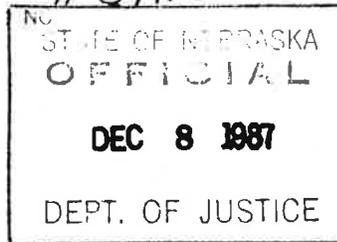


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: December 3, 1987

SUBJECT: Authority of Legislature to impose a fee on persons applying for review of a proposal under the "407 review process," i.e., Neb.Rev.Stat. §§71-6201 to 71-6230 or "the act."

REQUESTED BY: Don Wesely, Chairperson
Health and Human Services Committee

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

You have asked whether the Legislature can constitutionally impose a fee on the applicant for review of a proposal under the "407 review process." We have concluded it may, as discussed below.

1. The legislative power of the state is vested in the Legislature.

The legislative power of the state is vested in the Legislature. Art. III, sec. 1 of the Nebraska Constitution. This includes police power to make laws necessary to protect the health, safety and welfare of its citizens, subject to judicial review. State v. Drayton, 82 Neb. 254, 117 N.W. 768 (1908).

"A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare." Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 785, 104 N.W.2d 227 (1960). Thus before the Legislature can regulate any occupation, it must determine that the public interest demands it. The Legislature has recognized this in the act, particularly in §§71-6202, 71-6211, 71-6221 and 71-6222.

Thus it is the Legislature which must determine whether the regulation of a health care occupation is necessary to protect the public.

2. The Legislature may delegate legislative functions to administrative agencies under certain conditions.

Art. II, sec. 1 of the Nebraska Constitution prohibits the executive branch of the state from exercising power properly

- List of names: L. Jay Bartel, Martel J. Bundy, Janie C. Castaneda, Elaine A. Catlin, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Yvonne E. Gates, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Charles E. Lowe, Lisa D. Martin-Price, Steven J. Moeller, Harold I. Mosher, Fredrick F. Neid, Bernard L. Packett, Marie C. Pawol, Jill Gradwohl Schroeder, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Linda L. Willard

belonging to the legislative department. (To do so would "deny the equal protection of the law and violate the due process provisions of the Fourteenth Amendment of the federal Constitution." See, Smithberger v. Banning, 129 Neb. 651, 657, 262 N.W. 492 (1935).) However, delegation of legislative power to the executive department has been upheld as administrative authority, not legislative power, where there is an express legislative purpose and designated limitations or standards prescribed in the legislative act. See, Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 36, 120 N.W.2d 374 (1963).

Whether the proposed regulation is necessary to protect the health, safety and welfare of the public is a decision the Legislature must make before it can regulate a health profession under its police power. In the "407 review process" the Legislature has enlisted the help of the Director of Health, the Board of Health and a technical committee, appointed by the Director of Health with the advice and consent of the Board of Health, in making that determination. In doing so the Legislature has expressed its purpose and set out explicit standards. It has asked for a recommendation, not a final decision, on whether the application should be granted or denied. (Asking for a recommendation saved a delegation of authority from unconstitutionality in Blackledge v. Richards, 194 Neb. 188, 194, 231 N.W.2d 319 (1975).)

Thus, the Legislature has delegated "administrative authority" in this case to facilitate its own decision-making process in the exercise of the police power.

3. The Legislature may assess a reasonable fee to defray costs incurred in the exercise of the police power.

Art. VIII, sec. 1 of the Nebraska Constitution provides that the necessary revenue of the state shall be raised by taxation in such manner as the Legislature may direct to be levied by valuation uniformly and proportionately upon all tangible property and franchises. There are some exceptions not applicable here.

In Gates v. Howell, 204 Neb. 256, 265, 282 N.W.2d 22 (1979), plaintiffs claimed a fee required to obtain a permit violated Art. VIII, sec. 1 and Art. III, sec. 18 of the Constitution of the State of Nebraska. The court disagreed:

The purpose of requiring registration, however, is not for the purpose of raising revenue, but rather for the purpose of fulfilling the lawful authority of the state with regard to the public health, safety, and welfare.

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We find nothing wrong with the state requiring the registration of mobile homes and the assessing of a reasonable fee to defray the costs of registration and inspection, if any.

In conclusion, a fee imposed by the Legislature on applicants seeking a 407 review in order to defray the costs incurred in such exercise of the police power would not violate Art. VIII, sec. 1 of the Nebraska Constitution.

4. The Legislature may classify the objects of legislation for the purpose of legislating with reference thereto under certain conditions.

Art. III, sec. 18 of the Nebraska Constitution prohibits the Legislature from passing local or special laws in particular cases. The Fourteenth Amendment of the federal constitution prohibits any state from denying to any person within its jurisdiction the equal protection of the laws.

The applicable rule was quoted in McDonald v. Rentfrow, 176 Neb. 796, 800, 127 N.W.2d 480 (1964):

"The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification." (Emphasis supplied.) And, as stated by Commissioner Roscoe Pound in Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 5 L. R. A. N. S. 136: "On the other hand, if the legislature has made a reasonable classification, -not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, -and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated."

The "407 review process" covers proposals by any health professional group or organization, any individual, or any other interested person to regulate any health professional group not previously regulated and proposals to change the scope of practice of a regulated health profession. Neb.Rev.Stat. §§71-6204 and 71-6223. "[A]n applicant group shall submit an

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application to the director on forms prescribed by the director."
Id.

That application is not a legislative bill. Section 71-6223 requires that it include specified items, including the problem and why regulation or change of scope of practice is necessary to protect the public health, safety and welfare. Filing it triggers a three-tiered review process, culminating in a recommendation to the Legislature by the Director of Health on whether legislative action should be taken on the proposal and, if so, how. There is no provision in the act barring introduction of a bill containing such a proposal if there has been no 407 review or if the recommendation of the director is that no legislative action be taken.

Thus the class that would be affected by a fee which is made a required part of an application for 407 review would be only those groups or individuals who elect to avail themselves of the benefits of that process in order to persuade the Legislature that the rights of other persons should be infringed for the protection of the public. The fee would operate generally and uniformly on everyone in that class. So long as that fee is reasonably related to the costs incurred in making such a review, we conclude the classification is a permissible one.

Conclusion

We have concluded that the Legislature may impose a fee as a required part of the application for a 407 review without violating the constitutional provisions discussed above so long as that fee bears a reasonable relationship to the costs incurred in the process.

Sincerely yours,

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APPROVED BY:

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