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**FILED**

OCT 08 2019

NEBRASKA SUPREME COURT  
COURT APPEALS

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Case No. 19-0124

STATE OF NEBRASKA, ex rel. )  
 DOUGLAS J. PETERSON, Attorney )  
 General of the State of Nebraska, )  
 )  
 Relator, )  
 )  
 v. )  
 )  
 ROBERT B. EVNEN, Secretary of )  
 State of the State of Nebraska, )  
 )  
 Respondent. )

**APPLICATION FOR LEAVE TO  
COMMENCE AN ORIGINAL  
ACTION AND STATEMENT OF  
JURISDICTION**

COMES NOW Douglas J. Peterson, Attorney General of the State of Nebraska, Relator herein, and requests leave of the Court to commence an original action, pursuant to § 2-115 of the Nebraska Court Rules of Appellate Practice, for the following reasons:

1. Relator has attached hereto and incorporates herein a verified complaint setting forth the action to be commenced in this Court, said action being brought on behalf of the State of Nebraska against Respondent Robert B. Evnen, Secretary of State.

2. Relator has brought this action for a declaratory judgment under the Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (2016).

3. This Court has jurisdiction to hear this action and grant the relief requested under the authority of art. V, § 2 of the Nebraska Constitution and pursuant to Neb. Rev. Stat. § 24-204 (2016), as this is a civil action in which the State is a party.

4. Relator is authorized to bring this action pursuant to the statutory authority granted to him under Neb. Rev. Stat. § 84-203 (2014) and § 84-215 (2014) and pursuant to the constitutional and common law authority vested in the Attorney General.



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5. The issues raised by the Relator's complaint concern the constitutionality of certain provisions of the Election Act, Neb. Rev. Stat. §§ 32-101 to 32-1551 (2016 and Cum. Supp. 2018), pertaining to the appointment of election commissioners and chief deputy election commissioners..

6. On numerous occasions this Court has accepted for filing original actions, on the relation of the Attorney General, which requested a declaratory judgment regarding the constitutionality of a statute. See, e.g., *State ex rel. Bruning v. Gale*, 284 Neb. 257 (2012); *State ex rel. Stenberg v. Omaha Exposition and Racing, Inc.*, 263 Neb. 991 (2002); *State ex rel. Stenberg v. Moore*, 249 Neb. 589 (1996); *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901 (1994); *State ex rel. Stenberg v. Beermann*, 240 Neb. 754 (1992); *State ex rel. Spire v. Beermann*, 235 Neb. 384 (1990); *State ex rel. Spire v. Public Employees Retirement Bd.*, 226 Neb. 176 (1987); *State ex rel. Douglas v. Marsh*, 207 Neb. 598 (1980); *State ex rel. Meyer v. Duxbury*, 183 Neb. 302 (1968).

7. Neb. Rev. Stat. §§ 32-207 (2016) provides for the appointment of election commissioners by the Governor in counties having a population of more than one hundred thousand inhabitants and Neb. Rev. Stat. § 32-209 provides that the election commissioner appointed by the Governor in such counties shall appoint a chief deputy election commissioner. Numerous related provisions of the Election Act make reference to the election commissioners and chief deputy election commissioners who are so appointed.

8. Neb. Const. art. IX, § 4 provides that the Legislature "shall provide by law for the election of such county and township officers as may be necessary. . . ." This constitutional provision requiring the election of county officers is mandatory. As shown

by the Relator's Complaint, the Relator alleges that the election commissioners and chief deputy election commissioners are county officers and that the provisions of the Election Act which provide for their appointment to office violate Neb. Const. art. IX, § 4.

9. Further, at the request of Senator Matt Hansen, the Relator issued an opinion which concluded that those provisions of the Election Act which provide for the appointment of election commissioners and chief deputy election commissioners by the Governor or by a county board are constitutionally suspect and would be found to violate Neb. Const. art. IX, § 4. Op. Att'y Gen. No. 19-012 (September 24, 2019).

10. Governor Pete Ricketts notified the Relator on September 30, 2019, that, in reliance on the Attorney General's written opinion, he will refuse to exercise the statutory duty imposed by Neb. Rev. Stat. § 32-207 to appoint the election commissioner in counties having a population of more than one hundred thousand inhabitants. In these circumstances, Neb. Rev. Stat. § 84-215 directs the Attorney General to file an action to determine the validity of the statutes in question.

