

IN THE DISTRICT COURT FOR HALL COUNTY, NEBRASKA

JUDITH VOHLAND,)	Case No. CI
)	
Plaintiff,)	COMPLAINT FOR
)	DECLARATORY JUDGMENT
v.)	
)	
HALL COUNTY and TRACY)	
OVERSTREET, in her official)	
capacity as Hall County Election)	
Commissioner,)	
)	
Defendants.)	

COMES NOW Plaintiff Judith Vohland, and, for her Complaint for Declaratory Judgment against Defendants Hall County and Hall County Election Commissioner Tracy Overstreet, alleges and states as follows:

1. Plaintiff is a resident and registered voter of Hall County.
2. Defendant Hall County is a County of the State of Nebraska with a population between 20,000 and 100,000 inhabitants.
3. Defendant Tracy Overstreet is the Hall County Election Commissioner. She was appointed to that position by the Hall County Board of Supervisors on or about October 3, 2017. Her current four-year term began on January 1, 2018 and, if not interrupted, will expire on December 31, 2021.
4. Plaintiff has legally protected interests in voting in elections overseen and administered by validly elected officers of Hall County and voting for the county officers of Hall County, including the Hall County Election Commissioner.
5. Article IX, Section 4 of the Nebraska Constitution provides in pertinent part that “[t]he Legislature shall provide by law for the election of such county and township officers as may be necessary.” (Emphasis added.)

6. Hall County's election commissioner is a county officer as that term is used in Article IX, Section 4 of the Nebraska Constitution.

7. Section 32-211 of the Nebraska Revised Statutes provides that the county board of a county having not less than 20,000 inhabitants and not more than 100,000 inhabitants may create the office of county election commissioner and the election commissioner shall be appointed by the county board.

8. Under the plain language of Article IX, Section 4 of the Nebraska Constitution, the Legislature is required to provide by law for the election, not the appointment, of county election commissioners, and Neb. Rev. Stat. § 32-211 (2016) is therefore unconstitutional.

9. In accordance with the plain language of the Nebraska Constitution, the Attorney General of the State of Nebraska has issued an opinion stating that "the positions of election commissioner and chief deputy election commissioner created by Nebraska statutes are county officers" and that the "Nebraska statutes requiring or authorizing the appointment of an election commissioner . . . are constitutionally suspect and would, if challenged, be found unconstitutional" by the Nebraska Supreme Court. A true and correct copy of the Attorney General's Opinion is attached hereto as Exhibit A and is incorporated herein by this reference.

10. A real and active controversy presently exists as to the constitutionality of Neb. Rev. Stat. § 32-211 (2016), including its application to the office of the Hall County Election Commissioner. This controversy implicates the legality of actions taken by the Hall County Election Commissioner, the rights of registered voters in Hall County to elect county officers, including the Hall County Election Commissioner, and the Hall County Board's power to appoint election commissioners in the future.

11. Appointment of the Hall County Election Commissioner by the Hall County Board of supervisors harms Plaintiff by preventing her from voting in elections that are overseen and administered by a validly elected election commissioner and preventing her from voting for the office of Hall County Election Commissioner.

12. Pursuant to Neb. Rev. Stat. § 25-21,149 (2016), this Court has the power to declare Neb. Rev. Stat. § 32-211 unconstitutional as applied to the office of Hall County Election Commissioner.

WHEREFORE, Plaintiff Judith Vohland respectfully requests that the Court enter an Order as follows:

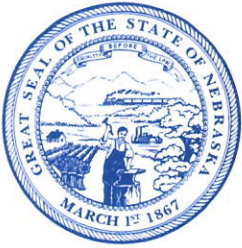
1. Declaring that Neb. Rev. Stat. § 32-211 and related provisions of the Election Act are unconstitutional as applied to the office of the Hall County Election Commissioner.
2. Awarding Plaintiff her costs and reasonable attorney's fees.
3. Providing such other relief as the Court deems just and equitable.

Dated this 5th day of December, 2019

JUDITH VOHLAND, Plaintiff

By: Andre R. Barry, # 22505
CLINE WILLIAMS WRIGHT
JOHNSON & OLDFATHER, L.L.P.
1900 U.S. Bank Bldg.
233 South 13th Street
Lincoln, NE 68508
(402) 474-6900
abarry@clnewilliams.com

By: s/ Andre R. Barry
Andre R. Barry



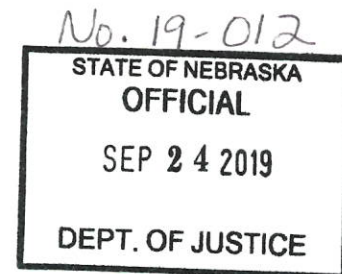
STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

EXHIBIT

A

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

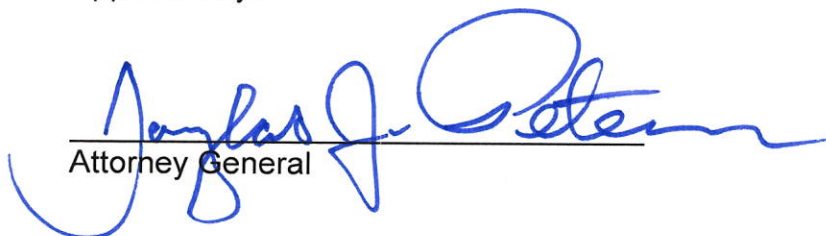
For the reasons discussed above, it is our opinion that the positions of election commissioner and chief deputy election commissioner created by Nebraska statutes are county officers. The Nebraska Supreme Court has not yet addressed the specific question whether the appointment of election commissioners 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

IN THE DISTRICT COURT FOR HALL COUNTY, NEBRASKA

JUDITH VOHLAND,)	Case No. CI
)	
Plaintiff,)	PRAECIPE FOR SUMMONS
)	
v.)	
)	
HALL COUNTY and TRACY)	
OVERSTREET, in her official)	
capacity as Hall County Election)	
Commissioner,)	
)	
Defendants.)	

TO: THE CLERK OF THE DISTRICT COURT FOR HALL COUNTY, NEBRASKA

Please issue summons in this action and deliver the same to the undersigned attorney for service upon Defendants and the Attorney General of the State of Nebraska by certified mail, together with a copy of the Complaint for Declaratory Judgment filed herein, at the following addresses:

Marla Conley
Hall County Clerk
121 South Pine Street
Grand Island, NE 68801

Tracy Overstreet
Hall County Election Commissioner
121 South Pine Street
Grand Island, NE 68801

Douglas Peterson
Attorney General
2115 State Capitol
PO Box 98920
Lincoln, NE 68509

/s Andre R. Barry
Andre R. Barry