

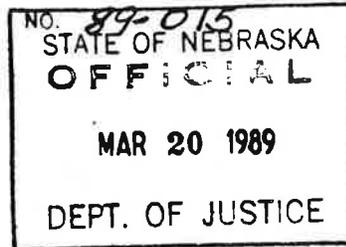
Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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

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DATE: March 20, 1989

SUBJECT: The constitutionality of an act of the Legislature which would make Kearney State College a part of the University of Nebraska system; designating its campus as the University of Nebraska at Kearney; and transferring its governance from the State College Board of Trustees to the Board of Regents of the University of Nebraska.

REQUESTED BY: Senator Jerome Warner
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
A. Eugene Crump, Deputy Attorney General

In your letter to this office under date of February 7, 1989, you inquire if the Constitution of Nebraska prohibits the inclusion of Kearney State College in the University of Nebraska System. The same is hereinafter discussed.

Currently, Nebraska has four State Colleges. These colleges were first known as normal schools or two-year institutions of learning devoting their resources and facilities primarily to the training of teachers. A cursory review of the historical development of each is worthy of note.

In 1867, the same year that the State of Nebraska was admitted to the Union, the Legislature established a State Normal School at Peru. It was Nebraska's first normal school and the third teacher training school west of the Missouri River. In 1903 the Legislature appropriated money for the establishment of another state normal school in Central or Western Nebraska subject to certain conditions. Pursuant thereto, the City of

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Kearney was selected as the site thereof by the State Board of Education on September 1, 1903. The third normal school was established at Wayne in 1909 when the Legislature authorized the purchase of the property, buildings, and equipment of the Nebraska Normal College, a private institution founded in 1891. It opened as a State Normal School in September, 1910. The fourth normal school has its roots in the Chadron Congregational Academy, which was founded in 1888 to meet the needs of a pioneering community for teachers. In 1910, the State Board of Education selected Chadron as the site for a fourth State Normal School and acquired eighty acres of land that included the Academy's property.

The basic purpose of the above described normal schools was "the training and instruction of persons, both male and female, in the arts of teaching and managing schools, and in the principles and practice of the various branches of learning taught in our public schools." See, Section 7072, Revised Statutes of Nebraska 1913. The control of the four normal schools was initially placed in a statutory created board of education consisting of seven members, five of whom were appointed by the Governor for a term of five years each, and the State Treasurer and the State Superintendent of Public Instruction, by virtue of their office, were also members of the board. See, Section 6742, Revised Statutes of Nebraska 1913. Seven years later this board was elevated to a constitutional status.

Specifically, on the eighteenth day of the 1919-1920 Constitutional Convention, Proposal Number 222 was made by delegate Wall. The proposal provided as follows:

The general government of the state normal schools located at Peru, Kearney, Wayne and Chadron, and such other normal schools as may be established by law, shall be vested, under the direction of the legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, one each for a term of one, two, three, four, five and six years, and thereafter one each for a term of six years, and the State Superintendent of Public Instruction who shall be a member ex-officio. The duties and powers of said board shall be prescribed by law; and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

[Vol. 1, Proceedings of the Constitutional Convention, 1919-1920, p. 192.] [Emphasis added.] The proposal was referred to the Committee on Education.

Subsequently, the Committee on Education reported for general file Proposal Number 222, amended, as follows:

The general government of the state normal schools, as now existing, and such other normal schools as may be established by law, shall be vested, under the direction of the legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, one each for a term of one, two, three, four, five and six years, and thereafter [sic] one each year for a term of six years, and the State Superintendent of Public Instruction who shall be a member ex-officio. The duties and powers of said board shall be prescribed by law; and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

[Vol. 1, Proceedings of the Constitutional Convention, 1919-1920, p. 655.] [Emphasis added.]

It is well settled law that it is permissible to consider the facts of history in determining the meaning of the language of the Constitution. State v. Sheldon, 78 Neb. 552, 111 N.W. 372 (1907). "It is also appropriate and helpful to consider, in connection with the historical background, the evil and mischief attempted to be remedied, the objects to be accomplished, and the scope of the remedy its terms imply." State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 341 N.W.2d 502 (1949). It is therefore proper to examine the recorded proceedings of the 1919-1920 Constitutional Convention on Proposal Number 222 and the subsequent legislative history on the amendments thereto.

1920 Amendment

The recorded proceedings of the 1919-1920 Constitutional Convention discloses that on the thirty-ninth day thereof the following occurred:

MR. WALL: I move that the Committee of the Whole now proceed with the consideration of Proposal No. 222.

Motion prevailed.