11. A timely resolution of these questions is of importance to Nebraska citizens as well as the Governor. Until receiving the Attorney General's written opinion, the Governor was considering an appointment of the Douglas County Election Commissioner whose term expires this year. Further, if a political subdivision holds an election in conjunction with the statewide primary or general election of 2020, certain statutory deadlines of the election calendar will begin on December 1, 2019. Neb. Rev. Stat. § 32-404 (2016) and § 32-606 (2016). Relator thus requests that the Court accept this original action to expedite obtaining a final judicial determination of the constitutionality of these provisions of the Election Act.

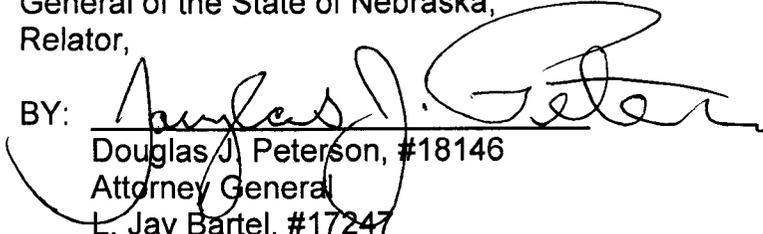
12. The constitutional issues raised by the complaint are of statewide interest. Currently, election commissioners are appointed by the Governor pursuant to Neb. Rev. Stat. § 32-207 in three counties in Nebraska

13. The constitutional questions raised by the Relator's complaint are based on the face of the statutes in question, the Nebraska Constitution and what Relator believes are certain undisputed facts as set forth in the complaint. Consequently, Relator believes that the constitutional issues present primarily questions of law and that there will be no dispute as to the facts underlying this controversy. For these reasons, Relator believes that any further facts deemed necessary for the Court's determination of the issues presented can be stipulated to by counsel for the parties.

WHEREFORE, the Relator respectfully requests this court to grant him leave to commence an original action in the Supreme Court of Nebraska.

Dated: October 8, 2019.

STATE OF NEBRASKA ex rel.  
DOUGLAS J. PETERSON, Attorney  
General of the State of Nebraska,  
Relator,

BY: 

Douglas J. Peterson, #18146

Attorney General

L. Jay Bartel, #17247

Lynn A. Melson, #17363

Ryan S. Post, #24714

Assistant Attorneys General

2115 State Capitol

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**CERTIFICATE OF SERVICE**

It is hereby certified that on this 8<sup>th</sup> day of October, 2019, a copy of the foregoing Application for Leave to Commence an Original Action and Statement of Jurisdiction has been served upon the Respondent herein by placing said copy in the United States Mail, first class postage prepaid, addressed to Respondent Robert B. Evnen, as follows:

Honorable Robert B. Evnen  
Nebraska Secretary of State  
Nebraska State Capitol  
1445 K Street, Suite 2300  
Lincoln, NE 68509

  
\_\_\_\_\_  
Lynn A. Melson  
Assistant Attorney General

09-635-29

**FILED**

IN THE SUPREME COURT OF THE STATE OF NEBRASKA **OCT 08 2019**

STATE OF NEBRASKA, ex rel. )  
 DOUGLAS J. PETERSON, Attorney )  
 General of the State of Nebraska, )  
 )  
 Relator, )  
 )  
 v. )  
 )  
 ROBERT B. EVNEN, Secretary of )  
 State of the State of Nebraska, )  
 )  
 Respondent. )  
 )

Case No. 19-904 NEBRASKA SUPREME COURT  
COURT APPEALS

**VERIFIED COMPLAINT FOR  
ORIGINAL ACTION FOR  
DECLARATORY RELIEF**

COMES NOW the State of Nebraska on the relation of Douglas J. Peterson, Attorney General of the State of Nebraska, and for its cause of action against the Respondent, states and alleges as follows:

1. Relator is the duly elected, authorized, and acting Attorney General of the State of Nebraska.
2. Respondent Robert B. Evnen is the duly elected, authorized, and acting Secretary of State of the State of Nebraska.
3. Relator brings this action for declaratory judgment under the Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (2016).
4. Relator is authorized to bring this action pursuant to the statutory authority granted to him under Neb. Rev. Stat. § 84-203 (2014) and § 84-215 (2014) and pursuant to the constitutional and common law authority vested in the Attorney General.
5. This Court has jurisdiction to hear this action and grant the requested relief under the authority of article V, § 2 of the Nebraska Constitution, and pursuant to Neb. Rev. Stat. § 24-204 (2016) as this is a civil action in which the State is a party.



