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NO. STATE OF NEBRASKA
OFFICIAL
MAY 27 1993
DEPT. OF JUSTICE

DATE: May 27, 1993

SUBJECT: LB 632 and AM1909: Creation of Handicapped Parking Civil Violation

REQUESTED BY: Senator Scott Moore
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

LB 632 (1993), as amended by AM1909 (1993), creates a "handicapped parking civil violation" for the violation of any statute or ordinance regulating the use of parking spaces designated for handicapped or disabled persons. LB 632, § 1. The bill allows peace officers to issue citations for alleged violations, but also grants cities and villages the authority to designate by ordinance "any person" to issue such citations. *Id.* Commission of such a violation is classified as a civil matter and is punishable by monetary penalty. AM1909, §§ 2, 3.

LB 632 and AM1909 set forth detailed procedures regarding the manner in which alleged violations are handled. After the alleged violator is served with a citation, the county attorney or other legally authorized person either files a complaint regarding the violation or chooses not to do so. AM1909, § 7. The alleged violator then appears in court to admit or deny the allegations of the complaint. If the allegations are admitted, the court enters judgment for the state and imposes a civil sanction. If the allegations are denied, the court sets the matter for an informal hearing without a jury. *Id.*

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At this informal hearing, the state must prove the alleged violation by a preponderance of the evidence, and the rules of evidence generally do not apply. The alleged violator may be represented by counsel. *Id.* Although not explicitly outlined in the bill, we assume that the alleged violator would have the rights to confront and cross-examine witnesses called to testify against him or her and to present evidence on his or her own behalf. The court may dismiss the allegation or impose a civil sanction which conforms with the range provided in section 3 of AM1909. *Id.* Any party may appeal the judgment of the court to the Nebraska Court of Appeals. AM1909, § 8.

You have requested our opinion regarding the constitutionality of (1) classifying the above-described violations as civil matters, and (2) allowing municipalities to enact ordinances which designate that certain civilians may issue citations for alleged violations of the proposed law. You are especially concerned that these provisions might violate principles of due process. For the reasons outlined below, we believe the Legislature has the authority to classify offenses as civil or criminal and to authorize municipalities to designate civilian personnel who may issue citations for handicapped parking civil violations.

The Legislature has plenary legislative authority, which is limited only by the Nebraska and U.S. Constitutions. The state constitution is not a grant of power like the federal constitution, but is instead a limitation of power. ***State ex reel. Creighton Univ. v. Smith***, 217 Neb. 682, 353 N.W.2d 267 (1984); ***Lenstrom v. Thone***, 209 Neb. 783, 311 N.W.2d 884 (1981); ***Consumers Coal Co. v. City of Lincoln***, 109 Neb. 51, 189 N.W. 643 (1922).

> We look . . . in the Constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. . . . The law-making power of the state recognizes no restraints, and is bound by none, except such as are imposed by the Constitution.

Consumers, 109 Neb. at 64-65, 189 N.W. at 648 (emphasis deleted). Thus, the Legislature may legislate on any subject not inhibited by the state or federal constitutions, and restrictions on this legislative power will not be inferred unless the restriction is clearly implied. ***Creighton***, 217 Neb. at 688, 353 N.W.2d at 271; ***Lenstrom***, 209 Neb. at 789-90, 311 N.W.2d at 888.

We find nothing in the state or federal constitutions which would inhibit or restrict the Legislature in classifying cases involving handicapped parking violations as civil matters and in

authorizing municipalities to designate those civilian personnel who may issue citations for such violations. Specifically, these provisions do not appear to violate the principles of procedural or substantive due process.

The Fourteenth Amendment to the U.S. Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law." A nearly identical provision appears in article I, section 3, of the Nebraska Constitution. "Procedural" due process means that the state can take life, liberty, or property only when certain procedures are followed, and "substantive" due process prevents certain types of state action regardless of the procedures that are followed or available. ***Weimer v. Amen***, 870 F.2d 1400 (8th Cir. 1989). ***See also Rein v. Johnson***, 149 Neb. 67, 30 N.W.2d 548 (1947), ***cert. denied***, 335 U.S. 814 (1948) (due process is satisfied with regard to legislation if the legislature has power to act; that power is not exercised in an arbitrary, capricious, or unreasonably discriminatory manner; and the act has a reasonable relationship to a proper legislative purpose).

Procedural due process is "a flexible concept calling for such procedural protections as are appropriate in a particular situation." ***Bosselman, Inc. v. State***, 230 Neb. 471, 475, 432 N.W.2d 226, 229 (1988). "'Due process has been held to require that adjudication be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.'" ***Howard v. City of Lincoln***, 243 Neb. 5, 13, 497 N.W.2d 53, 58 (1993) (quoting ***Kirshen v. Kirshen***, 227 Neb. 479, 481, 418 N.W.2d 558, 560 (1988)). Substantive due process, on the other hand, involves state action which shocks the conscience or otherwise offends our judicial notions of fairness. The conduct involved must be "'offensive to human dignity.'" ***Weimer***, 870 F.2d at 1405 (quoting ***New v. Minneapolis***, 792 F.2d 724, 726 (8th Cir. 1986)).

Assuming that the interests involved in receiving a citation for a handicapped parking civil violation are significant enough to invoke due process protections, the procedural protections provided under LB 632, as amended by AM1909, seem constitutionally adequate. As described above, the proposed law provides for notice of alleged violations and pending court dates, as well as the opportunity to be heard in court. The alleged violator may be heard in both a preliminary hearing where he or she admits or denies the allegations, and in a later informal hearing--with counsel if desired--where the state is required to prove the violation by a preponderance of the evidence. Further, any party may appeal the lower court's judgment to the Nebraska Court of Appeals.

