyer v. Omaha-Douglas Public Building Commission***, 188 Neb. 30, 195 N.W.2d 236 (1972).

Finally, because the Nebraska Constitution "is not a grant but, rather, a restriction on legislative power, . . . the Legislature is free to act on any subject not inhibited by the Constitution." ***State ex rel. Stenberg v. Douglas Racing Corp.***, 246 Neb. 901, 905, ____ N.W.2d ____ (1994); ***State ex rel. Creighton Univ. v. Smith***, 217 Neb. 682, 353 N.W.2d 267 (1984). In so acting, however, the court has established that "[t]he people of the state,

by adopting a Constitution, have put it beyond the power of the [L]egislature to pass laws in violation thereof." *State ex rel. Randall v. Hall*, 125 Neb. 236, 243, 249 N.W. 756, 759 (1933); *See also State ex rel. Stenberg v. Murphy*, 247 Neb. 358, __ N.W.2d _ (1995)(holding that "constitutional language controls legislative language, not the other way around."); *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950)(holding that the Legislature cannot lawfully act beyond limitations of the Constitution). 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.

Under these rules, we analyze the provision of the state constitution which vests within the Commission's "coordination" powers the "[a]uthority to review, monitor, and approve or disapprove each postsecondary educational institution's programs . . . which utilize tax funds designated by the Legislature in order to provide compliance and consistency with the comprehensive plan and to prevent unnecessary duplication. . . ." Neb. Const. art. VII, § 14 (emphasis added). We find this language to clearly and unambiguously vest in the Commission the power to approve or disapprove a "postsecondary educational institution's program." As noted earlier, the creation of a proposed College of Engineering 'alls within that definition. Therefore, to the extent that LB 35, as currently drafted, does not provide in any manner for review of the proposed independent College of Engineering by the Commission, we find the measure to be violative of Article VII, Section 14 of the Nebraska Constitution.

We reach the same conclusion even if we adopt the view that the language of the constitutional provision is unclear and, therefore, subject to further construction. The Nebraska Supreme Court has directed that if the plain meaning of Article VII, Section 14 cannot be ascertained, then we are to review "[t]he intent and understanding of [the] framers [of the constitutional amendment] and the people who adopted it as expressed in the instrument." *State ex rel. Spire v. Beermann*, 235 Neb. at 389-90, 455 N.W.2d at 752. "It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply." *Id.*

A historical review illustrates that a form of the current Commission has been in existence since 1976. In that year, the Legislature enacted LB 579 which established a twelve-member "Nebraska Coordinating Commission for Postsecondary Education." *See* Laws 1976, LB 579, § 2 (codified at Neb. Rev. Stat. § 85-902 (1987)). In 1984, the membership of the Commission was expanded 'rom twelve to seventeen. *See* Laws 1984, LB 981, § 9. From the ime of its inception, the Commission remained merely an advisory body, one devoid of meaningful enforcement power over Nebraska

public postsecondary institutions. *See* Neb. Rev. Stat. § 85-910 (1987)(outlining Commission powers).

Concerned with the apparent lack of effectiveness in coordinating postsecondary education operations within Nebraska, the Legislature commissioned an extensive study of the issue. *See* Laws 1989, LB 247. Recommendations of consultants retained to conduct the study prompted Senator Ron Withem, then serving as Chairman of the Education Committee, to propose that an amendment to the Nebraska Constitution be forwarded "to the citizens of our state ... for the November ballot [on the question] of whether we should bring about this change in which postsecondary education is coordinated and governed in our state." Education Committee Hearing on LR 239, 91st Neb. Leg., 1st Sess., February 6, 1990 (Testimony of Senator Withem). On April 9, 1990, the Legislature enacted LB 1141, which placed the current provisions of Article VII, Section 14 before the electorate. The proposed constitutional amendment was adopted by a majority of voters in November 1990.

During the legislative session immediately following the November 1990, general election, Senator Withem introduced legislation to implement the newly-adopted constitutional amendment. *See* Introducer's Statement of Intent, LB 663, 92nd Neb. Leg., 1st Sess., February 12, 1991. In several instances during floor debate of LB 663, questions regarding the extent of the Commission's program review authority arose. For example,

> SENATOR ROBINSON: What power do they have as far as program goes, the coordinating commission?
>
> SENATOR WITHEM: What program do they have?
>
> SENATOR ROBINSON: Yeah, what power to they have as far setting programs . . .
>
> SENATOR WITHEM: They can approve programs, request to start a new program. They can approve that or they can disapprove it. If it is disapproved it goes out of existence. They can review existing programs and they can disapprove those. They have very, very strong powers in terms of program review and approval and disapproval.
>
> . . .
>
> SENATOR WARNER: . . . the program review authority and disapproval or approval as spelled out by Senator Withem, and again, it's a very strong one because if the coordinating commission disapproves a program even though we fund the program, even though the Legislature would fund the program under the mechanism, a warrant for the cost of those, at least to be provided for with state funds, but the General Fund money could not proceed....

Floor debate on LB 663, 92nd Neb. Leg., 1st Sess., March 25, 1991.

Further, in highlighting various provisions of the bill during its consideration, Senator Withem summarized as follows:

> SENATOR WITHEM: Finally, the bill makes a number of changes in our role and mission statutes. . . . I would point out to you that although the bill makes statutory changes in role and mission, those programs needed to implement those role and mission changes cannot go into effect until they will be approved by the Postsecondary Coordinating Commission.