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6. Neb. Rev. Stat. § 32-207 (2016) provides, in part: “The office of election commissioner shall be created for each county having a population of more than one hundred thousand inhabitants. The election commissioner shall be appointed by the Governor and shall serve for a term of four years or until a successor has been appointed and qualified.” Currently, Douglas, Lancaster, and Sarpy counties have election commissioners appointed by the Governor.

7. Neb. Rev. Stat. § 32-209 (2016) provides that the election commissioner in counties having a population of more than one hundred thousand inhabitants shall appoint a chief deputy election commissioner who shall be a member of a different political party than the election commissioner. The chief deputy election commissioner performs the duties assigned by the election commissioner and, in the absence of the election commissioner, performs all the duties of the election commissioner.

8. Neb. Rev. Stat. § 32-211 (2016) provides that the county board of each county with not less than twenty thousand nor more than one hundred thousand inhabitants may create the office of election commissioner and shall appoint that election commissioner. The county board of such counties may also appoint a chief deputy election commissioner of a different political party than the election commissioner.

9. Neb. Rev. Stat. § 32-218 (2016) provides that the county clerk will perform the duties assigned to the election commissioner, except in those counties which have an election commissioner appointed pursuant to Neb. Rev. Stat. § 32-207 or § 32-211.

10. On September 24, 2019, Attorney General Opinion No. 19-012 was issued at the request of Senator Matt Hansen. That opinion concluded that the election commissioners and chief deputy election commissioners appointed pursuant to Neb. Rev.

Stat. §§ 32-207, 32-209 and 32-211 are county officers and that appointment of those county officers by either the Governor or a county board violates art. IX, § 4 of the Nebraska Constitution. A true and correct copy of Op. Att'y Gen. No. 19-012 is attached hereto as Exhibit A and incorporated herein by reference.

11. In reliance upon Op. Att'y Gen. No. 19-012, Governor Pete Ricketts, Governor of the State of Nebraska, by letter dated September 30, 2019, notified the Relator that he will refuse to exercise the statutory duty imposed by Neb. Rev. Stat. § 32-207 to appoint the election commissioner in counties having a population of more than one hundred thousand inhabitants. A true and correct copy of that letter is attached hereto as Exhibit B and incorporated herein by reference.

12. Relator alleges that the positions of election commissioner and chief deputy election commissioner created by Neb. Rev. Stat. § 32-207 and § 32-209 exercise sovereign functions of government and are county officers.

13. Neb. Const. art. IX, § 4 states that the Legislature "shall provide by law for the election of such county and township officers as may be necessary. . . ." This constitutional provision mandates that county officers be elected. Thus, Neb. Rev. Stat. § 32-207 and § 32-209, which require the appointment of an election commissioner and chief deputy election commissioner in counties having a population of more than one hundred thousand inhabitants, violate Neb. Const. art. IX, § 4 and are unconstitutional.

WHEREFORE, Relator prays for a declaratory judgment finding and determining that the provisions of Neb. Rev. Stat. § 32-207 and § 32-209 which require the appointment of election commissioners and chief deputy election commissioners, along with any related provisions of the Election Act which pertain to the appointment of these

officers, are in violation of art. IX, § 4 of the Nebraska Constitution in the respects alleged above.

Relator also prays for such other, further, and different relief as shall be just and equitable.

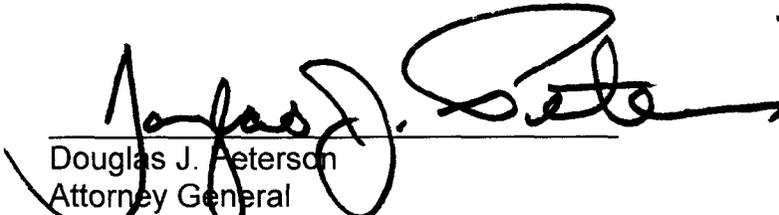
STATE OF NEBRASKA ex rel.  
DOUGLAS J. PETERSON, Attorney  
General of the State of Nebraska,  
Relator,

BY:   
\_\_\_\_\_  
Douglas J. Peterson, #18146  
Attorney General  
L. Jay Bartel, #17247  
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VERIFICATION

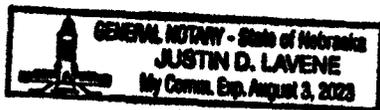
STATE OF NEBRASKA )  
 ) ss.  
COUNTY OF LANCASTER )

Douglas J. Peterson, being duly sworn on his oath, deposes and says that he is the duly qualified and acting Attorney General of the State of Nebraska, the relator herein, and he has read the foregoing complaint and application for leave to commence an original action in this Court, and the facts set forth therein are true and correct to the best of his knowledge and belief.

