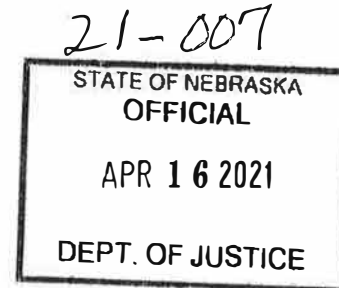




STATE OF NEBRASKA
Office of the Attorney General

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

DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Application of the Legislative Approval Requirement in Neb. Const. art. IV, § 10, to the Governor's Appointment of Members of the Nebraska Brand Committee (LB 572) (AM686)

REQUESTED BY: Senator Steve Halloran
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

Currently, the Nebraska Brand Committee "consist[s] of five members appointed by the Governor." Neb. Rev. Stat. § 54-191(1) (Cum. Supp. 2020). You introduced an amendment to LB 572, recently adopted on General File, which would amend this statute to provide that appointees to the Nebraska Brand Committee are "subject to confirmation by the Legislature." AM686. In connection with this pending legislation, you have requested our opinion on three questions relating to the appointment of members of the Nebraska Brand Committee and the application of the appointment powers granted the Governor in Neb. Const. art. IV, § 10. Your specific questions are:

1. If the underlying statute creating the Brand Committee is silent upon the question of whether the Legislature asserts its confirmation authority as a procedural step in completing the appointment of its members, does the Legislature waive or divest its confirmation jurisdiction under Article IV, Section 10 over appointments of members of the Brand Committee?
2. If such express confirmation intent is required to be stated in the statutory provisions creating an office, and the Legislature is precluded from exercising confirmation jurisdiction without statutory revision, at what point does an appointee's commission begin?

3. If the Legislature does not waive its confirmation authority under Article IV, Section 10 by its statutory silence on the question of the Legislature asserting its confirmation jurisdiction for members of the Brand Committee, what is the procedure for compelling that the Governor's appointments to the Brand Committee be submitted to the Legislature for confirmation?

You state AM686 would "expressly provide that appointments to the Brand Committee are subject to legislative confirmation for all future appointments." You seek guidance regarding the amendment and "to understand if the Legislature may assert confirmation jurisdiction over recent appointments to the Brand Committee."

For the reasons stated below, we conclude that art. IV, § 10, does not require legislative confirmation of appointments to the Brand Committee as it authorizes the Legislature to create offices by law and provide for the appointment of persons to those offices without legislative approval. As § 54-191 currently does not require legislative approval of appointees to the Brand Committee, legislative confirmation of appointees is not required. This is not uncommon, as a review of current statutes creating various offices shows the Legislature has, in some cases, granted power to appoint without legislative confirmation to the Governor, and, in other cases, has required that the Legislature approve appointments. While § 54-191 does not currently require legislative confirmation of Brand Committee appointees, the Legislature can change the statute to provide for legislative confirmation of such appointees. AM686, were it to become law, would require that future appointees to the Brand Committee be confirmed by the Legislature.

ANALYSIS

Neb. Const. art. IV, § 10, provides, in relevant part:

The Governor shall appoint with the approval of a majority of the Legislature, all persons whose offices are established by the Constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such person shall be appointed by the Legislature.

In Op. Att'y Gen. No. 90026 (March 28, 1990), we discussed the application of art. IV, § 10, to legislation offered to implement a proposed constitutional amendment to replace the Board of Regents of the University of Nebraska and Board of Trustees of the Nebraska State Colleges with a new Board of Regents for Nebraska Higher Education. The legislation created a Nebraska Higher Education Commission ["Commission"]. Some of the members of the Commission were to be appointed by the Governor, while other members were to be appointed by the Board of Regents for Nebraska Higher Education and other bodies. The question presented by this process was "whether appointments may be constitutionally made by entities other than the Governor." *Id.* at 2-3. In addressing this question, we noted an early Nebraska Supreme Court decision, *State ex rel. Horne v. Holcomb*, 46 Neb. 88, 64 N.W. 437 (1895) ["*Horne*"], discussing language found in art. V, § 10 of the Nebraska Constitution of 1875, which was "virtually identical" to the language found currently in art. IV, § 10. *Id.* The Court in *Horne* stated:

