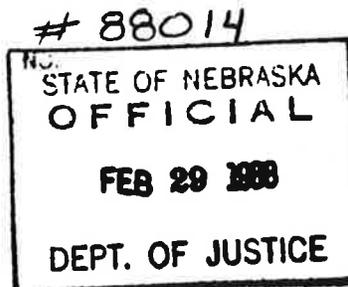


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 25, 1988

SUBJECT: Whether county superintendents, pursuant to LB 128, as amended, can constitutionally be appointed rather than elected.

REQUESTED BY: Senators Ron Withem and Chris Abboud
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Harold Mosher, Assistant Attorney General

LB 128, as amended, would repeal selected statutes which provide for the election of county superintendents. Section 6 of LB 128, as amended, would grant to the county board of each county the power to appoint a county superintendent [except that no county superintendent shall be appointed in those counties (a) having a population of three thousand inhabitants or less and (b) which have been organized into a single school district under the direction of a single board of education and a superintendent of schools elected by that board of education]. If a county board chose not to appoint a county superintendent and the duties of that officer are not assumed by a superintendent of schools within the exception stated above, the county board of education has a duty to contract pursuant to Neb.Rev.Stat. §79-320.01 (Reissue 1987) for the performance of all the duties imposed by law upon the county superintendents. The question immediately arises as to whether it is constitutional under LB 128, as amended, to appoint, rather than elect, county superintendents. In order to answer that question it is necessary to determine if county superintendents are public officers.

It is a universal rule that in order to indicate a public office the duties thereof must partake for a time in being some degree of the sovereign powers of the state, either legislative, executive or judicial. As stated by the Nebraska Supreme Court in State ex rel. O'Connor v. Tusa, 130 Neb. 528, 536, 265 N.W. 524 (1936): "A public officer is an incumbent of a public office, which is the right, duty and authority conferred by law,

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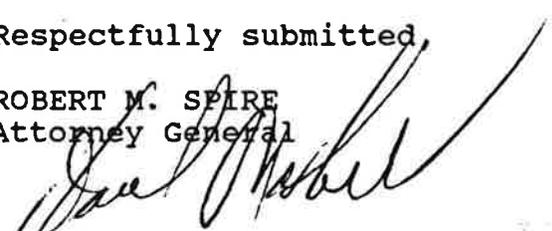
by which for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public."

Section 6(4) of LB 128, as amended, refers to the county superintendent as an "office." It is also to be noted that LB 128, as amended, does not repeal or amend existing statutory powers and duties of that office. Rather, LB 128, as amended, repeals and amends selected existing statutes which provide the manner by which the office is filled. Thus if LB 128, as amended, became operative law, the individuals appointed to that position would be invested with the same sovereign functions of government which are currently invested in individuals who are elected to that office.

Under our system of government the people of our state cannot be denied the opportunity to elect county officers. Article IX, section 4 of the Constitution of Nebraska provides "The Legislature shall provide by law for the election of such county and township officers as may be necessary and for the consolidation of county offices for two or more counties; Provided, that each of the counties affected may disapprove such consolidation by a majority vote in each of the counties." We are therefore of the opinion that so much of LB 128, as amended, which pertains to the appointment of county superintendents is in violation of Article IX, section 4, of the Constitution of Nebraska.

Respectfully submitted,

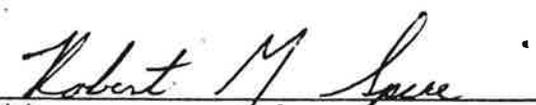
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20-19-2

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

APPROVED:


Attorney General