  
\_\_\_\_\_  
Douglas J. Peterson  
Attorney General

Subscribed in my presence and sworn to before me this 4<sup>th</sup> day of October,

2019.



  
\_\_\_\_\_  
Notary Public

09-363-29

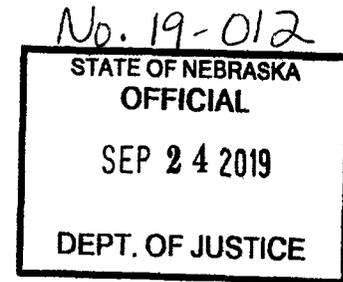
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JUSTIN D. LAVERNE  
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STATE OF NEBRASKA  
**Office of the Attorney General**

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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL



**SUBJECT:** Constitutionality of the Appointment of County Election Commissioners and their Chief Deputies

**REQUESTED BY:** Senator Matt Hansen  
Nebraska State Legislature

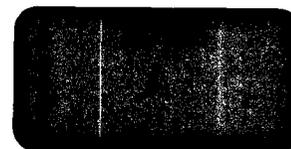
**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Lynn A. Melson, Assistant Attorney General

### INTRODUCTION

You have requested an opinion from this office concerning the appointment of county election commissioners and their chief deputies. You note that Neb. Const. art. IX, § 4 states that “[t]he Legislature shall provide by law for the election of such county and township officers as may be necessary. . . .” Your two questions are as follows:

1. Whether the election commissioners provided for under Neb. Rev. Stat. §§ 32-207 and 32-211 are county officers under Nebraska Article IX, Section 4 of the Nebraska Constitution.
2. If election commissioners are county officers, whether the appointment of election commissioners and their deputies violates Article IX, Section 4 of the Nebraska Constitution.

You explain that you are “considering legislation that would make the offices of election commissioner and deputy election commissioner subject to popular vote rather than appointment by the Governor and county boards.” Therefore, we will also discuss



whether chief deputy election commissioners are county officers who must be elected pursuant to Neb. Const. art. IX, § 4.

### **ARTICLE IX, § 4 AND APPLICABLE STATUTES**

Neb. Const. art. IX, § 4 provides: "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."

Turning to the statutes most relevant to your questions, Neb. Rev. Stat. § 32-207 (2016) provides that "[t]he office of election commissioner shall be created for each county having a population of more than one hundred thousand inhabitants. The election commissioner shall be appointed by the Governor and shall serve for a term of four years or until a successor has been appointed and qualified." Currently, Douglas, Lancaster, and Sarpy counties have election commissioners appointed by the Governor.

In those counties having a population of more than one hundred thousand inhabitants, the election commissioner must appoint a chief deputy election commissioner who is a member of a different political party than the election commissioner. Neb. Rev. Stat. § 32-209 (2016).

Neb. Rev. Stat. § 32-211 (2016) provides that the county board of each county with not less than twenty thousand nor more than one hundred thousand inhabitants "may" create the office of election commissioner and shall appoint that election commissioner. It is our understanding that, currently, four counties have election commissioners appointed by their county boards.

Section 32-211 further provides that, if an election commissioner is appointed by a county board, the board also has the option of appointing a chief deputy election commissioner of a different political party than the election commissioner.

Neb. Rev. Stat. § 32-218 (2016) provides that the county clerk will perform the duties assigned to the election commissioner, except in those counties which have an election commissioner pursuant to § 32-207 or § 32-211.

### **ANALYSIS**

#### **I. Whether Election Commissioners Are County Officers.**

Your first question is whether election commissioners (and chief deputy election commissioners) are county officers. The Nebraska Supreme Court has discussed the indicia of public office on multiple occasions. Characteristics of a public office include the creation of the position by constitution or a statute, a definite or fixed term of office, a required oath of office and the ability to exercise an independence beyond that of

employees. "When a position based upon a provision of law carries with it continuing duties of public concern which involve some exercise of the sovereign power in their proper performance, the position may be said to be an office public in character." *Eason v. Majors*, 111 Neb. 288, 291, 196 N.W. 133, 134 (1923) (holding that a department head at the state normal school was a public officer). "[A] public officer is 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." *Home Savings & Loan Ass'n v. Carrico*, 123 Neb. 25, 30, 241 N.W. 763, 765 (1932) (holding that an attorney appointed to represent an indigent defendant was neither an officer nor an employee).