Id.

In debate on an amendment regarding education centers offered to LB 663 by Senator Nelson, it was noted that

> SENATOR WITHEM: We have established the commission constitutionally with the authority to approve or disapprove programs. We, as the Legislature, have in effect said this . . . the floor of the Legislature is not the appropriate place to make these decisions. The appropriate place to make these decisions is within the coordinating commission. For us, in the very year that that [sic] would pass, after that passed, to violate that and come in and establish education centers legislatively I think would be the wrong signal about how seriously we're taking the coordinating commission.

Id.

The Commission's history and the debate centering upon the extent of the Commission's role in postsecondary education demonstrate the Legislature's clear intent to vest substantial program review powers in the Commission. We conclude that enactment of LB 735, without providing for a program review by the Coordinating Commission for Postsecondary Education, would violate the state constitution as well as several provisions of the corresponding "Coordinating Commission for Postsecondary Education Act."

Additional Considerations

In addition to the issues raised by LB 735 under Article VII, Section 14 of the Nebraska Constitution, our research prompted

the following considerations which should be contemplated by the Legislature.[1]

Your letter notes that in 1994, the Legislature enacted statutory language providing:

> After January 1, 1995, the Legislature shall not change the role and mission provisions in this section and sections 85-121.05 and 85-917 to 85-966 unless and until a proposal for such change has first been reviewed by the Coordinating Commission for Postsecondary Education and its recommendations on such proposal have been given to the Legislature pursuant to subdivision (2) of section 85-1412, section 85-1414, or otherwise.

Neb. Rev. Stat. § 85-966.01 (1994).

You indicate that while the statute is subject to amendment or repeal, "the language provides one Legislature's interpretation of how the authority of the Coordinating Commission should be viewed." We agree. Moreover, enactment of LB 735 would appear to contradict two statutes in addition to Neb. Rev. Stat. § 85-966.01. First, Neb. Rev. Stat. § 85-1414(12) (1994) mandates that "[a]ny program which is authorized by action of the Legislature . . . and which is not in existence prior to January 1, 1992, shall not become operative unless and until such program has been approved by the commission pursuant to this section." Next, Neb. Rev. Stat. § 85-1418(1) (1994) assures that "[n]o state warrant shall be issued by the Department of Administrative Services or used by any public institution for the purpose of funding any program . . . which has not been approved or which has been disapproved by the commission pursuant to the Coordinating Commission for Postsecondary Education Act."

The enactment of LB 735 without repeal or amendment of all three of these statutes would provide conflicting law as to the Commission's program review authority. Generally, the Legislature is presumed to have intended that every provision of a statute have meaning. ***Richardson v. Board of Ed. of School Dist. No. 100,*** 206 Neb. 18, 290 N.W.2d 803 (1980). Further, in enacting legislation, the Legislature is presumed to have known the preexisting state of the law. ***In re Hilbers Property Freehold Transfer,*** 211 Neb. 268, 318 N.W.2d 265 (1982). Based upon these two presumptions of law, a reviewing court has a duty to give effect to the language of

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[1] For purposes of reaching our conclusion in this opinion, we did not find it necessary to address the precedent established by the court's holding in ***Board of Regents v. Exon,*** 199 Neb. 146, 256 N.W.2d 330 (1977).

every statute and to reconcile various provisions so that they are harmonious. ***State v. Black***, 195 Neb. 366, 238 N.W.2d 231 (1976).

If current statutes remain in place and LB 735 is enacted, an argument exists that, to the extent the provisions of LB 735 contradict current law, then a repeal by implication would occur. The court has indicated:

> While repeals of statutes by implication are not favored and a statute will not be considered so repealed unless the repugnancy between the new enactment and the former statute is plain and unavoidable, where such repugnancy exists, the new enactment will be deemed to have repealed the former statute by implication.

State v. Fellman, 236 Neb. 850, 857-58, 464 N.W.2d 181, 187 (1991); ***Mauler v. Pathfinder Irr. Dist.***, 244 Neb. 217, 505 N.W.2d 691 (1993). Thus, "a legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict." ***Mauler***, 244 Neb. at 219, 505 N.W.2d at 693. We cannot opine with certainty as to whether a reviewing court would declare a repugnancy between the provisions of LB 735 and current law. We merely direct your attention to the issue and recommend that existing statutory provisions be considered.

Conclusion

In conclusion, LB 735, as currently drafted, violates Article VII, § 14 of the Nebraska Constitution. The defect in the legislation could be repaired by an amendment which would make implementation of the legislation subject to the review and approval of the Coordinating Commission for Postsecondary Education. In addition, the Legislature should carefully examine existing statutes and make any revisions it deems necessary to clearly effect its intent.

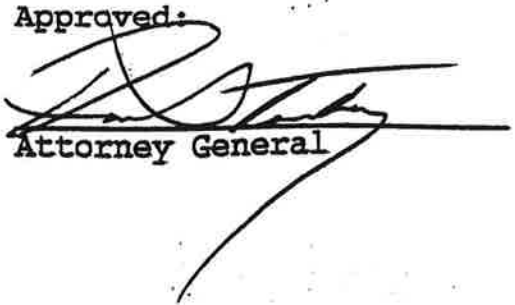
Sincerely,

DON STENBERG
Attorney General

Lauren L. Hill
Assistant Attorney General

24-20-14.op
cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved:



Attorney General