[A] careful analysis of the above section [art. V, § 10] discloses that power is thereby conferred upon the governor to appoint two classes of officers, viz. (1) those whose offices are established by the constitution itself; (2) those whose offices are created by law, and whose appointment or election is not otherwise provided for. The phrase "whose appointment or election is not otherwise * * * provided for," is an apparent limitation upon the preceding general language, and, read by itself, impliedly authorizes the legislature to prescribe the manner of selecting all officers of its own creation. *Id.* at ___, 64 N.W. at 438.

Based on this language, we concluded "the Legislature can authorize governmental entities other than the Governor to make appointments." Op. Att'y Gen. No. 90026 at 3. We noted, however, that the final clause of art. IV, § 10 provided "those appointments may not be made the Legislature itself." *Id.*

Op. Att'y Gen. No. 93076 (September 24, 1993), discussed the necessity of legislative approval of an appointee to the office of Lieutenant Governor. We noted three constitutional provisions on appointments and vacancies: Neb. Const. art. IV, §§ 10, 11, and 12. As to art. IV, § 10, we stated it "applies only to initial appointments by the Governor of officials whose appointment or election is not otherwise provided for." *Id.* at 3. (emphasis added).¹

Horne construed language in the Nebraska Constitution of 1875 virtually the same as art. IV, § 10, to mean that the Governor had power to appoint two classes of officers, those whose offices are created by the Constitution, and "those whose offices are created by law, and whose appointment or election is not otherwise provided for." 46 Neb. at ___, 64 N.W. at 438. The Court further interpreted the phrase "whose appointment or election is not otherwise . . . provided for" to "impliedly authorize the legislature to prescribe the manner of selecting all officers of its own creation." *Id.* Thus, as to offices created by law, the Legislature has authority to prescribe the manner of appointment. The logical conclusion is that, in exercising this power, the Legislature may by statute create an office and provide for the Governor's appointment of officers without legislative approval.

The Idaho Constitution contains language virtually identical to Neb. Const. art. IV, § 10. Specifically, Idaho Const. art. IV, § 6, provides: "The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment is not otherwise provided for." The Idaho Supreme Court has construed this to mean that "[t]he legislature can create positions to be filled by gubernatorial appointments without requiring that they be subject to legislative confirmation." *Troutner v. Kempthorne*, 142 Idaho 389, 393, 128 P.3d 926, 930 (2006) (citing *In re Inman*, 8 Idaho 398, 69 P. 120 (1902)). In *Inman*, the Idaho Supreme found an act allowing the governor to appoint a

¹ Your request is limited to appointments and the interpretation of the Governor's appointment power under art. IV, § 10. Accordingly, our analysis is limited to that provision and does not address appointments to fill vacancies under Neb. Const art. IV, §§ 11 and 12.

state board of medical examiners without the concurrence of the senate did not violate art. IV, § 6, of the Idaho constitution. It noted this provision “points out the manner of filling offices whose appointment or election is not otherwise provided for by law.” *Id.* at ___, 69 P. at 121. It found that “in the act in question, the legislature has provided, as it has the power to do under the constitution, for the appointment by the governor.” *Id.* See also *Lyons v. Bottolfson*, 61 Idaho 281, ___, 101 P.2d 1, 8 (1940) (“[T]he Legislature has the authority to give the power of appointment of the bridge committee without the consent of the Senate.”).

