IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

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

Relator,

v.

DAVID J. SHIVELY, in his official capacity as Lancaster County Election Commissioner; MAURA KELLY, in her official capacity as Lancaster County Chief Deputy Election Commissioner; MICHELLE Y. ANDAHL, in her official capacity as Sarpy County Election Commissioner; MICHELLE BOYLAND, in her official capacity as Sarpy County Chief Deputy Election Commissioner; BRIAN W. KRUSE, in his official capacity as Douglas County Election Commissioner; and CHRIS CARITHERS, in his official capacity as Douglas County Chief Deputy Election Commissioner,

Respondents,

and

PETER RICKETTS, in his official capacity as Governor of the State of Nebraska; and ROBERT B. EVNEN, in his official capacity as Secretary of State of the State of Nebraska,

Intervenors.

Case No. CI 19-3741

LANCASTER COUNTY
2021 JAN 13 PM 3:36
CLERK OF THE DISTRICT COURT

JUDGMENT

This case is before the Court on competing motions for summary judgment filed by the Relator, on the one hand, the Respondents and Intervenors on the other. On October 21, 2020, the Court heard argument and received evidence. Ryan Post appeared for the Relator. David Lopez appeared for the Respondents and Intervenors. John Zimmer appeared for amicus curiae Civic Nebraska. Joshua Woolf appeared for amici curiae Lancaster, Douglas, and Sarpy

Counties. Being fully advised on the premises, the Court sustains the Respondents and Intervenors' Motion for Summary Judgment and overrules the Relator's Motion for Summary Judgment.

I. BACKGROUND

In November 2019, the Attorney General, the Relator, sued for a declaration that the statute allowing the Governor to appoint election commissioners in counties with more than 100,000 inhabitants was unconstitutional. See Neb. Rev. Stat. § 32-207 (Reissue 2016). The Attorney General also sought a declaration that the statute allowing the election commissioners of such counties to appoint their chief deputies is unconstitutional. See Neb. Rev. Stat. § 32-209 (Reissue 2016). The basis for this action is Neb. Const. art. IX, § 4, which provides: "The Legislature shall provide by law for the election of such county and township officers as may be necessary . . . ."

The Respondents are the election commissioners for Lancaster, Douglas, and Sarpy Counties and their chief deputies. The Governor and Secretary of State later filed a Complaint in Intervention. The Attorney General has not moved to dismiss or for a summary judgment on the Complaint in Intervention.

In September 2020, the Attorney General moved for summary judgment. The same day, the Respondents and Intervenors jointly moved for summary judgment, too. On October 21, 2020, the Court heard both motions. It took the Attorney General's objections to the Respondents and Intervenors' evidence under advisement. It now sustains the Attorney General's relevance objection to Exhibit 6 and overrules the remaining objections.

II. STANDARD

A party is entitled to summary judgment as a matter of law if the pleadings and evidence show no genuine issue of any material fact or the ultimate inferences drawn from those facts. *Waldron v. Roark*, 298 Neb. 26 (2017). A fact is material only if it would affect a case's outcome. *Id.* The court views all the evidence in the light most favorable to the nonmovant and gives the nonmovant the benefit of all reasonable inferences from the evidence. *Walters v. Colford*, 297 Neb. 302 (2017). But if the facts are undisputed or reasonable minds can draw only one conclusion, the court must decide the question as a matter of law. *Id.*

The movant has the initial burden of making a prima facie case by producing enough evidence to show that it would be entitled to a judgment if the evidence were uncontroverted at trial. *Walters*, *supra*. Then the burden of production shifts to the nonmovant, who must produce evidence showing a material fact that prevents judgment as a matter of law. *Id.*

III. ANALYSIS

A. Rules for interpreting the Nebraska Constitution and statutes.

Because this case requires the Court to interpret both the Nebraska Constitution and statutes, the Court briefly summarizes the rules of construction. As for statutes, the Nebraska Supreme Court recently said:

> In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
>
> *Woodmen of the World Life Ins. Soc'y v. Neb. Dep't of Rev.*, 299 Neb. 43, 53 (2018).