Proposal No. 222

Proposal to add a new section to Article VIII as follows:

(Normal School Government.) The general government of the state normal schools located at Peru, Kearney, Wayne and Chadron, and such other normal schools as may be established by law, shall be vested, under the direction of the legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, one each for a term of one, two, three, four, five and six years, and thereafter one each year for a term of six years, and the State Superintendent of Public Instruction who shall be a member ex-officio. The duties and powers of said board shall be prescribed by law; and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

MR. NYE: On behalf of the Committee on Education I desire to state that when this proposal was under consideration it was unanimous before the Committee that the Normal Schools should be recognized in the Constitution in the same manner as are the universities and public schools. We are all aware that both the universities and public schools are based upon Constitutional provisions and that the Normal Schools are based upon legislative provisions. In order to give the normal schools an equal standing with the common schools and universities it was deemed advisable to recognize them in the Constitution for the reason that the normal schools have become one of the three great departments in our educational system. They perform special purposes and special functions and teach the youth of our state so that they may become teachers in the commons schools; but that is not the only purpose of the normal schools. The normal schools, also, have a course of study which provides the student who gets out from the high school an opportunity to review the practical subjects that he will get in after life, and these schools also provide a course of study that the boy and girl who never go to high school and cannot afford to go to the university, may go there and at a nominal price take this course of study which is best suited to them for their after life. A vast amount of money has been spent by the state in building up these normal schools, so that it was the opinion of the Committee that these normal schools, being established as they are, and performing such a useful purpose as they are performing, should be recognized in the Constitution.

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In regard to the members of the normal board. We have made the number seven, that is the present number, which is composed of five who are appointed by the Governor and two ex-officio members, being the Superintendent of Public Instruction and the State Treasurer. We dropped off the State Treasurer because he has always been merely a figurehead on the board, but we left on the State Superintendent for the reason that the common schools are under the control and management of the State Superintendent, and he looks to the normal schools primarily to furnish the teachers to teach in the common schools. It is very important to have the common schools closely associated and linked together, because the one cannot exist without the other and without one the other cannot successfully progress.

I submit to the Convention this brief statement that the normal schools should be recognized as the Committee has recommended.

THE SECRETARY: There was a Committee amendment which I will read now.

"Your Committee on Education respectfully reports for general file Proposal No. 222 amended as follows, to-wit:

"(Normal School Government.) The general government of the state normal schools, as now existing, and such other normal schools as may be established by law, shall be vested, under the direction of the legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, one each for a term of one, two, three, four, five and six years, and thereafter one each year for a term of six years, and the State Superintendent of Public Instruction who shall be a member ex-officio. The duties and powers of said board shall be prescribed by law; and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein."

FRED A. NYE, Chairman."

MR. NYE: The reason for making the change is simply this, that we drop out the location as it was in the original proposal, and simply inserted "The state normal schools as now existing." It was thought advisable to do

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that rather than to give prominence to the particular location by Constitutional provision.

[Vol. 1, Proceedings of the Constitutional Convention, 1919-1920, pp. 746 and 747.]
[Emphasis added.]

The recorded proceedings of the 1919-1920 Constitutional Convention also disclose that the method of selecting the members to serve on the proposed constitutional Board of Education of State Normal Schools was thereafter debated, including whether the members thereof should be elected by the people or be appointed by the Governor and if so, whether the appointment should be made with the advice and consent of the Senate. See, Vol. 1, Proceedings of the Constitutional Convention, 1919-1920, pp. 748 to 752. On the other hand, we have found no debate in the recorded proceedings of the 1919-1920 Constitutional Convention on the basic comments made by delegate Nye which are quoted above. The recorded proceedings of the 39th day of that Convention does reveal that at the close of the debate that day, Proposal Number 222, as amended, was reported to the Committee on Arrangement and Phraseology.

Thus, without more, the early historical background of this constitutional provision discloses that a majority of the delegates to the 1919-1920 Constitutional Convention believed that "in order to give the normal schools an equal standing with the common schools and universities it was deemed advisable to recognize them in the Constitution for the reason that the normal schools have become one of the three great departments of our educational system." This early historical background also discloses that the basic mission of the normal schools was the training of teachers. We find nothing in the recorded proceedings of the 1919-1920 Constitutional Convention or in Proposal Number 222 that would support a finding that in the event this proposal were approved by the electorate that university status could thereafter be granted to one or more normal schools by the passage of a legislative act or that the general government of one or more of the normal schools could thereafter be divested from the Board of Education of State Normal Schools and vested in some other entity by the passage of a legislative act.

As noted above, Proposal Number 222, as amended, was reported to the Committee on Arrangement and Phraseology. It was thereafter reported to the Committee of the Whole and read and passed a second and third time. Subsequently, it and forty other proposals, were submitted at a special election on September 21, 1920, at which time Proposal Number 222 was approved by the electorate. It was then designated section 13 of Article VII of the Constitution of Nebraska.

