

Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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NO. STATE OF NEBRASKA OFFICIAL
FEB 28 1989
DEPT. OF JUSTICE

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DATE: February 27, 1989
SUBJECT: Constitutionality of LB 595, the Chemically Impaired Professionals Act; Does LB 595 involve an unconstitutional delegation of legislative authority?
REQUESTED BY: Senator Dan Lynch
Nebraska State Legislature
WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

You have requested our opinion on LB 595, the Chemically Impaired Professionals Act. Specifically, you question whether provisions of the bill involve an impermissible delegation of legislative authority. We believe that there are constitutional problems with various portions of the bill. Our conclusions are discussed below.

LB 595, the Chemically Impaired Professionals Act, is apparently designed to provide a procedure to deal with and rehabilitate chemically impaired health professionals as an alternative to disciplinary proceedings against their professional licenses. Under the terms of the bill, a "monitoring body" would be designated for each health profession. The monitoring body, except in certain enumerated circumstances, would monitor the evaluation, treatment and rehabilitation of health professionals who are chemically impaired from the use of alcohol or drugs. Participation in a rehabilitation program authorized by a monitoring body would result in immunity from criminal prosecution and license suspension or revocation. The Department of Health could appoint "any qualified individual or group" to be a monitoring body. Therefore, under LB 595, a monitoring body could include private individuals or private groups.

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Senator Dan Lynch
February 27, 1989
Page -2-

When dealing with the delegation of authority to private individuals or groups, the general rule in Nebraska is that the Legislature may not delegate to private individuals either legislative or judicial functions. Summerville v. North Platte Valley Weather Control District, 170 Neb. 46, 101 N.W.2d 748 (1960); Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1954); Elliott v. Wille, 112 Neb. 78, 200 N.W. 347 (1924). There is some authority from other jurisdictions which indicates that private persons may be employed in an administrative capacity to carry a law into effect. See, 16 C.J.S. Constitutional Law §141, p. 454. However, there are no such cases in Nebraska, and we have previously taken the position that private individuals may not exercise governmental authority. For example, in our recent Opinion No. 89009, we indicated that the Nebraska School Activities Association could not be empowered to waive certain statutory waiting periods established under LB 183. Consequently, to the extent that LB 595 would allow a delegation of legislative or judicial authority to private individuals or private groups, it is suspect.

It seems to us that several portions of LB 595 would permit the delegation of legislative or judicial authority to the private individuals or private groups which might form a monitoring body under the bill. For example, when read together, sections 22 and 25 of the bill would allow a monitoring body to agree on a rehabilitation program for a chemically impaired health professional. The agreement would be on forms approved by the Department of Health, but the particulars of the agreement would be left to the monitoring body. This appears to allow a private body to independently make agreements affecting licensing decisions. Moreover, since such an agreement includes criminal immunity, the sections would, in effect, allow a private body to independently confer criminal immunity. In addition, section 23 of LB 595 would allow a monitoring body to independently make decisions concerning surrender or holding a professional license, and under section 30 of the bill, a monitoring body could independently restore a professional license. Finally, it appears to us that section 32(2) of LB 595 would allow a monitoring body to independently set fees for practitioners who participate in a rehabilitation program without any guidelines as to the amount of those fees. All of these provisions involve situations where a private individual or group could independently exercise legislative or judicial authority. Therefore, we believe that those provisions of the bill are impermissible.

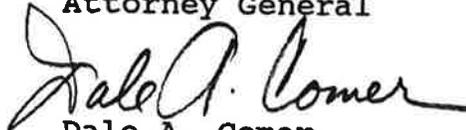
On the basis of your opinion request letter, you apparently believe that the situation envisioned by LB 595 would be little different than that where an agency contracts with other entities to perform certain functions. However, it seems to us that having a private entity independently make decisions and exercise

Senator Dan Lynch
February 27, 1989
Page -3-

legislative or judicial authority is quite different than contracting for a service to be performed under the supervision and with the approval of a governmental entity.

Sincerely yours,

ROBERT M. SPIRE
Attorney General

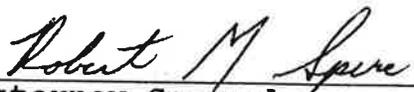


Dale A. Comer
Assistant Attorney General

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

APPROVED BY:



Attorney General