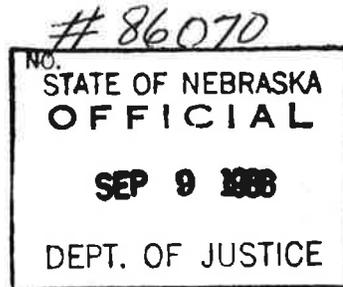


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



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Attorney General
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September 3, 1986

SUBJECT: Definition of Public Office and Constitutionality of Neb.Rev.Stat. §48-609 (1985 Supp.).

REQUESTED BY: Ronald E. Sorenson, Commissioner of Labor, Nebraska Department of Labor

WRITTEN BY: Robert M. Spire, Attorney General; Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion concerning the constitutionality of Neb.Rev.Stat. §48-609 (1985 Supp.). The specific question raised by your request is whether §48-609 precludes an employee of the Department of Labor from candidacy for election to the Board of Governors of the Southeast Community Technical College. It is our opinion that an employee of the Department of Labor may not be a candidate for this position and at the same time continue employment with the Department of Labor.

Section 48-609 generally authorizes the Commissioner of Labor to appoint officers, accountants, and other persons to carry out the duties and responsibilities of the Employment Security Laws (§§48-601 to 48-669) of the State of Nebraska. Section 48-609 further provides, in part, that:

. . . No person who is an officer or committee member of any political party organization or who holds or is a candidate for any public office shall be appointed or employed under the Employment Security Law. . . .

The language of the statute is clear and unequivocal in its prohibitions and provides that no person who is a candidate for public office may be employed by the Department of Labor.

In arriving at this conclusion it is necessary to consider whether an elected member of the Board of Governors of a technical community college is properly classified as a "public

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office". Public office has been defined by this office in previous opinions. See Report of the Attorney General, 1979-1980, No. 134 at 189. A public office has been defined as a duty, charge, or a place of trust, a position of which statutory duties have been attached. The Nebraska Supreme Court has further defined a public officer as an incumbent of a public office, which is the right, duty and authority conferred by law, by which for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public. Home Savings and Loan Ass'n v. Corrico, 123 Neb. 25, 241 N.W. 763 (1932). For further analysis of what constitutes a public office, you are referred to the Iowa Supreme Court Opinion of State v. Spaulding, 102 Iowa 639, 72 N.W. 288 (1897). Consistent with previous opinions, we advise you that an elective position to the Board of Governors of a community college is a public office.

You have further inquired as to the constitutionality of §48-609. Your question is generally whether or not this legislation infringes upon the rights of free speech and association guaranteed by the First Amendment or is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. While the statute is far-reaching to correct the abuses within its contemplation, it is our opinion that §48-609 is constitutional.

In considering the constitutionality of §48-609, it is appropriate to review the history of the Hatch Political Activity Act, 5 U.S.C.A. §118; et seq., and related legislative enactments. Section 48-609 and other statutes which regulate the political activity and conduct of public employees are commonly referred to as "mini-Hatch Acts" because these statutes have been patterned after the Hatch Act. The Hatch Act was enacted for a two-fold congressional purpose to protect tenure of government employees by taking political activity out of employment, promotion, and dismissal of government employees, and to take government employees out of political activity. United Federal Workers of America (C.I.O.) v. Mitchell, D.C. 56 F.Supp. 621, affirmed 67 S.Ct. 556, 330 U.S. 75, 91 L.Ed. 754 (1947). The Hatch Act which declares unlawful certain specified activities of federal employees or employees of state or local agencies financed by loans or grants from the United States, has generally been held to be constitutional in its application to particular individuals or agencies. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); United States Civil Serv. Comm. v. National Ass'n of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

The majority of the case law has generally upheld the constitutionality of statutes and regulations prohibiting dual office-holding. In addition, constitutional and statutory

provisions frequently prohibit not only the holding of incompatible offices, but the holding of more than one office, whether or not the positions held would be incompatible under the common law rule. Doyle v. City of Dearborn, 370 Mich. 236, 121 N.W.2d 473 (1963); 63 A Am.Jur.2d Public Officers and Employees §64 (1984); 3 McQuillin, Municipal Corporations, §12.66 (3 ed. rev. 1973).

You have further indicated that prohibitions applicable to other state employees are not as restrictive as those pertaining to employees of the Department of Labor. This raises the question whether the exclusion of other state employees from the same prohibitions is violative of the equal protection clause of the Fourteenth Amendment. This type of argument has generally been rejected by the courts. Distinctions which result from the application of law are not unreasonable under the equal protection clause where any set of facts can be conceived which would sustain the distinctions. The Supreme Court of Oklahoma, in construing a statute which precluded a district attorney from running for any office which had term, held that the statute was not invidiously discriminatory under either the rational basis or strict scrutiny test. Oklahoma State Election Board v. Coats, Oklahoma, 610 P.2d 776 (1980).

There are various Nebraska statutes which serve to regulate the political activity and conduct of public employees. These restrictions are matters on which the legislature shall determine and their validity has been upheld. The Nebraska Supreme Court in Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950) upheld the constitutionality of a Nebraska statute which generally provided that no person should be eligible to be a delegate either to a county, state, congressional, or preprimary convention who held a position or employment under the government of the United States or the state. The Court, in holding the statute to be valid, added that even though the statute was more burdensome than necessary to accomplish its purpose, the remedy lay with the legislature and not the court.

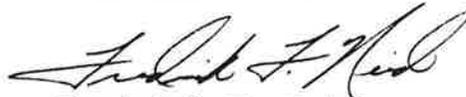
The courts have favored constitutionality over unconstitutionality when construing constitutional and statutory provisions concerning restrictions on political activity of public officers and employees. Although §48-609 is admittedly burdensome in its prohibitions, it cannot be said with any degree

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of certainty that the provision is unconstitutional due to the existing case law upholding statutory provisions prohibiting officers particularly named, or of a certain class from holding other offices.

Very truly yours,

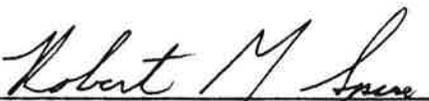
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