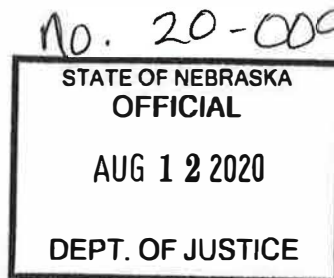




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Whether Noncompliance with the Legislature's Procedural Rules Invalidates Legislation [LB 814].

REQUESTED BY: Senator Megan Hunt
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

We are in receipt of your request for our opinion on the legal effect of alleged violations of legislative rules in advancing LB 814 to Final Reading. Our research and legal analysis of your questions are abbreviated given that your request letter is dated August 11, 2020, and we must respond prior to the scheduled adjournment of the legislative session on August 13, 2020.

Your request contained several questions: (1) "What is the legal consequence of failing to formally read and introduce a bill on General File, the first step of full legislative debate?" (2) "Is this oversight in compliance with basic, fundamental legislative rule and policy fatal to the validity of LB 814?" (3) "Can this misstep or oversight be corrected by returning LB 814 to General File or Committee to cure this procedural defect?" (4) "Given the lack of procedural compliance, can the passage and enactment of LB 814 be challenged in court should it be passed and signed by the Governor?" These questions may be succinctly summarized as asking what effect the Legislature's alleged failure to adhere to its procedural rules, occurring sometime between when a bill is filed on the

Legislature's Agenda for General File and when it is filed on the Legislature's Agenda for Final Reading, may have on the validity of that bill if it becomes law.

Your questions pertain to legislative rules that govern the stages of the legislative process. Your request makes specific reference to an alleged violation of Rule 6, Sec. 3 of the Rules of the Nebraska Unicameral Legislature. From the remaining context of your letter it appears that your other procedural concerns pertain to alleged violations of Rule 6, Sec. 5. Your request does not assert a violation of any other legislative rules, statutes or constitutional provisions. As your request pertains solely to rules of the Legislature regarding the stages of the legislative process, our opinion is likewise limited to such rules.

Because the Nebraska Supreme Court generally declines to review the Legislature's compliance with its own procedural rules, we conclude that any of the alleged procedural failings you have raised concerning LB 814 likely would not jeopardize its validity should it become law.

ANALYSIS

Article III, § 10 of the Nebraska Constitution states, in part: "[T]he Legislature shall determine the rules of its proceedings . . ." This Office has previously stated that "[u]nder this provision the Legislature has complete authority to determine the rules of its own proceedings 'in the absence of constitutional restraints.'" Op. Att'y Gen. No. 145 (November 3, 1981) (citing *State ex rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625 (1955)). Whether the Legislature complied with its own rules when enacting a bill is a question that the Nebraska Supreme Court has declined to review, "absent a constitutional issue," once the Legislature itself has determined that the bill has been passed in compliance with its rules. *DeCamp v. State*, 256 Neb. 892, 896, 594 N.W.2d 571, 574 (1999). "Where no definitive guidance is provided by the Constitution, [the Court is] required to give deference to the actions of the legislative branch in determining whether the statute was validly enacted." *Id.* at 895, 594 N.W.2d at 573. This judicial deference to the Legislature is consistent with—if not required by—the separation of powers provision in art. II, § 1 of the Nebraska Constitution.

Nebraska courts are not alone in their deferential approach to these cases. The precept that compliance with these kinds of legislative rules presents a nonjusticiable question, unless the legislative procedure is mandated by the constitution, is reflected in case law from a number of other jurisdictions. See 16 C.J.S. *Constitutional Law* § 425 (June 2020).

The Wisconsin Supreme Court, for example, recently confirmed that the separation of powers doctrine precludes judicial review of whether a legislative body complied with internal operating rules in enacting a statute. *League of Women Voters of Wisconsin v. Evers*, 387 Wis. 2d 511, 929 N.W.2d 209 (2019) [*League of Women Voters*]. "[U]nder separation of powers concepts and affording the comity and respect due a co-equal branch of state government," the judiciary may not "interfere with the conduct of legislative

affairs.” *Id.* at 537, 929 N.W.2d at 222. “When the legislative process has been completed, a court may then in a proper case consider whether the power of the legislature has been constitutionally exercised or whether the law enacted in the exercise of its power is valid.” *Id.* (quoting *Goodland v. Zimmerman*, 243 Wis. 459, 469, 10 N.W.2d 180 (1943)). “The process by which laws are enacted, however, falls beyond the powers of judicial review.” *League of Women Voters*, 387 Wis. 2d at 537, 929 N.W.2d at 222. Noting that the constitution “confers discretion on the Legislature to determine for itself the rules of its own proceedings,” the court stated it “[would] not intermeddle in what we view, in the absence of constitutional directives to the contrary, to be purely legislative concerns[.]” *Id.* at 539, 929 N.W.2d at 223 (quoting *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364, 338 N.W.2d 684 (1983) [*La Follette*]). The court explained that

[d]eclining to “inquire into whether the legislature has complied with legislatively prescribed formalities in enacting a statute” springs from the principles of “separation of powers and comity.” . . . “[T]he legislature’s adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution.” . . . “If the legislature fails to follow self-adopted procedural rules in enacting legislation, and such rules are not mandated by the constitution, courts will not intervene to declare the legislation invalid.” *Id.* at 539-40, 929 N.W.2d at 223 (quoting *La Follette*, 114 Wis. 2d at 364-65, 338 N.W.2d 684)).