Consistent with *Horne*, the Idaho cases construing language virtually identical to art. IV, § 10, further support reading that provision to allow the Legislature to provide for the appointment by the Governor of persons to offices created by law when that law “otherwise” provides for appointment without the approval of the Legislature. That is consistent with numerous existing Nebraska statutes that provide for the Governor’s appointment of members of various boards, commissions, and committees, without requiring legislative approval or consent. See, e.g., Neb. Rev. Stat. § 2-3745 (2012) (Dry Bean Commission); Neb. Rev. Stat. § 48-1116 (Cum. Supp. 2020) (Equal Opportunity Commission); Neb. Rev. Stat. § 72-724 (2018) (Nebraska Hall of Fame Commission); Neb. Rev. Stat. § 81-1407 (2014) (Nebraska Police Standards Advisory Council); Neb. Rev. Stat. § 81-3528 (Board of Engineers and Architects). That does not mean that the Legislature cannot require legislative approval of such appointees, as reflected in various statutes which impose such a requirement. See, e.g., Neb. Rev. Stat. § 2-1201 (State Racing Commission); Neb. Rev. Stat. § 9-1003 (Cum. Supp. 2020) (Nebraska Commission on Problem Gambling); Neb. Rev. Stat. § 39-2106 (Cum. Supp. 2020) (Board of Public Roads Classifications and Standards); Neb. Rev. Stat. § 83-309 (2014) (Nebraska Arts Council).

Thus, as to your first question, § 54-191 currently contains no language requiring legislative approval or confirmation of Brand Committee appointees. Under art. IV, § 10, the Legislature may create offices and provide for the Governor’s appointment of officers without requiring legislative approval. Because § 54-191 does not provide for legislative approval of Brand Committee members, no such approval is required.

As to your second question, where legislative confirmation or approval is not required, the general rule of when an appointment commences is stated in 67 C.J.S. Officers § 145 (2021) as follows:

As a general rule, if a law sets forth a date for the commencement of a term of office, the term commences on that date regardless of when appointments are actually made or the appointees formally qualify. Where the office is newly created, the term begins when the office is first filled. The matter of when an oath of office is taken is immaterial to its term.

The general rule is that, where no time is fixed by the constitution or statute, the term begins, in the case of elective offices, on the day of election and, in the case of appointive offices, on the date of appointment, but it is only where the constitution or statute fails to prescribe when the term of office shall begin that it begins on election or appointment.

Section 54-191 provides that "[t]he terms of the members [of the Brand Committee] shall be four-year, staggered terms, beginning on August 28 of the year of initial appointment or reappointment and concluding on August 27 of the year of expiration. At the expiration of the term of an appointed member, the Governor shall appoint a successor." Thus, for Brand Committee members, the commencement of a term is determined by the date prescribed by § 54-191.

Finally, your third question is predicated on the Legislature retaining authority to confirm Brand Committee members under art. IV, § 10, even though § 54-191 currently contains no requirement that appointees to the Brand Committee be approved by the Legislature. As we explained in response to your first question, the absence of language in § 54-191 requiring legislative approval of appointees to the Brand Committee is allowed under art. IV, § 10, and thus there is no requirement that such appointees be confirmed by the Legislature.

CONCLUSION

To summarize, the current statute creating the Brand Committee provides for appointment of committee members by the Governor and does not require legislative approval. Neb. Rev. Stat. § 54-191. This does not violate art. IV, § 10, as the Legislature may enact statutes creating offices that provide for the Governor's appointment to those offices without legislative approval. The Legislature, of course, is free to impose such an approval requirement if it chooses to do so, as it has in many cases. To require legislative approval of Brand Committee appointees, the Legislature would need to amend § 54-191 to impose this requirement. AM686, were it to become law, would add such a requirement and future appointees to the Brand Committee would be subject to legislative confirmation.

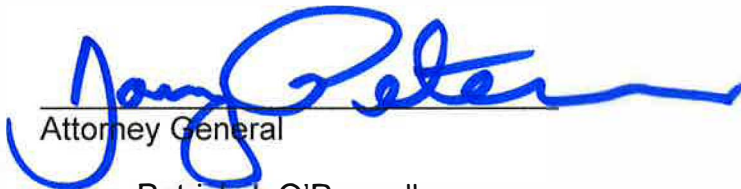
Very truly yours,

DOUGLAS J. PETERSON
Attorney General



L. Jay Bartel
Assistant Attorney General

Approved by:


Attorney General

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