In *State ex rel. O'Connor v. Tusa*, 130 Neb. 528, 535, 265 N.W. 524, 528 (1936) ["*Tusa*"], the Nebraska Supreme Court noted the following definition of "office": "An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." (quoting *United States v. Hartwell*, 73 U.S. 385, 393 (1867)). "It may be said that the almost universal rule is that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state." *Tusa* at 535, 265 N.W. at 528. After examining the statutory duties of a county manager, the Court determined that a county manager was a county officer. As we will discuss in greater detail in our response to your second question, the Court held that, because the county managers under those statutes were appointed to office, rather than elected, the statutes violated Neb. Const. art. IX, § 4.

Applying this analysis to your inquiry, we find that county election commissioners and chief deputy election commissioners in Nebraska are county officers. The "office of election commissioner" for each county with more than one hundred thousand inhabitants is created by statute, Neb. Rev. Stat. § 32-207 (2016). The election commissioner is appointed by the Governor for a term of four years. *Id.* Counties with a population of not less than twenty thousand nor more than one hundred thousand may create the "office of election commissioner." Neb. Rev. Stat. § 32-211 (2016). The election commissioner is appointed by the county board for a term of four years. *Id.*

All election commissioners are authorized to appoint other deputies, clerks and employees. Neb. Rev. Stat. § 32-212 (2016). Election commissioners must take an oath and give a bond before taking office. Neb. Rev. Stat. § 32-213 (2016). An election commissioner is responsible for the enforcement of the Election Act as it relates to his or her office and must adopt and promulgate rules and regulations in regard to elections and the registration of voters in his or her county. Neb. Rev. Stat. §§ 32-214 and 32-215 (2016).

The chief deputy election commissioner in a county with more than one hundred thousand inhabitants is also a position created by statute and has the same term of office as the election commissioner. Neb. Rev. Stat. § 32-209 (2016). The chief deputy election commissioner takes a required oath of office and furnishes a bond. Further, the chief deputy election commissioner performs duties assigned by the election commissioner and, in the absence of the election commissioner, the chief deputy "shall perform all the

duties of the election commissioner. . . .” *Id.* In a county with a population of not less than twenty thousand nor more than one hundred thousand, the county board has the option of appointing a chief deputy election commissioner, who serves for a term of four years. Neb. Rev. Stat. § 32-211 (2016).

Our conclusion that the election commissioners and chief deputy election commissioners are county officers is consistent with our 1994 opinion concerning the status and authority of election commissioners under LB 76, a substantial revision of the election laws pending before the Legislature at that time. Op. Att’y Gen. No. 94008 (February 7, 1994). The questions we addressed were: (1) if the election commissioner was appointed by the Governor, to whom the election commissioner would be responsible; and (2) whether a county board would have authority to require the election commissioner to comply with county personnel policies and procedures. In addressing those questions we stated:

It appears to us that the election commissioner for counties over 50,000 in population created by LB 76 would be a county officer because the bill provides that the election commissioner is employed by the county, and because the position created by the bill 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. See *Eason v. Majors*, 111 Neb. 288, 196 N.W. 133 (1923).

Op. Att’y Gen. No. 94008 at 3-4.

There are two other cases which are consistent with our conclusion. The Nebraska Supreme Court stated that the election commissioner and deputy election commissioner of Douglas County were “public officers” of Douglas County in *State ex rel. Meissner v. McHugh*, 120 Neb. 356, 233 N.W. 1 (1930). This case did not concern article IX, § 4. Instead, the Court determined, in the context of a special proceeding to contest whether a nomination for the office of county attorney must be accepted, that a single justice of the Court sitting in Lancaster County lacked jurisdiction over public officers in another county.

In *Dwyer v. Omaha-Douglas Public Bldg. Comm.*, 188 Neb. 30, 195 N.W.2d 236 (1972), the Court upheld the constitutionality of a statute authorizing certain cities and counties to establish a joint public building commission. The Court found that the Omaha-Douglas County Public Building Commission was a separate governmental subdivision and not an arm of the county. Therefore, the levy by the Commission was not a county tax. The Court also briefly considered an argument that appointment of the Commission members violated article IX, § 4, and found that the Commission members were not county officers as the Commission was a separate governmental subdivision.

