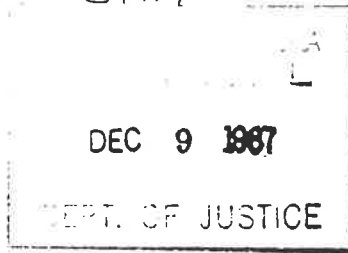


STATE OF NEBRASKA  
Department of Justice  
# 87114



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ROBERT M. SPIRE  
Attorney General



DATE: December 9, 1987

SUBJECT: Separation of Powers Between the Executive and  
Legislative Branches of Government in Relation to  
LB 683 (Nebraska Energy Settlement Fund)

REQUESTED BY: Governor Kay A. Orr

WRITTEN BY: Robert M. Spire, Attorney General

You have asked if LB 683 (Nebraska Energy Settlement Fund Legislation) violates the separation of powers provisions contained in Art. II of the Nebraska State Constitution. Our conclusion is that yes it does violate the separation of powers provisions, for the reasons I will explain below.

Perhaps some background information would be helpful here. Nebraska has received approximately 21 million dollars from several lawsuits for oil overcharges illegally made to Nebraska customers over ten years ago. A federal court ordered these payments to Nebraska along with similar payments to other states. Because of the practical impossibility of identifying individual users who were overcharged, the court did not reimburse specific users. Rather, the court distributed the money to the states with the requirement that the states use the restitutionary money for energy purposes.

The money received by Nebraska is subject to the federal court requirement that the Governor use it for energy programs which meet specific guidelines. These monies are being held in a separate state trust fund until used for the purposes ordered by the court. Some of these monies already have been disbursed pursuant to the court guidelines and other monies remain to be distributed in the future.

On January 16, 1987, our office issued an opinion regarding these funds in which we stated our conclusion that (1) overcharge funds are held by the state in a custodial manner (they are not "state" funds; they are held by the state for the specific purposes described in the federal court order); and (2) legislative appropriation is necessary for actual payment of these funds out of the state from the State Treasurer. For reference I attach a copy of this earlier opinion.

Governor Kay A. Orr  
December 9, 1987  
Page -2-

It is important to distinguish here between state and nonstate funds. State funds are those monies which are generated by state fees or state taxes. Nonstate funds are those which the state receives from outside sources. Examples of nonstate funds are the various federal grants which the state receives for specific purposes (such as grants to the state for the Department of Social Services to use to carry out the goals of certain designated federal programs).

The oil overcharge funds also are an example of nonstate funds. They are received by the state, not from a governmental agency, but through a federal court proceeding in which the funds have been awarded to the state to be used for the specific purposes set out in the federal court proceeding.

The Legislature must appropriate all funds (both state and non-state) before actual payment can be disbursed from the state. In other words, the State Treasurer cannot actually issue checks until there has been an appropriation authorizing the issuance of a warrant which in turn gives the State Treasurer the authority to write a check.

However, nonstate funds must be appropriated for purposes defined by the sources of the funds. For example, when the State of Nebraska receives a federal grant for a specific purpose this grant money must be appropriated by the Legislature for that specific purpose. And so it is with the oil overcharge funds. These must be appropriated by the Legislature pursuant to the specific purposes set out in the court order defining the use of the funds by the states. This means it is appropriate for the Governor to administer these funds within the court order guidelines.

In short, the federal court order grants these nonstate funds to the Governor to administer pursuant to the guidelines in the court order. These funds cannot actually be disbursed pursuant to the Governor's administration of them until the Legislature has appropriated them. The Legislature can only make this appropriation pursuant to the conditions set out in the federal court order. When it does so it is then the task of the Governor to administer the funds pursuant to those court order guidelines.

Let us now address LB 683:

LB 683 creates the Nebraska Energy Settlement Fund (Fund). The Fund consists of money received from awards or allocations to the State of Nebraska on behalf of consumers of petroleum products, as well as any investment interest earned on the Fund. The awards are a result of judgments or settlements in legal

Governor Kay A. Orr  
December 9, 1987  
Page -3-

actions brought on behalf of consumers of petroleum products who were overcharged for products sold during the period of time in which federal price controls on such products were in effect.

LB 683 further provides that the Governor shall develop a plan for the disbursement of money in the Fund. The Governor's plan must be in accordance with the court order awarding the funds, any applicable federal guidelines, and legislative guidelines contained within the bill. The bill then provides that the Governor must submit the plan to the Legislature. The Appropriations Committee of the Legislature shall then conduct a public hearing on the plan and the Legislature pass any appropriations therefor within 30 days. The State Energy Office is to be the administrative agency for selection of the projects, allocation of funds, and monitoring of the administration of the funds. No money is to be disbursed or expended from the Fund unless it is pursuant to an appropriation by the Legislature and in compliance with the guidelines set out in the bill. The bill further provides that the Governor is to submit a yearly report to the Legislature regarding projects receiving money.

Our concern with this bill relates to the requirement that the Governor submit a plan for expenditure of the funds to the Legislature and the Legislature's appropriation of funds based on its review of the plan. This appears to be an attempt by the Legislature to exercise executive functions, specifically, the executive function of administration of expenditures.

LB 683 at §3 provides that the Governor shall submit a plan to the Legislature to include certain specifics set out in the bill. The bill then provides for Legislative review of the executive plan and passage of any appropriations therefor. The Legislature is, in essence, requiring legislative approval before expenditure of the funds. The fact that the bill is written in terms of legislative approval for the appropriation does not alter the clear intent of the act requiring legislative approval for the expenditure. The Legislature is in effect attempting to both make the law and administer it; appropriate money, and spend it. This is a violation of the separation of powers article of the Constitution of the State of Nebraska.

