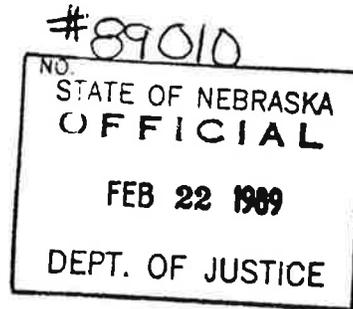


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General



DATE: February 21, 1989

SUBJECT: Whether the Protocol Office would be an Executive Office of the State -- LB177

REQUESTED BY: Senator Scott Moore  
Legislative District No. 24

WRITTEN BY: Robert M. Spire, Attorney General  
Linda L. Willard, Assistant Attorney General

You have inquired whether the Protocol Office which LB177 proposes to create would be an executive office pursuant to Article IV, Section 27 of the Constitution of the State of Nebraska and would thus require a two-thirds majority vote for creation. It is our determination that the proposed Protocol Office would not be an executive office as intended by the above referenced section of the State Constitution.

The Nebraska Supreme Court, on several occasions, has addressed the issue of what constitutes an Executive Office as intended in Article IV, Section 27 of the Constitution of the State of Nebraska. In State v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946), the Nebraska Supreme Court found that the Department of Agriculture was an executive department within the meaning of the State Constitution. The court determined in Marsh that an executive office is one the duties of which are mainly to cause the laws to be executed. The court cited several laws which the Department of Agriculture had the power and duty to enforce.

In State v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946), the Court determined that the Nebraska Liquor Commission was not an executive office since it was not charged with the actual execution and enforcement of laws. The court stated:

L. Jay Bartel  
Elaine A. Catlin  
Delores N. Coe-Barbee  
Dale A. Comer  
David Edward Cygan  
Lynne R. Fritz  
Denise E. Frost

Yvonne E. Gates  
Royce N. Harper  
William L. Howland  
Marilyn B. Hutchinson  
Donald E. Hyde  
Vanessa R. Jones

Kimberly A. Klein  
Charles E. Lowe  
Lisa D. Martin-Price  
Steven J. Moeller  
Harold I. Mosher  
Fredrick F. Neid

Bernard L. Packett  
Marie C. Pawol  
Kenneth W. Payne  
Douglas J. Peterson  
LeRoy W. Sievers  
James H. Spears

Mark D. Starr  
John R. Thompson  
Susan M. Ugai  
Terri M. Weeks  
Melanie J. Whittamore  
Linda L. Willard

Senator Scott Moore  
February 21, 1989  
Page -2-

. . . One of very important tests is that the department, if executive, has primarily to do with the political government of the state in the execution and enforcement of the law wherein the Governor is the supreme executive head.

147 Neb. at 777-778.

In Mekota v. State Board of Equalization and Assessment, 146 Neb. 370, 19 N.W.2d 633 (1945), the court held that the "Department of Industrial Development" had been defectively established in that it had not received the requisite two-thirds majority required to establish a new executive department. In so holding the court cited to State v. Loechner, 65 Neb. 814, 91 N.W. 874,

In State v. Loechner, supra, the following appears: "Ministerial offices, it is said, are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior. An executive officer, in the proper sense of the term, is one whose duties are mainly to cause the laws to be executed; such as the president, the governor of a state, or the chief executive officer of a city. It pertains to the execution and enforcement of the laws by one charged with that particular duty.

146 Neb. at 382.

Further, in Sommerville v. Johnson, et al., 149 Neb. 167, 30 N.W.2d 167, (1948), the Supreme Court held that the agency created by the Merit System Act was not an executive office. The reading of the opinion in that case demonstrates that the court was influenced in reaching its conclusion by the fact that the Merit System Organization was not vested with authority to administer or enforce any laws other than the law by which the agency was created. The following language appears in the opinion:

It is evident that the Legislature here established an agency in the nature of a Civil Service Commission. It created a council to guide and direct the administration of the act . . . it is intended to promote efficiency, economy, and equality . . . in the participating agencies. It depends in part upon cooperative effort between the council, the director, and the participating agencies. It administers no law save the law by which it was created . . . it executes none of the laws of the state so far as they relate to the people generally. We think it quite clear that it does not create an executive department nor an executive state office within the meaning of the Constitutional provisions herein discussed.

Senator Scott Moore  
February 21, 1989  
Page -3-

In each of the Supreme Court decisions mentioned above, it appears that the one common controlling factor upon which the court relied in reaching its conclusion was whether or not the agency in question was empowered to administer and enforce pertinent general laws of the state. It appears from a reading of LB177 that the Protocol Office is intended to function in a coordinating or liaison capacity. The office is given no power to enforce the general laws of the state nor even the power to promulgate rules and regulations. It is clear from a reading of LB177 as introduced that the Protocol Office would not be an executive office as contemplated by Article IV, Section 27 of the state constitution. Therefore, a simple majority vote of the Legislature would be sufficient to create the office.

Sincerely yours,

ROBERT M. SPIRE  
Attorney General



Linda L. Willard  
Assistant Attorney General

Approved:

  
\_\_\_\_\_  
Attorney General

28-117-3