## II. Whether Election Commissioners Must Be Elected.

Your second question is whether the appointment of election commissioners and chief deputy election commissioners violates Neb. Const. art. IX, § 4. This constitutional provision was incorporated into the Constitution in 1875. While text was added following the 1968 general election which authorized the consolidation of county offices, the original provision requiring the election of county officers remains unaltered.

Our current statutes which provide for the appointment of election commissioners and chief deputy election commissioners, as discussed above, are Neb. Rev. Stat. §§ 32-207, 32-209, and 32-211. Nebraska has had a statute requiring the Governor to appoint an election commissioner in a county of a certain population since 1913. Despite this long history, we are not aware of any Nebraska cases which directly address your questions. As a preliminary matter, we note that “[s]tatutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.” *Gourley v. Nebraska Methodist Health System, Inc.*, 25 Neb. 918, 942, 663 N.W.2d 43, 67 (2003). “[A] statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.” *State v. McCumber*, 295 Neb. 941, 948, 893 N.W.2d 411, 417 (2017). However, in this instance, it is our view that the statutes providing for the appointment of election commissioners and chief deputy election commissioners would, if challenged, be held unconstitutional by the Nebraska Supreme Court.

Our office previously discussed similar issues concerning article IX, § 4 in some detail in Op. Att’y Gen. No. 96024 (March 14, 1996). That opinion addressed whether a constitutional amendment was necessary to alter Nebraska’s form of county governance and institute an optional county administrator system. In the opinion we began by discussing several canons of constitutional construction.

First, we are bound by the cardinal rule that the state Constitution must be applied and enforced as it is written. *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). Next, the provisions of the Constitution must be read as a whole. *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922 (1986). “Moreover, constitutional provisions are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.” 238 Neb. at 774-775, 472 N.W.2d at 408-409.

\* \* \*

Finally, because the Nebraska Constitution “is not a grant but, rather, a restriction on legislative power, . . . the Legislature is free to act on any subject not inhibited by the Constitution.” *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 905, 524 N.W.2d 61, 64 (1994) (citations omitted). In so acting, however, the court has established that “[t]he people

of the state, by adopting a Constitution, have put it beyond the power of the [L]egislature to pass laws in violation thereof." *State ex rel. Randall v. Hall*, 125 Neb. 236, 243, 249 N.W. 756, 759 (1933).

Op. Att'y Gen. No. 96024 at 2-3.

With regard to article IX, § 4, we noted that the Nebraska Supreme Court "has long held that, pursuant to the Article IX, § 4 provision, '[t]he number and character of county offices that may be created rests in the discretion of the [Legislature].'" *Dinsmore v. State*, 61 Neb. 418, 429, 85 N.W. 445, 448 (1901). Op. Att'y Gen. No. 96024 at 4. However, we concluded 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." Op. Att'y Gen. No. 96024 at 6.

Our analysis in that opinion relied extensively on *State ex rel. O'Connor v. Tusa*, 130 Neb. 528, 265 N.W.524 (1936), which we discussed in answer to your first question. In *Tusa*, Douglas County voters had exercised their statutory option to adopt a county manager form of government. When an individual attempted to file as a candidate for the office of county register of deeds, a controversy arose whether the office of register of deeds had been abolished by adoption of the county manager form of government. In deciding that issue, the Nebraska Supreme Court held that a county manager was a county officer as that term is used in article IX, § 4 and that a Nebraska statute authorizing the appointment of a county manager was unconstitutional.

Moreover, in that opinion we noted that the Court's *Tusa* decision was consistent with the ruling in an earlier case. In *State ex rel. Harte v. Moorhead*, 99 Neb. 527, 156 N.W. 1067 (1916), the Court concluded a districting plan was unconstitutional. Citing the predecessor of article IX, § 4, the Court reasoned that county governments are local in their nature and that the Constitution protects them in their right of local self-government. "The Constitution makers had something definite in mind when they provided that county officers should be elected." *Id.* at 534, 156 N.W. at 1069. For these reasons, we concluded the language of article IX, § 4 would need to be amended before adopting a county administrator system in which county officers would be appointed. Op. Att'y Gen. No. 96024 at 6.