Further, a statute is presumptively constitutional and courts resolve all reasonable doubts in favor of its validity. *HBI, L.L.C. v. Barnette*, 305 Neb. 457 (2020). The party attacking a statute has the burden of clearly showing that it is unconstitutional. *Id.*

The rules for interpreting the Nebraska Constitution are similar:

> The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense. If the meaning is clear, the court will give to it the meaning that obviously would be accepted and understood by laypersons. Constitutional provisions are not subject to strict construction and receive a broader and more liberal construction than do statutes. It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.
> *State ex rel. Johnson v. Gale*, 273 Neb. 889 (2007).

Like statutes, which are only open to construction if ambiguous, a constitutional provision is not open to construction unless it is unclear: "Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary." *Banks v. Heineman*, 286 Neb. 390, 398 (2013).

B. Summary of the election commissioner statutes.

(1) Historical summary.

The Court now turns to the statutes at issue. In 1913, the Legislature created the office of election commissioner for counties with at least 150,000 people. Neb. Gen. Laws 1913, Ch. 36, pp. 116–131. At the time, the only county with that many people was Douglas County.

In the 1913 act, the Legislature gave the Governor the power to appoint election commissioners to 2-year terms. *Id.* at§ 1, p. 116. But the Legislature also tried to create some measure of partisan balance by requiring the election commissioner to appoint a chief deputy

who was a member of a different political party. *Id.* at § 4, p. 118. The other employees of the office were to be "divided between all political parties as nearly as practicable in proportion to the number of votes cast in said county at the preceding general election for the office of Governor by said parties, respectively." *Id.*

The election commissioner had general authority over elections within the county, which included the power to make rules and regulations, draw election districts, appoint election officials, register voters, and make lists of voters. *Id.* at §§ 1, 6, 8–10, 12, 16, pp. 116–29. The election commissioner had to take an oath and give a bond. *Id.* at § 1, p. 117. Although the governor appointed the election commissioner, the county was responsible for providing the election commissioner with an office and paying for supplies. *Id.* at §§ 3, 15, pp. 117–18, 128.

Since then, the Legislature has adjusted the population thresholds so that the governor also appoints election commissioners for Lancaster and Sarpy Counties. See Neb. Laws 1947, L.B. 402; Neb. Laws 1969, L.B. 542; Neb. Laws 1994, L.B. 76. Some other things have changed, too. For example, the length of an election commissioner's term increased from 2 to 4 years to coincide with the governor's term. Neb. Laws 1965, L.B. 170. The Legislature also gave some county boards the option of creating an office of election commissioner and appointing the commissioner themselves. Neb. Laws 1994, L.B. 76. But despite these changes, election commissioners today still have many of the same duties and powers that they had under the 1913 act.

(2) Current statutes.

Currently, the powers and duties of election commissioners are found in the Election Act, Neb. Rev. Stat. §§ 32-101 to 32-1551 (Reissue 2016 & Cum. Supp. 2020). Under the Election Act, counties with 20,000 to 100,000 inhabitants can choose to create the office of election

commissioner by resolution of the county board. Neb. Rev. Stat. § 32-211 (Reissue 2016). For counties that decide not to create the office, or in counties with less than 20,000 people, the county clerk has the duties and powers of the election commissioner. Neb. Rev. Stat. § 32-218(1) (Reissue 2016).

This lawsuit involves Nebraska's three most populous counties, each of which has more than 100,000 inhabitants. The remainder of this statutory summary will therefore focus on the law applicable to those counites. In counties with more than 100,000 inhabitants, the office of election commissioner is mandatory. Neb. Rev. Stat. § 32-207 (Reissue 2016). The election commissioner is appointed by the governor and serves a 4-year term. *Id.* He or she must take an oath of office and give a bond approved by the governor. Neb. Rev. Stat. § 32-213 (Reissue 2016).

