



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

August 24, 2017

Senator Burke Harr, District 8
Nebraska Legislature
State Capitol, Room 2011
Lincoln, NE 68509

Dear Senator Harr,

I am in receipt of your letter, first published in the Lincoln Journal Star on August 18th, but received by my office August 23rd.

Your letter demands that my office petition "the Court" to appoint a special assistant attorney general based upon your assertion that the law requires me to do so. Your only suggested legal authority for your assertion, quoting from your letter, is that the Nebraska Supreme Court's decision in *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984), stands for the proposition that "when the Attorney General's Office has a conflict in a criminal case, it *must* request the Court to appoint a special assistant attorney general to handle the case to cure the conflict." (emphasis in original). Your suggestion is incorrect.

Neither *Douglas*, nor other Nebraska case law, nor state statute enable the Attorney General to request that any court appoint a special assistant attorney general. Furthermore there exists no precedential authority that allows a court to make such an appointment - even on its own motion. Since authority for your proposition cannot be found in the *Douglas* opinion, I can only surmise that you are relying entirely on the case caption identifying attorneys, Richard G. Kopf, Wesley C. Mues, and Graten Beavers, as Special Assistant Attorneys General (SAAGs). Examination of the record in *Douglas*, which involved presentation of articles of impeachment on behalf of the Legislature against then-Attorney General Paul Douglas makes clear that SAAGs Kopf, Mues, and Beavers, were not appointed at the request of the Attorney General or any other member of the Department of Justice. Rather, the SAAGs were appointed directly by the Chief Justice Pro Tempore, on his own volition. The appointments of SAAGs Kopf, Mues, and Beavers is not

mentioned anywhere within the *Douglas* opinion itself, as the appointments were not relevant to the case. *Douglas* does not create any law on this subject whatsoever, provides no reliable guidance and does not provide any “well-established procedure,” as your letter contends. I simply cannot use my office to initiate a process that has no sound legal basis, particularly when the process you suggest is unnecessary.

The appointment of special assistant attorneys general is solely the prerogative of the Attorney General. Special assistant attorneys general are appointed by the Attorney General, act under the authority and direction of the Attorney General and possess no authority to prosecute any matter under any name other than that of the Attorney General. See, *Lower v. State*, 106 Neb. 666, 184 N.W. 174 (1921). The Court has reaffirmed this principle as recently as 2011, stating that “[t]he import of *Lower* is that when an assistant attorney general performs official acts that are within the authority of the Attorney General, he or she must do so on behalf of and in the name of the Attorney General rather than in his or her own name.” *State v. Williams*, 282 Neb. 182, 191, 802 N.W.2d 421, 429-30(2011).

What is clear from *Douglas* is that “the Attorney General is clothed and charged with all such common-law powers and duties except insofar as they have been limited by statute...” *Douglas*, 217 Neb. at 237, 349 N.W. 2d at 891. It is also clear that state statute expressly limits the power of this office in the matter that is the subject of your letter. Neb. Rev. Stat. § 81-2009(1) provides that “[t]he Attorney General, or a member of his staff, or a practicing attorney designated by the Attorney General, shall defend all civil and criminal actions instituted against the superintendent [of law enforcement] or any subordinate officer or employee of the Nebraska State Patrol arising from their employment.” As your letter acknowledges, this statute completely impedes the Attorney General’s usual prosecutorial prerogative.

While original criminal jurisdiction of the Attorney General and the Department of Justice is concurrent with that of Nebraska’s respective county attorneys, “the affirmative duty to prosecute all criminal matters is specifically placed upon the county attorney.” *Douglas*, 217 Neb. at 237, 349 N.W. 2d at 891. Nothing prevents the appropriate county attorney from carrying forward, as usual, with their “affirmative duty” by reviewing any investigative record referred to the county attorney or initiated by an appropriate federal, state, county, or municipal law enforcement agency for potential state law violations.

Accordingly, the Attorney General’s Office should not proceed as your letter demands. Moreover, this course of action neither hinders nor forecloses

the thorough investigation or proper prosecution of any alleged offenses in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas J. Peterson". The signature is fluid and cursive, with a large loop at the end.

Douglas J. Peterson
Attorney General of Nebraska

cc:

Senator Adam Morfeld, District 46
Senator Carol Blood, District 3
Senator Kate Bolz, District 29
Senator Ernie Chambers, District 11
Senator Sue Crawford, District 45
Senator Laura Ebke, District 32
Senator Matt Hansen, District 26
Senator Sara Howard, District 9

Senator Rick Kolowski, District 31
Senator Bob Krist, District 10
Senator Mike McDonnell, District 5
Senator Patty Pansing Brooks, District 28
Senator Dan Quick, District 35
Senator Paul Schumacher, District 22
Senator Tony Vargas, District 7
Senator Lynne Walz, District 15