Our office also considered whether county officers may be appointed in 1977-78 Rep. Att'y Gen. 20 (Opinion No. 13, dated February 1, 1977), in which we pointed out that a "potential problem" could be raised by article IX, § 4 if, under pending legislation, county officers were appointed rather than elected. And, in Op. Att'y Gen. No. 88014 (February 25, 1988), we concluded that the appointment of county superintendents, under proposed legislation, would violate article IX, § 4. In the latter opinion, we considered that the county superintendent was referred to as an "office" and that individuals appointed to that position would exercise sovereign functions of government. "Under our system of government, the people of our state cannot be denied the opportunity to elect county officers." *Id.* at 2.

Finally, our conclusion is supported by decisions of other jurisdictions and authorities. See *State ex rel. Johnston v. Melton*, 192 Wash. 379, 73 P.2d 1334 (1937) (holding that a state constitutional provision requiring the election of county officers was mandatory); *State ex rel. Armstrong v. Halliday*, 61 Ohio St. 171, 55 N.E. 175 (1899) (holding that a state constitutional provision required county officers to be elected so that a county fish and game warden could not be appointed); 3 Eugene McQuillin, *The Law of Municipal Corporations* § 12:117 (3d ed.) ("The constitutional method for filling offices must be observed. Neither the legislature of the state, nor that of the municipality, can change such method.").

### CONCLUSION

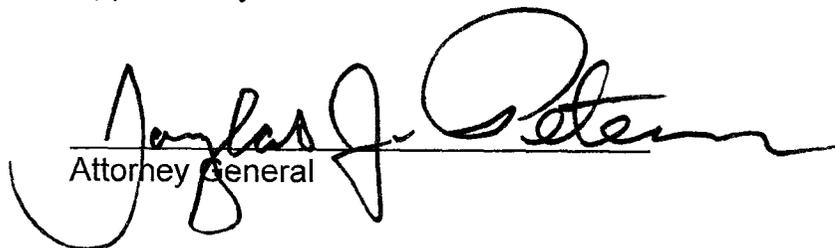
For the reasons discussed above, it is our opinion that the positions of election commissioner and chief deputy election commissioner created by Nebraska statutes are county officers. The Nebraska Supreme Court has not yet addressed the specific question whether the appointment of election commissioners by either the Governor or a county board violates Neb. Const. art. IX, § 4. However, in our view, the Nebraska statutes requiring or authorizing the appointment of an election commissioner or a chief deputy election commissioner are constitutionally suspect and would, if challenged, be found unconstitutional by the Court.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General

  
Lynn A. Melson  
Assistant Attorney General

Approved by:

  
Attorney General

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



**Pete Ricketts**  
Governor

## STATE OF NEBRASKA

OFFICE OF THE GOVERNOR  
P.O. Box 94848 • Lincoln, Nebraska 68509-4848  
Phone: (402) 471-2244 • [pete.ricketts@nebraska.gov](mailto:pete.ricketts@nebraska.gov)

September 30, 2019

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

Dear Attorney General Peterson:

On September 24, 2019, you issued a formal legal opinion regarding the Governor's authority to appoint the Douglas, Lancaster, and Sarpy County Election Commissioners. In your formal opinion #19-012, you opine that it is unconstitutional for me to complete a duty that is required under the existing provisions of Nebraska Revised Statute §32-207. Specifically, current law requires me to appoint the Election Commissioner in three counties, each of whom serves a term of four years or until a successor has been appointed and qualified.

Currently, I am considering an appointment of the Douglas County Election Commissioner. I am writing to provide you with my formal notice that, solely in reliance upon your written opinion, I am refusing to exercise the statutorily-imposed appointment duty.

Please also consider this my formal notice to you that, solely in reliance upon your written opinion, I am refusing to exercise the statutorily-imposed appointment in order to invoke the procedures set forth in Nebraska Revised Statute §84-215 which states: "[w]hen the Attorney General issues a written opinion that an act of the Legislature is unconstitutional and any state officer charged with the duty of implementing the act, in reliance on such opinion, refuses to implement the act, the Attorney General shall, within ten working days of the issuance of such opinion, file an action in the appropriate court to determine the validity of the act."

Since the constitutionality of a statute has been questioned in your opinion, it is my belief that this issue should be decided by our judicial system before a legislative change is undertaken. My refusal to carry out this appointment is not an agreement with your opinion as written. Rather, my refusal is necessary in order to have this matter determined by the courts in a timely manner.

Sincerely,

Pete Ricketts  
Governor