1952 Amendment

In the year 1951, the sixty-second session of the Nebraska Legislature approved LB 212, an act to submit to the electors several amendments to the Constitution of Nebraska which related to education. Included was a proposal to amend section 13 of Article VII of the Constitution of Nebraska as follows:

The general government of the state normal schools, as now existing, and such other normal schools as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled Board of Education of State Normal Schools, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the Commissioner of Education shall be a member ex-officio. The duties and powers of the board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein. (Emphasis added.)

The above quoted proposal was approved by the electorate at the general election in November, 1952. It was simply a house cleaning measure made necessary by other amendments to the Nebraska Constitution subsequent to the year 1920 and to harmonize this section of the Constitution with other proposed amendments in LB 212. Specifically, it substituted the word "Legislature" for the word "senate" and the words "Commissioner of Education" for the words "State Superintendent of Public Instruction."

1968 Amendment

In the year 1967, the seventy-seventh session of the Nebraska Legislature approved LB 174, an act to submit to the electors another proposal to amend to section 13 of Article VII of the Constitution of Nebraska. It provided as follows:

The general government of the state colleges as now existing, and such other state colleges as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled as designated by the Legislature, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the Commissioner of Education shall be a member ex-

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officio. The duties and powers of the board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein. (Emphasis added.)

The above quoted proposal was approved by the electorate at the general election in November, 1968. The reason and the meaning to be ascribed thereto is well documented in the legislative history thereof. In his filed statement of purpose, dated January 26, 1967, Senator Robinson, who introduced the proposed amendment, stated:

This bill submits to the voters a constitutional amendment which, if adopted, gives to the legislature the power to change and rename the Board of Education of State Normal Schools.

The public hearing on this proposed amendment is short and quoted below in its entirety:

Dr. Freeman Decker, State Normal Board: The name "normal school" is completely out of date, and has been a thorn in our side for a long time. We have been more concerned the last four or five years, because it makes it difficult to recruit faculty members. Normal school goes back hundreds of years. Historically, state normal schools offered one to two year courses in art of teaching. At present, few state normal schools exist; they become state colleges. We do not specify any given name, but could offer suggestions to the Legislature for a name.

Senator Harsh: Is it worth \$10,000?

Dr. Decker: It is worth more than that. When fighting to get faculty members, there are advantages to asking them to teach in teachers colleges.

Senator Elrod: Reason for allowing Legislature to name it is that this would never happen again.

Dr. Decker: Probably yes. If other changes need to be made, the Legislature can call us anything they want to.

Dr. Floyd Miller, State Commissioner of Education: I subscribe to the testimony given by Dr. Decker.

The was no opposition to this bill.

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It is self-evident that this 1968 amendment to section 13 of Article VII of the Constitution of Nebraska was simply cosmetic. It renamed the former "state normal schools" as "state colleges" and granted the Legislature the authority to designate the name of their governing board. The reason for this proposal, as explained by Dr. Freeman Decker, was straight forward. When recruiting faculty members "there are advantages to asking them to teach in teachers colleges."

Conclusion

The legislative history of the four state colleges, Peru, Kearney, Wayne, and Chadron, is thus well documented. Their principle mission from the beginning of statehood has been the training of teachers. Consequently, we are of the firm opinion that a legislative act which would grant university status to any or all of the existing State Colleges would be unconstitutional.

We would also note that the initial language of section 10 of Article VII of the Nebraska Constitution dealing with the government of the University of Nebraska is virtually identical to the initial language of section 13 of Article VII of the Nebraska Constitution dealing with the state colleges. Both sections provide that the "general government" of the respective institutions "shall be vested," under the direction of the Legislature, in the respective governing boards. In Board of Regents v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977), our Supreme Court discussed section 10 of Article VII of the Nebraska Constitution. The court stated,

The trial court further found that the provision that the duties and powers of the Board of Regents "shall be prescribed by law," means that the Legislature may set forth the powers and duties of the Regents. With this finding we agree but this provision must be considered with the other language of the section which requires that the general government of the University be vested in the Board of Regents. Thus, although the Legislature may add to or subtract from the powers and duties of the Regents, the general government of the University must remain vested in the Board of Regents and powers and duties that should remain in the Regents cannot be delegated to other officers or agencies.

Id. at 149, 256 N.W.2d at 332, 333. (Emphasis added). Since section 13 of Article VII is virtually identical to section 10 of Article VII, it seems to us that, by analogy, the court's language in the Exon case would apply equally to section 13 of Article VII. Based upon that case and the constitutional history discussed above, we therefore believe that the Legislature may not, by statute, divest the general government of one or more of the state colleges from the Board of Trustees of the Nebraska State Colleges and place that college(s) under the general government of the Board of Regents of the University of

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Nebraska. This may not be done directly by statute; nor may it be done indirectly by altering the powers and duties of the Board of Trustees so as to create the same change. On the other hand, such a change in governance might be effected if the people were to chose to amend the Nebraska Constitution.

Respectfully submitted,

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Attorney General


A. Eugene Crump
Deputy Attorney General

Approved:


Attorney General

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

20-535-8