

Linda Willard

DEPARTMENT OF JUSTICE

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

#89028

NO. STATE OF NEBRASKA OFFICIAL APR 5 1989 DEPT. OF JUSTICE
--

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

DATE: April 4, 1989

SUBJECT: Constitutionality of LB 397; Does requiring a collegiate athletic association to observe due process in its disciplinary proceedings violate the Constitution of the State of Nebraska?

REQUESTED BY: Senator Ernest Chambers
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

LB 397 would require that "[e]very stage and facet of all proceedings of a collegiate athletic association, college or university that may result in the imposition of a penalty for violation of such association's rule or legislation shall comply with due process of law as guaranteed by the Constitution of Nebraska and the laws of Nebraska." The bill also creates a cause of action for colleges or universities and individuals who are penalized by a collegiate athletic association without appropriate due process. You have requested our opinion as to whether LB 397 violates the Constitution of Nebraska. We believe that the bill is constitutionally permissible with the possible exception of certain portions of Section 6 dealing with the damages which may be awarded as a result of penalties imposed in violation of the act. Our analysis is set forth below.

As we have noted on previous occasions, a general question on the constitutionality of a legislative bill will necessarily result in a general response from this office. See, Opinion of the Attorney General, #85157, December 20, 1985. If we are to address specific questions or potential problems with a bill, they must be set out in the opinion request. You have simply asked whether LB 397 violates our state constitution in any sense. We must, therefore, provide a general response to your question in the absence of any description of your specific concerns.

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

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

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

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

Senator Ernest Chambers
April 4, 1989
Page -2-

LB 397 would obviously create special obligations for collegiate athletic associations different from those obligations faced by other private associations or corporations. Consequently, it seems to us that a question might be raised as to whether such disparate treatment could constitute a violation of the equal protection guarantee found in Article I, Section 1 of our state constitution. Since LB 397 involves economic or social legislation and disparate treatment which does not reach a fundamental right or suspect class, its constitutionality would be resolved by determining whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. School District No. 46 Sarpy County Nebraska v. City of Bellevue, 224 Neb. 543, 400 N.W.2d 229 (1987); State v. Michalski, 221 Neb. 380, 377 N.W.2d 510 (1985). Moreover, the power of classification rests with the Legislature, and our courts will not interfere with that power if real and substantial differences exist which afford a rational basis for the classification. State v. Michalski, *supra*. Section 1 of LB 397 contains a statement of the legislative intent underlying the bill. Considering that legislative intent, we cannot say that there is no rational relationship between the state's interest in affording due process of law within the disciplinary proceedings of a collegiate athletic association and the necessary classification effected by the bill. Therefore, we do not believe that LB 397 involves an impermissible violation of Article I, Section 1 of our state constitution.

The different requirements placed upon collegiate athletic associations under LB 397 also raise a question as to whether LB 397 constitutes special legislation in contravention of Article III, Section 18 of our state constitution. The analysis under this section of our state constitution is quite similar to the analysis outlined above under Article I, Section 1. The question again is whether LB 397 involves a permissible separate classification of collegiate athletic associations.

In connection with Article III, Section 18 of our state constitution, our supreme court has indicated that it is competent for the Legislature to classify objects of legislation, and if the classification is reasonable and not arbitrary, such a classification is a legitimate exercise of the legislative power. State ex rel. Douglas V. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980). Such a classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the legislation which renders its enactment appropriate. *Id.* The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and

Senator Ernest Chambers
April 4, 1989
Page -3-

baseless classification attempted to evade and violate the provisions of our state constitution which prohibit local and special laws. Id.

As was the case with our concerns involving equal protection, we cannot say that the special classification for collegiate athletic associations created by LB 397 would be unreasonable, arbitrary or a questionable exercise of the legislative power. To the contrary, it appears possible to argue that the classification is based upon substantial differences of situation or circumstances, and is entirely reasonable. As a result, we do not believe that LB 397 is special legislation in violation of Article III, Section 18 of our state constitution.

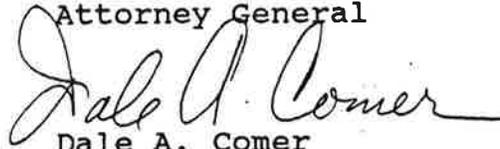
We do have some concern with Section 6 of LB 397. That section provides that a collegiate athletic association which violates the due process provisions of the act shall be liable to an aggrieved college or university for an amount equal to one hundred and fifty percent of the monetary loss per year during the period that any monetary loss occurs due to a penalty imposed in violation of the bill. It appears to us that Section 6 of LB 397 would thus authorize punitive damages to the extent that a collegiate athletic association which violates the act would be liable for more than one hundred percent of the actual loss growing out of a penalty imposed without due process. Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a fine or penalty. Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960). Under Article VII, Section 5 of our Nebraska Constitution, all fines, penalties and license money arising under the general laws of the state must be appropriated exclusively to the use and support of the common schools. Since Section 6 of LB 397 would allow a plaintiff college or university to collect damages in excess of its actual damages suffered as result of a denial of due process, it appears to us that Section 6 would violate Article VII, Section 5 of our state constitution.

Therefore, it is our opinion that LB 397 generally is constitutional under our state constitution. However, we do believe that there is a potential constitutional problem with the penalty provisions set out in Section 6 of LB 397.

Senator Ernest Chambers
April 4, 1989
Page -4-

Sincerely yours,

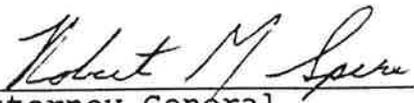
ROBERT M. SPIRE
Attorney General



Dale A. Comer
Assistant Attorney General

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

APPROVED:


Attorney General

5-70-13