The election commissioner must appoint a chief deputy who is a member of a different political party. Neb. Rev. Stat. § 32-209(1) (Reissue 2016). The county chairpersons of the other political parties give the election commissioner a list of candidates from which to choose. Neb. Rev. Stat. § 32-210 (Reissue 2016). The election commissioner's other employees must be "registered voters representing all political parties as nearly as practicable in proportion to the number of votes cast in such county at the immediately preceding general election for the office of Governor or President of the United States by the parties, respectively." Neb. Rev. Stat. § 32-212 (Reissue 2016).

The governor can remove an election commissioner or chief deputy election commissioner who has committed one or more of certain enumerated statutory grounds for removal, including dereliction of duty and incompetence. Neb. Rev. Stat. § 32-214 (Reissue 2016). If the governor declines to remove such an election commissioner or chief deputy, then

any citizen of the county can sue for an order requiring the governor to remove the offending individual. *Id.*

Although the election commissioners are appointed by the governor, they are otherwise tied to the county in which they serve. The commissioner, the chief deputy, and all employees of the office are county employees. Neb. Rev. Stat. § 32-217 (Reissue 2016). The county sets the salaries of the commissioner and chief deputy, subject to statutory minimum salaries which vary based on population. *Id.* The county provides and furnishes the commissioner's office space. Neb. Rev. Stat. § 32-216(1) (Reissue 2016). The county also provides all necessary supplies, materials, equipment, and services, the purchase of which must generally comply with the County Purchasing Act. § 32-216(2). The election commissioner must file an annual inventory statement with the county board. Neb. Rev. Stat. § 32-216(1). The commissioner must also reside in the county. Neb. Rev. Stat. § 32-208 (Cum. Supp. 2020).

As under the 1913 act, the election commissioner is responsible for enforcing the Election Act and providing for all elections in his or her county unless otherwise specifically provided. Neb. Rev. Stat. § 32-214 (Reissue 2016); Neb. Rev. Stat. § 32-215(1) (Reissue 2016). The election commissioner's specific powers and duties include:

- Promulgating rules and regulations for elections and voter registration in the county, consistent with the Election Act and the Secretary of State's regulations. § 32-215(1).
- Appointing election officials like precinct and district inspectors, judges of election, and clerks of election. Neb. Rev. Stat. § 32-221(1) (Cum. Supp. 2020).
- Choosing the places of registration for each precinct. § 32-215(2).
- Designating polling places for each precinct. § 32-215(2).
- Drawing the boundaries of voting precincts. Neb. Rev. Stat. § 32-903 (Cum. Supp. 2020).
- Helping the Secretary of State maintain the statewide voter registration list. Neb. Rev. Stat. § 32-329 (Reissue 2016).

B. Cases interpreting Neb. Const. art. IX, § 4.

The issue in this case is whether election commissioners and their chief deputies are county officers under Neb. Const. art. IX, § 4, which again provides: "The Legislature shall provide by law for the election of such county and township officers as may be necessary . . . ." This language was first proposed at the 1871 constitutional convention and later included in the Constitution of 1875. Robert D. Miewald et al., The Nebraska State Constitution 327 (2d ed. 2009). It has remained unchanged thereafter.

Few cases have interpreted this provision. In 1901, the Nebraska Supreme Court observed that it gave the Legislature the discretion to create whatever county offices that it saw fit. *Dinsmore v. State*, 61 Neb. 418 (1901). But while the Legislature has discretion over the number and character of county offices, the court later stated that such offices are subject to the people's right of local self-government. See *State ex rel. Harte v. Moorhead*, 99 Neb. 527 (1916). In 1916, the court explained that the "Constitution makers had something definite in mind when they provided that county officers should be elected," although it did not say what that "something definite" was. *Id.* at 534.

