DATE: August 26, 1994


REQUESTED BY: Allen J. Beermann
Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

During the 1994 legislative session, the Nebraska Legislature passed several legislative resolutions which proposed amendments to the state constitution. Under the provisions of Neb. Rev. Stat. § 32-707.01 (1988), the Executive Board of the Legislative Council is to prepare an explanatory statement for each of those proposed constitutional amendments which "in clear, concise language, [explains on the ballot] the effect of a vote for and against" the proposal. Those explanatory statements are to be "submitted to the Secretary of State not less than four months prior to the general election for certification to the county clerks and election commissioners along with the ballot titles." On July 8, 1994, the Chairman of the Legislature's Executive Board filed the requisite explanatory statements for the proposed constitutional amendments with your office. The general election will be held on November 8, 1994.

We have now received a copy of a letter from a Grand Island attorney, dated August 11, 1994, and directed to you, Governor Nelson and Attorney General Stenberg. In that correspondence, the attorney presents various arguments supporting his position that...
the ballot explanations prepared for the 1994 legislative
resolutions proposing state constitutional amendments were filed
with your office after the deadline established by Section 32-707.01. The attorney also argues that one specific constitutional
change proposed by the Legislature, LR2CA dealing with arbitration,
is unconstitutional. For these various reasons, the attorney asks
you and the other constitutional officers involved to withhold the
constitutional amendments proposed by the Legislature from the
ballot. Alternatively, he also threatens a mandamus action should
you and the other state officials place the proposed amendments on
the ballot or otherwise not undertake a declaratory judgment action
to litigate the matters raised in his letter. You have now asked
for our views, in light of the attorney’s correspondence, as to
whether the constitutional amendments proposed by the Legislature
should be placed on the ballot. We believe that they should be
submitted to the voters in the November general election.

The attorney initially argues that the ballot explanations in
question should have been filed with your office by July 6, 1994,
in order to meet the requirements of a filing "not less than four
months prior to the general election." This argument is based upon
the notion that a minimum four-month time period must elapse from
the filing of the statements to the date of general election, and
generally governs the computation of time and provides that the
first day of any statutory time period is excluded in time
computation while the last day is included.

The argument based on Section 25-2221 notwithstanding, we
believe that this situation is clearly governed by the previous
decision of the Nebraska Supreme Court in State ex rel. Morris v.
Marsh, 183 Neb. 521, 162 N.W.2d 262 (1968). In that case, the
court considered whether an initiative measure was timely filed on
July 5, 1968, for the general election on November 5, 1968, under
a constitutional provision which required that "the [initiative]
petition shall be filed with the Secretary of State, who shall
submit the measure . . . at the first general election held not
less than four months after such petition shall have been filed." The
court ultimately stated,

There is little or no dispute that in terms of a full day
and an exact date, November 5 is a date exactly 4 months
after July 5. The respondent attempts to read the
language of the Constitution as requiring the election to
be held more than 4 months after the filing of the
petition, instead of "not less than 4 months." (Emphasis
ours.) The district court’s computation was correct.

We hold that a requirement than an initiated measure
be submitted at the first general election held not less
than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5.

Id. at 526, 527, 162 N.W.2d at 266, 267. (Emphasis in original). In a similar fashion, we believe that the filing by the Executive Board on July 8 for a general election on November 8 satisfies the requirements of Section 32-707.01.

Apart from the question of whether the filing of ballot explanations by the Executive Board was timely under the statutes, there is a greater question as to the effect of a late filing. In other words, if we assume, for the sake of argument, that the July 8 filing was late under Section 32-707.01, does that late filing authorize you to refuse to place the constitutional amendments proposed by the Legislature on the November ballot? Based upon our research, we do not believe that such a late filing would warrant that result.

The Nebraska Supreme Court has stated that,

The two important, vital elements in any constitutional amendment are the assent of two-thirds of the Legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials in secured. But they are not themselves the essentials.

State ex rel. Thompson v. Winnett, 78 Neb. 379, 388, 110 N.W. 1113, 1116 (1907). Based, in part, upon this reasoning, the Nebraska Supreme Court has indicated that substantial compliance with the constitutional requirements regarding amendment of the state constitution is sufficient to amend that document. Duggan v. Beermann, 245 Neb. 907, ___ N.W.2d ___ (1994); Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937); State ex rel. Hall v. Cline, 118 Neb. 150, 224 N.W. 6 (1929); State ex rel. Thompson v. Winnett, supra. For example, in the Swanson case, the court indicated that notice of a constitutional amendment was sufficient even though newspaper publications in one county of the state were not made on the correct dates and newspaper publications in three other counties were not made the required number of times.

The filing requirements in Section 32-707.01 are statutory rather than constitutional. If substantial compliance with constitutional requirements is sufficient for amendment of the state constitution, then surely substantial compliance with statutory requirements is satisfactory as well. Given that premise, we believe that filing ballot explanations two days late is substantial compliance with Section 32-707.01, and would not
justify removing the proposed constitutional amendments from the ballot.

Finally, the attorney from Grand Island takes specific issue with LR2CA, a proposed constitutional amendment which would permit arbitration in Nebraska. He argues that this constitutional amendment would, in itself, be unconstitutional in several respects. On that basis, he asks that you exercise your authority and refuse to place that proposed amendment on the ballot.

The Nebraska Supreme Court has indicated that, unless the subject of a proposed initiative or referendum petition is invalid or unconstitutional on its face, the Secretary of State cannot pass upon the validity or construction of any proposed law when the petition is presented for filing and placement on the ballot. State ex rel. Brandt v. Beermann, 217 Neb. 632, 350 N.W.2d 18 (1984). This rule includes initiatives to amend the state constitution. By analogy, we believe that this rule applies equally in the present situation where the Legislature has presented duly enacted resolutions amending the constitution for placement on the ballot. In our view, unless those legislative resolutions exhibit some facial flaw, you do not have the authority to pass upon their constitutionality and to refuse to place them on the ballot. In that regard, we do not believe that LR2CA is unconstitutional on its face. Consequently, you should place it on the ballot for consideration by the people of Nebraska.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

Approved by:

[Signature]

Attorney General