The court concluded by noting the legislature is “accountable to the people...for any failure to follow its self-imposed statutory or procedural rules.” *League of Women Voters*, 387 Wis. 2d at 540, 929 N.W.2d at 223. “Provided the Legislature acts in accordance with its mandates, the constitution confers no power on the judiciary to enjoin or invalidate laws as a consequence for deficiencies in the implementation of internally-imposed legislative procedures.” *Id.*

Numerous state courts agree with the Wisconsin Supreme Court that a legislature’s failure to follow its procedural rules does not invalidate legislation. *E.g.*, *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996) (“[T]he legislature has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation.”); *Starr v. Governor*, 154 N.H. 174, 178, 910 A.2d 1247, 1251 (N.H. 2006) (“We will not declare a legislative act invalid for failure of a house to observe its own rules.”); *Board of Trustees of the Judicial Reform Retirement System v. Attorney General*, 132 S.W.3d 770, 777 (Ky. 2003) (“[O]ur Constitution authorizes the General Assembly to establish rules governing its own proceedings. So long as those rules do not violate some other provision of the Constitution, it is not within our prerogative to approve, disapprove, or enforce them.”); *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 633, 716 N.E.2d 704, 708 (Ohio 1999) (“[I]t is well settled that, in considering the validity of a statute, courts will not inquire into whether the legislature complied with its own rules in enacting the statute, as long as no constitutional provision is violated.”);

State v. Gray, 221 La. 868, 874, 60 So .2d 466, 468 (La. 1952) (“[I]t is well settled that an act of the Legislature will not be declared void or invalid for failure of the legislative body to observe its own rules of procedure.”).

Although the Nebraska Constitution includes some procedural requirements for the Legislature to follow, it does not appear that any of those requirements are violated by the procedural issues you raised. Article III, § 13, for example, requires “the assent of a majority of all members elected” and demands that “the yeas and nays on the question of final passage of any bill be entered upon the journal.” (Emphasis added.) But those requirements are not implicated by your request. Nor is the requirement in art. III, § 14 that every bill be “read by title when introduced” implicated as the title of LB 814 was read when introduced on January 8, 2020. Floor Debate on LB 814, 106th Leg., 2nd Sess. at 15 (Jan. 8, 2020 (Rough Draft)). The remaining procedural requirements in art. III, § 14 are also irrelevant because they apply only to the vote taken upon final passage of a bill. The procedural concerns you raise pertain to legislative rules that govern the Legislature’s action in consideration of a bill on General File and Select File, respectively. These particular legislative rules do not correspond to any discrete mandate of the Nebraska Constitution governing legislative procedure, and therefore challenges to compliance with those rules present nonjusticiable questions.

In *DeCamp*, the Nebraska Supreme Court demonstrated the important distinction between constitutionally imposed legislative requirements and legislatively created internal procedures. The court initially determined whether the bill at issue complied with the requirement in art. III, § 14 that a bill be “on file for final reading and passage for at least one legislative day.” But when the court turned to compliance with legislatively created rules, it deferred to the Legislature. Specifically, the court concluded that the Legislature had itself determined that the bill satisfied the requirements of Legislative Rule 6, Sec. 7 by passing the bill in compliance with all other constitutionally imposed legislative procedures. *DeCamp*, 256 Neb. at 896, 594 N.W.2d at 574. Consistent with this reasoning, should LB 814 pass in accordance with constitutional requirements, Nebraska courts would likely conclude that the Legislature itself deemed the bill to have been properly enacted, regardless of the concerns you have raised.

CONCLUSION

Based on the information currently available to us, we conclude that none of the procedural concerns articulated in your request regarding LB 814 presents a constitutional issue. Further, based on the widely held view that courts will not invalidate statutes based on the failure of a legislative body to observe its own rules, Nebraska courts would not likely entertain a challenge to LB 814 if enacted based on the procedural issues raised in your request.

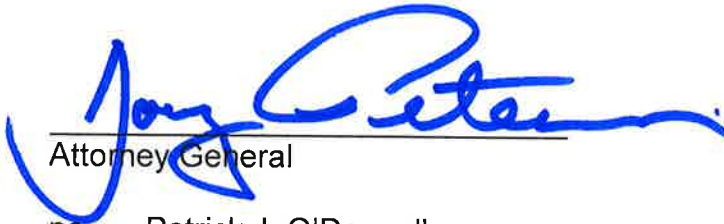
Very truly yours,

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Attorney General



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Approved by:



Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature