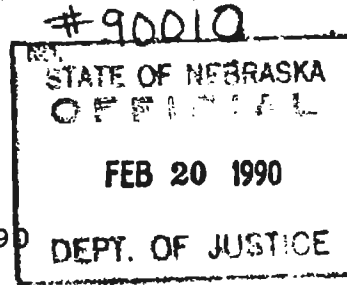


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA • STATE CAPITOL

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ROBERT M. SPIRE
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DATE: February 15, 1990

SUBJECT: Legislative Confirmation of Gubernatorial Appointments

REQUESTED BY: Senator Loran Schmit and Senator Ron Withem
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

During the special session of the Nebraska Legislature which convened in November, 1989, Governor Orr submitted a number of gubernatorial appointments to the Legislature for confirmation as required by various constitutional and statutory provisions. On the seventh legislative day of the session, November 17, 1989, the Legislature, by majority vote, permitted the Committee on Education and the Committee on Natural Resources to hold certain of those appointments in committee for action at a later date. 91st Nebraska Legislature, First Special Session, Legislative Journal at page 154. You have now asked for our opinion as to the status of those appointments neither approved or disapproved by the Legislature in the special session. You have also asked for our opinion as to the status of various other pending gubernatorial appointments which were not submitted to the Legislature for confirmation due to apparent administrative error. Our response to your questions is set out below.

There are two provisions in our Nebraska Constitution which deal with the appointment of individuals to nonelective state offices. Article IV, Section 10 of the Nebraska Constitution provides, in pertinent part:

The Governor shall appoint with the approval of a majority of the Legislature, all persons whose offices are established by the Constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no person shall be appointed or elected by the Legislature.

The pertinent portions of Article IV, Section 12 of the Nebraska Constitution also provide:

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If any nonelective state office, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment. If the Legislature is in session, such appointment shall be subject to the approval of a majority of the members of the Legislature. If the Legislature is not in session, the Governor shall make a temporary appointment until the next session of the Legislature, at which time a majority of the members of the Legislature shall have the right to approve or disapprove the appointment. All appointees shall hold their office until their successors shall be appointed and qualified.

Article IV, Section 10 obviously establishes the general appointment authority held by the Governor. On the other hand, Article IV, Section 12 deals with those situations where there is a vacancy in a particular nonelective state office. Both sections provide for legislative approval of gubernatorial appointments.

For purposes of this opinion, we will assume that the gubernatorial appointments at issue occurred when the Legislature was not in session. We also assume that those appointments were made at the end of a regular term of office, so that the individuals designated by the Governor were appointed to serve at the beginning of a new term.

As noted above, Article IV, Section 12 of the Nebraska Constitution allows the Governor to make a temporary appointment when the Legislature is not in session, and the individual so appointed can serve until the next session of the Legislature, when a majority of the Senators have the right to approve or disapprove the appointment. By previous opinion, we have indicated that, if the Legislature does not exercise that right of approval or disapproval during the next session, the appointee will serve until the end of the term for which he was appointed. See, 1973-1974 Report of the Attorney General, No. 56 at 75. As a result, if Article IV, Section 12 of the Constitution applies to the appointments at issue in the present instance, it would appear that the Legislature's failure to approve or disapprove the individuals involved at the November special session would allow those individuals to serve the remainder of their terms, and their status would be that of properly appointed officials. However, the initial portion of Article IV, Section 12, by its clear language, applies to situations where an office is "vacated by death, resignation or otherwise." Therefore, whether Article IV, Section 12 applies in the current situation turns on whether the end of a fixed term constitutes a "vacancy" in office which may be filled

by the Governor by means of a temporary appointment. If the end of a fixed term does not create such a vacancy, then the temporary appointment provisions of Article IV, Section 12 do not apply.

Neb.Rev.Stat. §32-1037 (Reissue 1988) sets out nine separate circumstances which create a vacancy in the civil offices of the state. Although that statute includes death and resignation as events which trigger a vacancy in conformance with Article IV, Section 12 of the Nebraska Constitution, that statute does not list the end of a fixed term as a situation creating a vacant office. Moreover, in an early case, our supreme court stated:

As a general rule the appointing power has no vacancy to fill upon the expiration of a term, where the incumbent is entitled to hold over until his successor is elected and qualified.

State ex rel. County Attorney v. Willott, 103 Neb. 798, 800, 174 N.W. 429, at 429 (1919). Since Article IV, Section 12 of the Nebraska Constitution does generally provide that, "all appointees shall hold their office until their successors shall be appointed and qualified," we believe that the end of a fixed term in Nebraska does not create a vacancy subject to the provisions of Article IV, Section 12 of the Nebraska Constitution.

Our research indicates that a majority of other authorities supports the proposition that the end of a fixed term does not create a vacancy in office when state law contains constitutional and statutory provisions similar to those in Nebraska. For example, in 164 A.L.R. 1248, 1249, it is stated:

The greater number of cases have held that during the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment.

