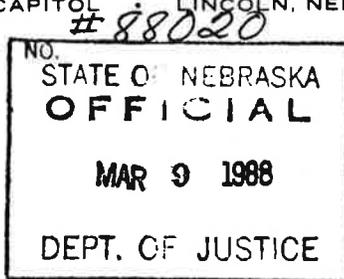


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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
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DATE: March 7, 1988

SUBJECT: Whether LB 1097 Unconstitutionally Delegates Legislative Authority

REQUESTED BY: Senator Don Wesely, Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Yvonne E. Gates, Assistant Attorney General

You have requested our opinion on two questions concerning LB 1097. First, does this bill provide an unlawful delegation of legislative authority by allowing an eye care professional to determine whether an applicant who fails to meet minimum visual standards should obtain a driver's license? Second, is the legislation unconstitutionally vague because it does not provide sufficient guidelines for the eye care professional to apply in making the determination? The answer to both questions is yes, LB 1097 is unconstitutional.

Regulating the use of public roadways and protecting the public safety on those roadways is a proper exercise of the state's police power. Schultz v. State, 89 Neb. 35, 130 N.W. 972 (1911). While practical administration may require delegation of that responsibility, it has long been established that the legislature may not delegate legislative functions to private individuals. Rowe v. Ray, 123 Neb. 118, 23d N.W. 689 (1930). In Fulmer v. Jensen, 221 Neb. 582, 379 N.W.2d 736 (1986), the Nebraska Supreme Court recognized that powers delegated to a governmental agency by the legislature could be further delegated to agency subordinates and assistants "... to any extent, so long as the agency preserves for itself the right to make the final decision." Id., at 585 quoting 2 Am.Jur. 2d §224 at 54-55.

As originally drafted, LB 1097 clearly delegates the final decision regarding the issuance of the license to any doctor or optometrist, allowing that professional to stipulate what restrictions, if any, are to be placed on the license. The amendment by the Transportation Committee requires that an ophthalmologist issue the certificate. Additionally, it places the final decision back in the agency by requiring the individual to satisfactorily complete a drive test before the license can be

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issued. However, neither version of the bill overcomes the obstacle addressed in your second question.

LB 1097 is invalid because neither it nor any other statute in pari materia with it contain any limitation or standards for the determination of safe visual acuity. Neb.Rev.Stat. §60-406.06 requires the Director of Motor Vehicles to adopt such rules and regulations as may be necessary to carry out the provisions of the Motor Vehicle Operator's License Act. On that authority the Department has set the standards of eyesight required for issuance of the license. By permitting eye care professionals to issue certificates for individuals who otherwise could not obtain a license, LB 1097 in effect obviates the standards. "A statute which in effect reposes an absolute unregulated and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers." School District No. 39 v. Decker, 159 Neb. 693, 700, 68 N.W.2d 354 (1955). Presuming that an ophthalmologist will exercise good judgment does not sustain the delegation of unregulated discretion to either a private individual or an administrative agency. If passed, LB 1097 would fail a constitutional challenge.

Sincerely,

ROBERT M. SPIRE
Attorney General

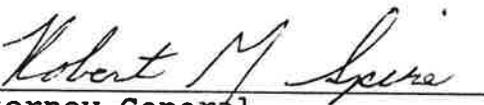


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13-5-10

cc: Patrick J. O'Donnell
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APPROVED BY:


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