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NO.

STATE OF NEBRASKA
OFFICIAL
AUG 3 1994
DEPT. OF JUSTICE

DATE: August 1, 1994

SUBJECT: Nomination List for Nebraska Accountability and Disclosure Commission

REQUESTED BY: Dannie Trautwein, Executive Director
Nebraska Accountability and Disclosure Commission

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired regarding the proper procedure to follow in appointments to the Nebraska Accountability and Disclosure Commission (Commission). According to your letter, you notified the Nebraska Legislature on June 16, 1994, that the term of one of the then current members of the Commission would expire on June 30, 1994. In your letter, you advised the Chairman of the Legislative Council of the requirement for the Legislature to submit names to fill the vacancy. Subsequently, on July 15, 1994, you received a copy of a letter, from the Legislature to the Governor, submitting two names for the vacant position. Your question is whether, under Neb. Rev. Stat. §§ 49-14,105(1)(a) and 49-14,112 (1992 Cum. Supp.), the Legislature is required to submit a new list or if the Governor can now appoint someone of his own choosing.

Neb. Rev. Stat. § 49-14,112 (1992 Cum. Supp.) states in relevant part:

> When a vacancy occurs by expiration of a term of office or otherwise, which vacancy is subject to an appointment from a list pursuant to the provisions of section 49-14,105, such list shall be submitted to the

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> Governor or the Secretary of State not later than thirty days after such vacancy occurs. . . . The Governor or the Secretary of State shall make his or her appointment within thirty days of receiving the list provided for in section 49-14,105 unless two or more of the individuals whose names appear on the list are unwilling to withdraw from activities or resign from positions as required by section 49-14,114. If such individuals are unwilling to so withdraw or resign, the Governor or the Secretary of State shall notify the provider of the list. Within thirty days after such notification is received, a new list of names of at least five individuals shall be submitted to the Governor or Secretary of State. . . . The Governor or Secretary of State shall appoint an individual from the new list within thirty days of receipt unless two or more of the individuals whose names appear on the second list are unwilling to withdraw from activities or resign from positions as required by section 49-14,114. In such event, the Governor or Secretary of State shall appoint an individual of his or her own choosing within thirty days after the receipt of the new list. **If the Governor or Secretary of State does not receive the initial list within thirty days of a vacancy, the Governor or Secretary of State may make an appointment of his or her own choosing.** If the Governor or Secretary of State does not receive the second list within thirty days after notification to the provider of the list, the Governor or Secretary of State may make an appointment of his or her own choosing. . . .

(Emphasis added.)

Neb. Rev. Stat. § 49-14,105(1)(a) states, "[t]here is hereby established the Nebraska Accountability and Disclosure Commission. The Commission shall be composed of nine members, including the Secretary of State. The eight appointed members shall be appointed, subject to the provisions of section 49-14,110 as follows: (1) four members shall be appointed by the Governor in the following manner: (a) one member from each of two lists submitted by the Legislature. **Each list shall contain at least five individuals who are qualified to serve . . . .**" (Emphasis added.)

In this instance, the Legislature submitted a list containing only two names. In prior opinions, this office has advised that a list of three or fewer candidates places an unconstitutional restriction on the Governor's power of appointment. *See* Op. Att'y Gen. No. 87045; Op. Att'y Gen. No. 227 (1978); Op. Att'y Gen. No.

151 (1979). Additionally, Neb. Rev. Stat. § 49-14,105(1)(a) requires that the list submitted by the Legislature "shall contain at least five individuals who are qualified." Generally, in the construction of statutes the word "shall" is considered mandatory and inconsistent with the idea of discretion. ***See State v. Stratton***, 220 Neb. 854, 374 N.W.2d 31 (1985); and ***Mayer v. Douglas & Lomason***, 212 Neb. 680, 325 N.W.2d 648 (1982).

The Nebraska Supreme Court has tempered this rule in ***Hartman v. Glenwood Tel. Membership Corp.***, 197 Neb. 359, 371, 249 N.W.2d 468, 475 (1977), wherein it stated:

> While the word 'shall' may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word 'shall' be construed as permissive rather than mandatory, such will be done. * * * Provisions governing the time for doing an act, or directing the doing of certain things within certain times without any negative words restraining the doing thereof afterward, are deemed to be directory.

In the current instance, the statute specifically requires a list of at least five names of qualified individuals. While the statute does not specifically "restrain the doing thereof," after the thirty days it does permit the Governor to take an alternative course of action if the initial action by the Legislature is not done in a timely manner.

Submission of a list of names containing less than five qualified individuals does not meet the requirement of the statute. If the Governor does not receive an initial list of at least five qualified individuals within thirty days of a vacancy, he may proceed under his authority under Neb. Rev. Stat. § 49-14,112 (1992 Cum. Supp.) to make an appointment of a qualified individual of his own choosing.

The Legislature is not required to submit a new list of individuals. However, if the Legislature submits a list of candidates, in order to be a valid list it must contain the names of at least five qualified individuals and the list must be submitted to the Governor within thirty days after such vacancy

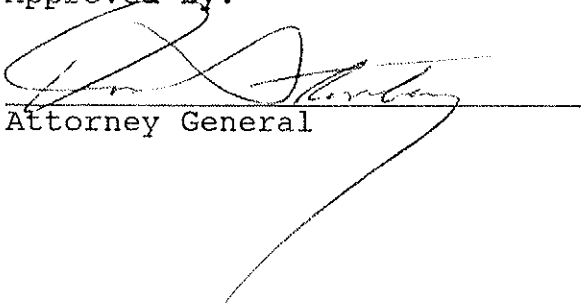
occurs. If the Legislature fails to comply with the full requirements of the law, the Governor may then exercise his authority as set out in the statutes.

Sincerely,

DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

28-15-14.op
Approved by:



Attorney General