Twenty years later, the court held that a law was unconstitutional under art. IX, § 4 for the first and only time. See *State ex rel. O'Connor v. Tusa*, 130 Neb. 528 (1936). In *Tusa*, the relator, Thomas O'Connor, sued for a writ of mandamus compelling the election commissioner for Douglas County to put him on the ballot for register of deeds. The election commissioner rejected O'Connor's filing because Douglas County had adopted the county manager form of government. The recently adopted county manager act had created an alternative form of county government. This act allowed county boards to appoint a county manager who would, in turn, appoint other county officers. The act made the county manager responsible for certain functions

otherwise performed by separate county offices, including the "recording of deeds, mortgages and other instruments, and the entry and preservation of such other public records as the law requires." *Id.* at 533–34 (citation omitted). In keeping O'Connor off of the ballot, the election commissioner reasoned had suspended elections for registers of deeds by adopting the county manager form of government. The district court denied O'Connor's application for a writ of mandamus.

Having not yet defined "officers" under art. IX, § 4, the Nebraska Supreme Court began by describing what others had said about the term:

- "An office has been defined as follows: 'An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties.'" *Id.* at 535, quoting *United States v. Hartwell*, 73 U.S. 385 (1867).

- "The words 'office' and 'officer' are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject-matter in reference to which the terms are used." *Id.* at 535, quoting *State ex rel. Childs v. Kiichli*, 54 N.W. 1069 (Minn. 1893).

- "One of the most important criteria of a public office is that the incumbent is vested with some of the functions pertinent to sovereignty, for it has been frequently decided that in order to be an office the position must be one to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being." *Id.* at 535–36, quoting 22 R. C. L. 374, § 4.

The court said that the last quotation above represented 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." *Id.* at 535.

Without explaining why, the court said that there was "no question" that registers of deeds were county "officers" under art. IX, § 4. *Id.* at 536. And although the county manager act transferred the duties of the office to the county manager, it did not abolish the office. Thus, the county manager act violated the constitution for two reasons: (1) it allowed the county manager

to appoint county officers, such as registers of deeds; and (2) it allowed the county board to appoint the county manager, who was himself an "officer" under the constitution because he could hold one or more of the county offices.

C. Election commissioners are not county officers under art. IX, § 4.

Under *Tusa*, to be an art. IX, § 4 "officer," the duties of the post must "partake in some degree of the sovereign powers of the state." *Id.*, 130 Neb. at 535. In addition to such duties, an office ought to include tenure, duration, and emolument (i.e., compensation). *Id.* In sum, officers should exercise the sovereign powers of the state, their jobs should not be temporary, and they should be paid.

This definition of "officer" is very broad, as the quo warranto cases show. For example, in *State ex rel. Spire v. Conway*, the Attorney General sought to oust an assistant professor at a state college who also served as a member of the Legislature. 238 Neb. 766 (1991). The Attorney General argued that the professor-*cum*-legislator was violating the dual service aspect of the separation of powers section of the Nebraska Constitution.

The first question the Nebraska Supreme Court answered was whether the assistant professor's teaching job was a "public office" under the quo warranto statute. See Neb. Rev. Stat. § 25-21,121. The Attorney General cited an earlier opinion which held that a person who headed the English department at a state normal school was holding a "public office." See *Eason v. Majors*, 111 Neb. 288 (1923). The assistant professor in *Conway* responded that *Eason* was an "aberrant decision" in light of *Tusa* and another case holding that an attorney hired to defend an indigent defendant was not a county officer for purposes of garnishment. See *Home Savings & Loan Ass'n v. Carrico*, 123 Neb. 25 (1932).

The Supreme Court disagreed, holding that *Eason*'s interpretation of "public office" coincided with the interpretations in *Tusa* and *Carico*: "*Eason* is not an anomaly; in reality, the foregoing three cases are in complete agreement as to the definition of public office: It is a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power." *Conway*, *supra*, 238 Neb. at 771–72. Applying the same core definition as *Tusa*, the court held that an assistant professor was invested with the state's sovereign power because "it is through the teacher that the educational policies of the state are executed." *Id.* at 772. Further, the assistant professor had discretion in how he exercised the state's sovereign power because he assigned course materials, established classroom discipline, led classroom discussions, and graded his students.

