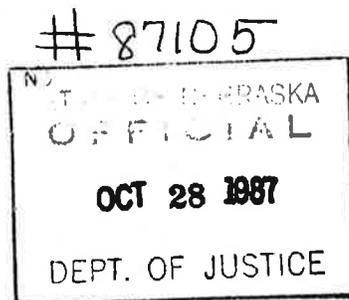


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



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

DATE: October 23, 1987

SUBJECT: Questions Related to the Certificate of Need Law

REQUESTED BY: Senator James E. Pappas  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Marilyn B. Hutchinson, Assistant Attorney General

1. Creation of an independent review panel.

As part of a task force developing legislation to change the Certificate of Need law, you want to propose legislation that will create a review panel which is independent of the Department of Health and which is a quasi-judicial body.

These objectives appear to be mutually exclusive. An administrative agency with only judicial functions would be judicial, not quasi-judicial. That is, its judicial functions would not be merely practical discretion reasonably incident to the exercise of ministerial police power by that review panel. See, Department of Banking v. Hedges, 136 Neb. 382, 401, 286 N.W. 277 (1939), and Hadden v. Aitken, 156 Neb. 215, 225, 55 N.W.2d 620 (1952). Therefore, creation of such an agency would be in violation of the constitutional requirement that the executive and judicial branches of government be separate. See, Neb. Const., Art. II, sec. 1.

2. Providing legal counsel for such independent review panel.

You want the independent review panel you create to be represented by a lawyer to rule on evidentiary matters. You ask if such a panel would be able to hire a lawyer independently or if such a lawyer would need to be from this office.

L. Jay Bartel  
Martel J. Bundy  
Janie C. Castaneda  
Elaine A. Catlin  
Dale A. Comer  
Laura L. Freppel

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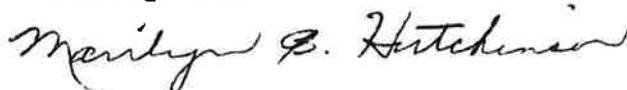
Senator James E. Pappas  
October 23, 1987  
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Current law makes the Attorney General the attorney for the state and for enumerated state officers who may not use state funds to pay any special counsel without written authorization of the Governor or the Attorney General. See, Neb.Rev.Stat. §84-205 (Reissue 1981). The head of an independent review panel would arguably be covered by that section.

Thus, such an independent agency could not hire a lawyer independently without the consent of the Governor or the Attorney General. An attorney on the staff of the Department of Health could not represent an independent appeal panel. An attorney from this office could.

Sincerely yours,

ROBERT M. SPIRE  
Attorney General

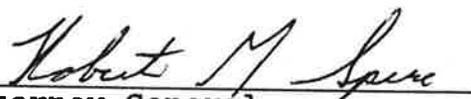


Marilyn B. Hutchinson  
Assistant Attorney General

16-02-2

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

APPROVED BY:

  
Robert M. Spire  
Attorney General