In short, LB 683 is unconstitutional because it impinges on the executive power of the Governor to administer the funds involved. It is important to note here that the Legislature cannot do indirectly what it cannot do directly. Our Nebraska State Supreme Court so ruled to this effect in the 1974 case of State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974). The Court held that, "[T]he legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly." 219 N.W.2d at 730. The

Governor Kay A. Orr  
December 9, 1987  
Page -4-

Legislature cannot attempt to supervise the distribution of an appropriation by requiring the Governor to submit a plan for distribution to the Legislature for approval prior to appropriating the money when it could not constitutionally supervise the appropriation after it had been made.

The Constitution of the State of Nebraska adopted the same tripartite separation of powers as the Federal Constitution. In analyzing the distribution of powers as set out in the Constitution of the United States, the United States Supreme Court stated, "The object of the Constitution was to establish three great departments of government: the Legislative, the Executive, and the Judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third to expound and enforce them." Martin v. Hunter, 1 Wheat 304, 4 L.Ed. 97 (1816). In Wayman v. Southard, 10 Wheat 1, 6 L.Ed. 253 (1825), the United States Supreme Court stated, "The difference between the departments is, that the Legislature makes, the Executive executes, and the Judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments."

It is the prerogative of the Legislature to make the law within constitutional bounds. In State ex rel. Meyer v. State Board of Equalization and Assessment, 185 Neb. 490, 497-498, 176 N.W.2d 920, 925 (1970), the Nebraska Supreme Court cited to an earlier Mississippi case in stating, "Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function." In Meyer, the Nebraska Supreme Court also held that:

The Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within constitutional limits.

185 Neb. at 499, 176 N.W.2d at 926.

The power of the executive branch is set out in Article IV, Section 6, of the Constitution of Nebraska which provides as follows: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

In Anderson v. Lamn, 579 P.2d 620, 623 (1978), the Colorado Supreme Court addressed the question of executive power and held, "[T]he executive has the authority to administer the funds appropriated by the legislature for programs enacted by the

Governor Kay A. Orr  
December 9, 1987  
Page -5-

legislature. . . ." The Colorado Supreme Court further cited to the Nebraska case of Meyer v. The State Board of Equalization, supra, in concluding, "[t]hat the General Assembly is not permitted to interfere with the executive's power to administer appropriated funds which includes the making of specific staffing and resource allocation decisions. . . . In addition, the legislature may not attach conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision but are essentially executive in character. . . ." 579 P.2d at 622-624.

In Meyer, the Nebraska Supreme Court held:

There is one thing, however, which [the Legislature] cannot do, and that is inherent in Article II, section 1, Constitution of Nebraska. It cannot through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of the government. It cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed. . . .

185 Neb. at 499-500, 176 N.W.2d at 926.

Nebraska Attorney General's Opinion No. 22, February 26, 1963, discusses the problems inherent in the Legislature requiring legislative approval prior to expenditure of already appropriated funds. That opinion details how such a system would lead to the eventual destruction of the constitutional system of separation of powers. For reference I attach a copy of this 1963 opinion.

Drawing the line between what the Legislature may decide with regard to the purpose of an appropriation and what the Governor shall do in administering an appropriation is hard to do. For example, the Legislature can require certain programs but cannot tell the Governor precisely how to hire people to carry out the programs, how many paper clips to purchase for the program, etc.

This line between overall purpose and administrative detail is always a judgment call. It is similar to the line between the duties of a private corporate board of directors to set policy and the corporate chief executive officer to administer that policy. The private board should not supervise the administration of the CEO, but rather should simply set the

Governor Kay A. Orr  
December 9, 1987  
Page -6-

policy and let the CEO figure out the details of the administration.

However, with outside funds (such as federal grant funds and these oil overcharge funds) the purposes and the lines of demarcation are clear. When federal guidelines are set out that earmark how federal outside funds should be spent, then the Legislature must appropriate pursuant to those guidelines and the Governor in turn must administer in keeping with the purposes set out in those guidelines. Likewise, with this oil overcharge money (a) the Legislature must appropriate pursuant to the guidelines set out in the federal court order, and (b) the Governor in turn must administer the funds in a manner consistent with the parameters described in those guidelines.

Where does this leave us? In short, I have said that LB 683 violates the constitutional separation of powers by impinging upon the constitutional right and duty of the Governor to administer. Thus, if the Governor and the Legislature cannot agree at this time (through some modification in LB 683, for example) then a court test is appropriate.

And so with these oil overcharge funds (as indeed with any outside nonstate funds which the state receives) what can the Legislature do?

1. Accept the funds with the restrictions indicated and appropriate the funds with these restrictions.
2. Refuse to appropriate the funds.
3. Work out with the Governor on a volunteer basis how the funds will be spent within the restrictions on the funds as received. In so doing, both the Legislature and the Governor would recognize that the Governor actually has the sole authority to make the administrative determinations.

What can the Governor do?

1. Voluntarily accept legislative restrictions. In so doing, both the Legislature and the Governor would recognize that the Governor actually has the sole authority to make the administrative determinations.

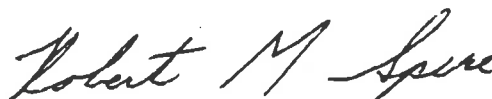
2. Ignore the Legislature. If the Legislature refuses to appropriate the funds, then seek a court order requiring appropriation.

This entire matter is not an easy one. It is, as lawyers would say, a "close case." Nonetheless, in reviewing in detail

Governor Kay A. Orr  
December 9, 1987  
Page -7-

the law and the nature of these funds, it is our conclusion that LB 683 does violate our constitutional separation of powers provisions.

Sincerely,



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Attorney General

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APPROVED BY:



Deputy Attorney General