Citing Ohio caselaw, the Attorney General suggests that "officers" under art. IX, § 4 should generally take an oath and give a bond, which might pare down the number of county workers who must be elected. But the Court is skeptical that these considerations would meaningfully refine the definition of "officers." For one thing, the Legislature could avoid the election requirement by amending the statutes to no longer require an oath or bond for a county job. In this way, a constitutional provision meant to empower the people to choose their county officers could leave them with non-elected officers performing the same jobs, now without oaths or bonds.

Plus, an oath does not distinguish county officers from mere county employees in Nebraska because a statute requires *all* public employees to swear an oath. See Neb. Rev. Stat. § 11-101.01 (Reissue 2012); see also Neb. Rev. Stat. § 11-101 (Reissue 2012) (nearly identical oath for "state, district, county, precinct, township, municipal, and especially appointed officers"). Similarly, *any* person who is entrusted with county funds is required to give a bond or

equivalent insurance policy. Neb. Rev. Stat. § 11-121 (Reissue 2012). These are not new requirements. Public employees have had to take the same oath since 1951. See 1951 Neb. Laws, L.B. 257. Any person entrusted with county funds has had to give a bond since 1881. See Neb. Gen. Laws, ch. 13, § 21, pp. 100–101 (1881).

The Attorney General does not acknowledge how broadly his position would sweep. He does argue that the only officers in question here are the election commissioners and their chief deputies. That is true, but courts must also ask if their interpretation of the constitution will carry out the framers' intent and purpose. See *State ex rel. Johnson v. Gale*, 273 Neb. 889 (2007). So the Court may question whether the framers would have intended that matrons of the county jail, for example, must be elected. See Neb. Rev. Stat. § 47-111 (Reissue 2010).

It is appropriate to emphasize that election commissioners have been appointed by the governor for more than 100 years. Although the population thresholds have changed, their powers and duties today are much as they were in 1913. If anything, election commissioners exercised even broader powers a century ago because they are now subject to more oversight from the Secretary of State.

This history is relevant not because it is how things have always been done, or even because it has worked well. Rather, this history is important under the well-established rule that legislative interpretation of a statutory or constitutional provision, long acquiesced in, is relevant to construing the meaning of doubtful constitutional provisions. See *State ex rel. Douglas v. State Bd. of Equalization*, 205 Neb. 130 (1979); *State ex rel. State Railway Comm'n v. Ramsey*, 151 Neb. 333 (1949); *Platte Valley Public Power & Irrigation Dist.*, 144 Neb. 584 (1944).

Article IX, § 4 is open to construction because its meaning is not clear. As the Supreme Court observed in *Tusa*, the word "officer" is of "vague and variable import." *Id.*, 130 Neb. at

535 (quotation omitted). In another case, the court remarked that others had been "struck by the wilderness of law upon the subject." *Eason, supra*, 111 Neb. at 292. Secondary sources somewhat closer in time to the Constitution of 1875 do not shed much light on which county workers the framers intended to be "officers" under art. IX, § 4. See Floyd R. Mechem, A Treatise on the Law of Public Offices and Officers (1890) (full text available on Google Books).

The Court therefore places great weight on the fact that for more than a century the Legislature, the executive officers, and the residents of counties with election commissioners have acquiesced in the appointment of election commissioners. This history distinguishes the present case from *Tusa*, which involved a brand-new county office (county manager) that usurped the duties of a long-established, elective county office (register of deeds). The Court concludes that the statutes allowing the Governor to appoint election commissioners in the State's three most populous counties do not violate the state constitution. They instead represent how the Legislature, the executive branch, and the public have settled the meaning of art. IX, § 4 through 107 years of practical constitutional interpretation.

IT IS THEREFORE ORDERED that the Relator's Motion for Summary Judgment is **OVERRULED**. The Respondents and Intervenors' Motion for Summary Judgment is **SUSTAINED**. The Complaint is dismissed with prejudice.

DATED this 13 day of January, 2021.

BY THE COURT:

Lori A. Maret
District Court Judge