



June 7, 2019

Doug Peterson
Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509

Dear Attorney General Peterson:

Civic Nebraska is writing this letter to alert you to a constitutional issue that affects the appointment of county election commissioners and their deputies by the Governor and the ability of those county officials to continue service in office.

“County governments are local in nature, and the [Nebraska] Constitution protects them in their right of self-government.” *State ex rel. Harte v. Moorhead*, 99 Neb. 527, 534, 156 N.W.2d 1067, 1069 (1916). In particular, article IX, section 4 of the Nebraska Constitution as adopted in 1875 requires the Legislature to provide that county officers be elected by the people:

The Legislature shall provide by law for the election of such county and township officers as may be necessary and for the consolidation of county offices for two or more counties; Provided, that each of the counties affected may disapprove such consolidation by a majority vote in each of such counties.

NEB. CONST., art. IX, § 4 (emphasis added).

Contrary to this clear constitutional language, statutes adopted in later years, including the current statutes adopted in 1994, require the Governor to appoint election commissioners in counties with more than 100,000 inhabitants. NEB. REV. STAT. § 32-207, require election commissioners appointed by the Governor to appoint deputy election commissioners in their respective counties, NEB. REV. STAT. § 32-209, and permit (but do not require) county boards in counties having 20,000 to 100,000 inhabitants to appoint election commissioners, NEB. REV. STAT. § 32-211.

In 1996, under Attorney General Stenberg, the Office of the Attorney General issued an opinion regarding the constitutional language quoted above. Neb. AG Op. 96024. Applying the plain language of article IX, section 4, as required by Nebraska law, the Attorney General specifically found that a constitutional amendment would be necessary to authorize the Legislature

to provide for a county administrator form of government “in which county officers may be appointed.” Neb. AG Op. 96024 at 1. In formulating his opinion, the Attorney General relied extensively on two decisions of the Nebraska Supreme Court, *State ex rel. O’Connor v. Tusa*, 130 Neb. 528, 265 N.W. 524 (1936) and *State ex rel. Harte v. Moorhead*, 99 Neb. 527, 156 N.W. 1067 (1916), as well as other decisions of the Nebraska Supreme Court. Neb. AG Op. 96024 at 4–6. The Attorney General explained a core constitutional principle in this area: that “[w]hile the Legislature is vested with broad authority to determine which county offices will exist, once those offices have been established, the people have retained the right to elect the individuals who will occupy those offices.”

This constitutional principle clearly prohibits the appointment of county officers by the Governor or any other governmental officials. The only question as to the constitutionality of the statutes is whether county election commissioners and deputy election commissioners are county “officers” for purposes of the statutes. Nebraska case law clearly provides that they are.

According to Nebraska case law, a public officer is a position that exercises sovereign powers and is vested with discretionary authority. In *State ex rel. O’Connor v. Tusa, supra*, the Nebraska Supreme Court considered whether a county manager appointed by a county board under the County Manager Act amounted to a “public officer” within the purview of article IX, section 4. The court determined that a county manager, who essentially was in charge of all functions of county government, including registering deeds and assessment of taxes, was a public officer for purposes of article IX, section 4 of the Nebraska Constitution. In reaching this conclusion, the court laid down “the almost universal rule . . . that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state.” *Id.* at 527–28. Accordingly, the court further defined a public officer as “an incumbent of a public office, which is the right, duty and authority conferred by law, by which, for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public.” *Id.* Similarly, in *State ex rel. Spire v. Conway*, 472 N.W.2d 403 (Neb. 1991), the Nebraska Supreme Court found that an assistant professor at Wayne State College filled a “public office” within the meaning of § 25-21,121 and accordingly a *quo warranto* action could be maintained against him to preclude his service at both the college and in the Nebraska Legislature.

With specific regard to the definition of county officer in *Tusa*, the offices of county election commissioner and deputy election commissioner are clearly created by law. NEB. REV. STAT. §§ 32-207, 32-209. Moreover, county election commissioners and deputy election commissioners serve coterminous four-year terms. NEB. REV. STAT. §§ 32-207, 32-209(2).

Like the county manager whose office was at issue in *Tusa*, county election commissioners exercise a portion of the sovereign functions of the county. Specifically, election commissioners have the power to appoint and direct subordinates and, even more importantly, are responsible for

enforcement of the Election Act within their respective counties. NEB. REV. STAT. §§ 32-212, 32-214. Deputy election commissioners have the power to perform duties as assigned by election commissioners and, in the absence of the election commissioner, to perform the duties of the election commissioner, which includes enforcement of the Election Act. NEB. REV. STAT. § 32-209(5). It should also be noted that in performing these duties, county election commissioners and deputy election commissioners exercise powers traditionally held by county clerks. *Cf.* Neb. Rev. Stat. § 32-218 (providing that county clerks shall perform the duties of election commissioners in counties without election commissioners).

Thus, as the Office of the Attorney General has also previously concluded, county election commissioners are county officers because they are employed by the county and because the position “entails many of the indicia of public office, *e.g.*, the election commissioner is appointed for a specific term, the position is created by statute, and the position has duties and authority beyond that of a mere employee.” Neb. AG Op. 94008.

There are currently four counties in which county boards appoint election commissioners and three counties with county election commissioners appointed by the Governor.

Nebraska statute provides for *quo warranto* as a mechanism for the removal of persons who, like the occupants of these offices, are holding office unlawfully. *See* NEB. REV. STAT. §§ 25-21,121 *et seq.* We recognize the disruption that would be caused by removing these county officers before provisions have been made for election of replacements by the people. However, there is also a danger that the legitimacy of elections supervised by these officers may be called into doubt. This is a problem that must be addressed sooner rather than later.

We ask, therefore, that your office commit either to supporting efforts in the Legislature to amend the statutes to provide for popular election of election commissioners and deputy commissioners, in conformance with the Nebraska Constitution, or, in the alternative, to immediately institute an action in *quo warranto* for removal of those persons currently holding these offices so that the offices can properly be filled by popular vote during the next general election.

Civic Nebraska also requests a meeting within the next thirty days to discuss this problem and your intended course of action. If no action is taken by your office or the appropriate county attorneys, Civic Nebraska intends to pursue legal action to obtain a remedy as authorized by Nebraska’s *quo warranto* statutes and other applicable law.

Sincerely,



Adam Morfeld, J.D.
Executive Director & Founder
Civic Nebraska



John Cartier, J.D.
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Civic Nebraska

Andre Barry
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