Similarly, classifying handicapped parking violations as civil matters and authorizing cities and villages to designate by ordinance persons who have the authority to issue citations do not shock the conscience. These provisions are not the type of "abusive governmental action completely prohibited by due process." ***Weimer***, 870 F.2d at 1406.

Our conclusions are supported by general case law concerning a legislature's power to classify offenses as civil or criminal and a municipality's power to supplement its police protection with specially designated personnel.

It is within a legislature's power to define and classify public offenses as civil or criminal and to prescribe appropriate punishments. ***Adams v. City of Pocatello***, 91 Idaho 99, 416 P.2d 46 (1966) (legislature's function to enact police regulations governing citizen conduct and corresponding penalties to be enforced by the executive branch for violations); ***Anderson v. Commercial Credit Co.***, 110 Mont. 333, 101 P.2d 367 (1940) (laws providing penalties like civil fines usually sustained as being within legislature's power); ***State v. Pettit***, 233 Neb. 436, 445 N.W.2d 890 (1989) (legislature has power to define crimes and punishment within constitutional boundaries); 16 C.J.S. *Constitutional Law* § 114, at 383 (1984).

Subject to the powers vested in it by state constitutional provisions and statutes, a city may supplement the police protection it offers by authorizing private persons to perform some of its police functions. ***People v. Perry***, 27 Ill. App. 3d 230, 327 N.E.2d 167 (1975) (upheld city ordinance which allowed appointment of special police persons for guarding individual buildings, premises, persons, or property; ordinance fell within city's obligation to protect people and property; reasonable for city to deputize individuals to perform limited functions in order to improve safety for all); ***Frank v. Wabash R.R. Co.***, 295 S.W.2d 16 (Mo. 1956); ***K-Mart Corp. v. St. Louis County***, 672 S.W.2d 127 (Mo. Ct. App. 1984); ***Caronia v. Civil Serv. Comm'n***, 6 N.J. Super. 275, 71 A.2d 135 (App. Div. 1950) (upheld statute which allowed municipality to appoint special police persons for limited and special purpose of escorting school children across street); ***State v. Clark***, 10 Ohio App. 3d, 462 N.E.2d 436 (1983) (municipality may confer upon auxiliary police such powers as are necessary to discharge assigned duties); ***Surry v. City of Seattle***, 14 Wash. 2d 350, 128 P.2d 322 (1942) (city ordinance allowed appointment of private persons as special police to serve without city compensation); 16A Eugene McQuillin, The Law of Municipal Corporations § 45.06.10, at 32 (3d ed. 1992); 3 C. Dallas Sands & Michael E. Libonati, Local Government Law § 18.03, at 18-10 (1982).

Since LB 632 and AM1909 would explicitly vest cities and villages with the authority to enact ordinances designating who may issue citations for handicapped parking civil violations, it would obviously be within those municipalities' powers to appoint private persons for that limited purpose. *See* Charles S. Rhyne, The Law of Local Government Operations § 19.1, at 447 (1980) (municipalities can exercise only those powers conferred by the legislature).

Conclusions

The Nebraska Legislature may constitutionally classify handicapped parking violations as civil matters and may authorize municipalities to provide by ordinance that certain civilians may perform the limited function of issuing citations for such violations.

Although you did not specifically ask about the standard by which the state must prove its case in handicapped parking violation cases, we would like to take this opportunity to comment on the "preponderance of the evidence" standard provided in section 7(4) of AM1909. While we have concluded that the Legislature may label the violations at issue as civil matters, it should be noted that the Nebraska Supreme Court has held that traffic infractions are criminal offenses for purposes of the double jeopardy provision in article I, section 12, of the Nebraska Constitution, "notwithstanding the legislative labeling of a traffic infraction [as] a civil offense." *State v. Knoles*, 199 Neb. 211, 215, 256 N.W.2d 873, 875 (1977). *See also State v. Clayton*, 584 P.2d 1111 (Alaska 1978) (prosecution for traffic infraction is quasi-criminal proceeding to which some criminal procedures, like issuance of warrants, apply). *But see United States v. Ward*, 448 U.S. 242 (1980), *reh'g denied*, 448 U.S. 916 (1980) (case involving assessment of monetary penalty under federal act was not criminal within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination); *State v. Anton*, 463 A.2d 703 (Me. 1983) (traffic infraction proceedings not criminal prosecutions to which right to jury trial applies).

As noted above, courts have varied in designating which criminal procedures or standards, if any, are applicable to seemingly civil matters. However, the criminal degree of persuasion, "beyond a reasonable doubt," generally has been held inapplicable to civil actions--including actions for statutory penalties--unless such civil cases involve the drastic impairment of liberty and reputation. McCormick on Evidence § 341, at 964 (Edward W. Cleary, ed., 3d ed. 1984) (citing civil cases involving designation of mentally disordered sex offenders as examples of drastic impairment of liberty and reputation); 9 John H. Wigmore,

Evidence § 2498, at 421-22 (James H. Chadbourn, rev., 1981). *See also* 31A C.J.S. *Evidence* § 103, at 167 (1964) (burden of proof is a matter of policy; not objectionable to convert burden of proof to a statutory rule of substantive law; state has virtually unrestricted power to change rules of evidence regarding burden of proof); 16 C.J.S. *Constitutional Law* § 129, at 416 (1984) (legislature may regulate burden of proof and the extent of proof required).

Since the civil sanctions authorized in the bill are fairly modest and are not a drastic impairment of liberty and reputation, the "preponderance of the evidence" standard in the proposed bill is probably correct. However, you should be aware that certain criminal procedures may attach to handicapped parking violation proceedings, regardless of the "civil" label the Legislature attaches to those proceedings.

Sincerely,

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

Approved By:

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