Similarly, in 81A C.J.S. States §87, the rule is set out:

Generally, as well as under circumstances or statute so providing, no vacancy exists in an office where the incumbent holds over after expiration of his term until his successor is elected or appointed and has qualified . . .

See also, State ex rel. Gebelein v. Killen, 454 A.2d 737 (Del. 1982); State ex rel. Thompson v. Gibson, 22 Wis.2d 275, 125 N.W.2d 636 (1964); McCall v. Cull, 51 Ariz. 237, 75 P.2d 696 (1938); 63A Am.Jur.2d Public Officers and Employees, §146.

On the basis of these various authorities, we do not believe that the temporary appointment provisions of Article IV, Section 12 of the Nebraska Constitution apply to gubernatorial appointments made at the end of a fixed term. To the extent that our earlier opinion No. 56 from 1973 cited above implies a contrary result, that opinion is in error. We also believe that the status of the appointments in question must be determined from the general provisions of our Constitution dealing with appointments.

Article IV, Section 10 of the Nebraska Constitution provides that the Governor shall appoint various officers "with the approval of a majority of the Legislature." Where an appointment is made as a result of a nomination by one authority and confirmation by another, the appointment is not valid and complete until the actions of all bodies involved have been taken. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955); 67 C.J.S. Officers §42; 63A Am.Jur.2d Public Officers and Employees §117; 1931-1932 Report of the Attorney General, Opinion dated February 5, 1931 at 120. Consequently, the appointments of the officials in the present instance are not complete and final until they are approved by a majority of the Legislature.

However, the Legislature did not approve the appointments at issue during the special legislative session in 1989. Instead, the appointments were held in committee by a majority vote of the Legislature. In order to resolve your questions concerning the status of the gubernatorial appointments, we must necessarily determine whether this delay was constitutionally or statutorily permissible, and what effect, if any, it had on the status of the appointments submitted by the Governor.

In our view, portions of Article IV, Section 12 of our Nebraska Constitution require the Legislature to act on certain temporary gubernatorial appointments at its next session, or lose the right to disapprove those appointments. See, 1972-1973 Report of the Attorney General, Opinion No. 56 at 75. However, those provisions apply to temporary appointments made to fill vacancies and, as noted above, the appointments in the present instance were not made as a result of vacancies under Article IV, Section 12. Apart from those portions of Article IV, Section 12, we can find no other constitutional provisions which require legislative action on interim appointments at the next session, nor is there a statute which requires such results. Our supreme court has noted, however, that Article III, Section 10 of our state Constitution allows the Legislature to determine the rules of its own proceedings, and this power extends to the transaction of any legislative business and to the performance of any duty conferred upon the Legislature by the Constitution. State ex rel. Johnson v. Hagemeister, supra. On the basis of this constitutional provision, it appears that the

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propriety of the confirmation delays depends upon the Legislature's own rules.

Legislative Rule 3 Sections 3(e)(ii) through 3(e)(v) deal with the legislative confirmation of gubernatorial appointments. Those rules provide that the committee to which an appointment is assigned must prepare a report approving or rejecting the appointment which shall be filed with the Clerk of the Legislature. There is no time frame specified for that report, and nothing in those rules appears to prevent a committee from holding a nomination over from a special session to the regular session. On the other hand, Rule 2, Section 1 of the Legislature's rules provides that, in all matters not covered by the rules, "the Legislature shall decide as to the procedure to be followed, the same to require the concurrence of a majority of the elected members." A majority of the Legislature voted to allow the committees in question to hold the proffered appointments for later disposition. Therefore, the delay in the confirmation proceedings appears permissible and proper under the Legislature's rules, and also under our Constitution and statutes.

Your initial question concerns the status of those appointments which were neither approved nor disapproved by the Legislature in the November, 1989, special session. As set out in the analysis above, we believe that those appointments are not complete and final pending an approval by the Legislature. Moreover, the Legislature was not required to disapprove those appointments during the special session in order to preserve that right of disapproval. As a result, those appointments remain pending until the Legislature chooses to approve them by a majority vote.

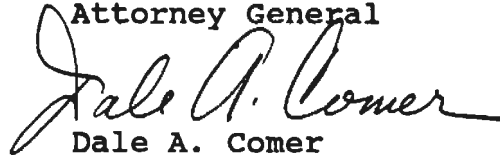
Your second inquiry is as to the status of pending appointments which, due to administrative error, were not forwarded to the Legislature for appropriate action during the special session. Again, on the basis of the analysis above, we believe that those appointments are not final until approved by the

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Legislature. They remain pending until submitted, and until the Legislature confirms them by majority action.

Sincerely yours,

ROBERT M. SPIRE
Attorney General

A handwritten signature in cursive script, reading "Dale A. Comer".

Dale A. Comer
Assistant Attorney General

5-156-2

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

APPROVED BY:

A handwritten signature in cursive script, reading "Robert M. Spire".
Attorney General