

OFFICIAL OPINION NO. 73-23, Governor cannot diminish Constitutional officers by Executive Order.

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

June 25, 1973

R. Van Johnson  
Acting Commissioner  
Office of Consumer Affairs  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 73-23

**Governor cannot diminish Constitutional officers by Executive Order.**

Dear Mr. Johnson:

You have asked for an official opinion on the following question:

Can the Office of the Consumer Affairs Commissioner, created by statute and made a part of the Attorney General's Office by the Legislature, be removed therefrom by an Executive Order issued pursuant to Article IV, Section 8 of the State Constitution?

The constitutional section in question provides:

All executive and administrative offices, boards, agencies, commissions and instrumentalities of the state government and their respective functions, powers and duties, *except for the office of governor, lieutenant governor, attorney general, secretary of state, auditor, treasurer, and commissioner Of school and public lands*, shall be allocated by law among and within not more than twenty-five principal departments, organized as far as practicable according to major purposes, by no later than July 1, 1974. Subsequently, all new powers or functions shall be assigned to administrative offices, agencies and instrumentalities in such manner as will tend to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a principal department.

*Except as to elected constitutional officers,* the Governor may make such changes in the organization of offices, boards, commissions, agencies and instrumentalities, and in allocation of their functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the Legislature within five legislative days after it convenes, and shall become effective, and shall have the force of law, within ninety days after submission, unless disapproved by a resolution concurred in by a majority of all the members of either house.. (Emphasis added).

The framers of our Constitution, and the people who adopted it, must be understood to have used words in their natural sense to have intended what they said. *Gibbons v. Ogden*, 9 Wheat 1, 188, 6 L. Ed. 23; *Schomer v. Scott*, 65 S.D. 353, 274 N.W. 556. The word "except" means "not including," *In Re Kelley's Estate*, 274 N.Y.S. 488 495, 153 Misc. 445. It also means "to take or leave out of consideration, to exclude ... omit, or withhold." *Rickman v. Commonwealth*, 243 S. W. 929 (Ky). Also, "the purpose of an exception is to exclude from the operation of certain words what would otherwise be included in them." *In Re Garvin's Estate*, 6 A 2d 796, 800 (Pa.).

Accordingly, the intent of this provision, insofar as it applies to your question, is clear and simple. The Governor may not reorganize any part of a constitutional office. No other rational or logical construction can be made from this section.

Either paragraph standing alone is evidence that the Legislature *and* the people who passed the Article intended that constitutional offices and their "functions, powers and duties" would not be emasculated or changed by anyone but the Legislature. Read together, both paragraphs make this conclusion irrefutable.

The Office of the Commissioner of Consumer Affairs was "established in the Office of the Attorney General by the Legislature." SDCL 37-23-1. As such, its functions, powers and duties became part of the functions, powers and duties of the Attorney General. The Governor could no more transfer that office to another department than he could transfer the Attorney General's authority to prosecute lawsuits. Both the authority to prosecute lawsuits and authority over consumer affairs are integral parts of the Office of the Attorney General placed there by the Legislature, and neither can be removed by an Executive Order. This fact is the same with respect to the other elected constitutional officers enumerated above and with respect to their functions, powers and duties as set forth by the Legislature

in statute. To hold otherwise would allow one constitutional officer the authority to emasculate the offices of all the other constitutional officers, which certainly the Legislature and people did not intend.

It is interesting to note that this section was patterned after the model state Constitution. The Model Constitution was derived from Constitutions passed in the States of Hawaii, Alaska and New Jersey. However, none of those states had a provision exempting constitutional offices from reorganization. That provision was specifically added by our Legislature. This is an important distinction; the exemption clauses were not mere happenstance, they were intentionally added after being considered and studied with due deliberation. See in *Re Opinion of the Justices*, \_\_\_\_\_ S.D. \_\_\_\_\_, 203 N.W. 2d 526, pp. 528-9 for the legislative history. No words of a constitution can be regarded as meaningless. The language of a constitutional provision should be construed as written, and the words employed should be given their common, ordinary and accepted meaning. Using this guide to interpret the section, it is manifest that the Legislature, by inserting exceptions into the model, intended that the Governor's power to reorganize by Executive Order be limited to preserve the autonomy of the other Constitutional officers elected by the people.

The three Justices of the Supreme Court who wrote the majority opinion in response to a request for an advisory opinion, . *In Re Opinion of the Justices*, supra, did not answer the second question submitted by the Governor:

2. Can an executive order which becomes effective and has the force of law by the procedures established in Article IV, Section 8 of the South Dakota Constitution transfer an agency or function created and attached by statute to a constitutional office from that office to a principal department within the executive branch?

The Justices stated:

Your questions 2 and 3 are of such broad scope, may involve the authority of constitutional officers and the whole spectrum of state government and its institutions, that we decline to answer them as now stated at this time.

There is nothing in that opinion or in, *In Re Opinion of the Supreme Court*, relative to Executive Order 73-1, \_\_\_\_\_ S.D. \_\_\_\_\_, 204 N.W. 2d 184, upon which to base a conclusion that the Governor has the authority to reorganize divisions within a constitutional office.

Admittedly, the Legislature does have the power to transfer, by enacting a special statute, any power, function or duty out of a constitutional office, placed there originally by statute. But the Governor has never had this power, and the Constitution does not purport to give such to him. Legislative failure to veto the Governor's reorganization order cannot be deemed as affirmative legislative action or as legislative approval. What is *ultra vires ab initio* cannot be cured by a later action or inaction.

The reasoning of this opinion applies also to other functions of constitutional offices transferred out by the Executive Order, such as the Uniform Commercial Code filings of the Office of the Secretary of State and the Office of the Commissioner of Drugs and Substances Control of the Office of the Attorney General.

This opinion should not be construed as an attack on the Executive Order or upon reorganization, with which, incidentally, I wholeheartedly agree. It is a remarkable piece of work considering the short time available for its preparation. In this haste, it is explainable that certain matters could have been overlooked.

The answer to your question, is therefore, NO.

Respectfully submitted,

Kermit A. Sande  
Attorney General