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STATE OF NEBRASKA
OFFICIAL
APR 8 1992
DEPT. OF JUSTICE

DATE: March 31, 1992

SUBJECT: Liability Protection for Real Estate Appraisers Serving on Technical Review Panel

REQUESTED BY: Marilyn Hasselbalch, Director
Nebraska Real Estate Appraiser Board

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

In Attorney General Opinion #92012, issued January 28, 1992, we stated that the Nebraska Real Estate Appraiser Board (Board) is authorized by Neb. Rev. Stat. § 76-2239 (Supp. 1991) to contract with or use qualified individuals or companies if technical assistance is required in the Board's investigation of complaints against appraisers. You have now requested our opinion regarding liability protection for those who provide technical assistance to the Board under § 76-2239. Specifically, you have indicated that you are concerned about (1) the types of liability to which the Board's technical review panel could be subject, and (2) forms of protection available to the panel against any such liability.

I. Types of Liability

Without specific facts, it is impossible to analyze what causes of action may exist against members of your technical review panel in any given situation. A certain factual scenario may certainly create a right to judicial relief against members of your panel for negligence, libel, or slander, for example. However, in view of the multitude of possible lawsuits and factual situations that may arise, we must assume that a valid cause of action exists for purposes of analyzing the types of liability protection available to the panel.

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II. Liability Protection

Neb. Rev. Stat. §§ 81-8,239.05 and 81-8,239.06 (Cum. Supp. 1990) authorize indemnification of state officials and employees and legal representation by the Attorney General for those officials and employees in cases involving an act or omission occurring in the course and scope of employment. Specifically, § 81-8,239.05 provides:

> (1) The State of Nebraska shall indemnify its officials and employees and its past officials and employees for money damages and reasonable costs incurred as a result of an act or omission occurring in the course and scope of employment of such official or employee after May 22, 1981. Such official's or employee's right to indemnification shall include the payments of awards, settlements, and associated costs, including appeal bonds and reasonable costs associated with a required appearance before any tribunal.
>
> (2) Subsection (1) of this section shall not apply in case of malfeasance in office or willful or wanton neglect of duty. This section shall not be interpreted as an expansion of any state official's or employee's personal liability.

Section 81-8,239.06 states:

> (1) If any civil action is brought against any state officer or employee, such state official or employee may file a written request for counsel with the Attorney General asserting that such civil action is based in fact upon an alleged act or omission in the course and scope of employment. If any state officer or employee is requested to appear before a tribunal and the state may have an interest, such state official or employee may file a written request for representation at the tribunal by the Attorney General asserting that the request to appear is based upon an alleged act or omission in the course and scope of employment. The Attorney General shall thereupon appear and defend or represent that person unless after investigation he or she finds that the claim or demand does not arise out of an alleged act or omission occurring in the course and scope of employment or that the act or omission complained of amounted to malfeasance in office or willful or wanton neglect of duty, in which case the Attorney General shall give that person written notice

that defense of the claim or representation before the tribunal has been rejected.

As indicated in the statutes quoted above, indemnification is available to state "officials and employees" and legal representation by the Attorney General may be provided to "state officer[s] or employee[s]."

A. "State Employees"

"Employee of the state" for purposes of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987), is defined as "officers or employees of the state or any state agency and shall include duly appointed members of boards or commissions when they are acting in their official capacity. . . . State employee shall not be construed to include . . . any contractor with the State of Nebraska." § 81-8,210(3) (Supp. 1991). Because the indemnification and legal representation provisions in §§ 81-8,239.05 and 81-8,239.06 appear along with the State Tort Claims Act under the statutory subsection entitled "State Claims Board and Risk Management Program," it is arguable that the definition of "state employee" in § 81-8,210(3) also applies in the context of §§ 81-8,239.05 and 81-8,239.06.

Under this definition, contractors with the State of Nebraska are not state employees and are therefore not entitled to indemnification by the state and legal representation by the Attorney General under §§ 81-8,239.05 and 81-8,239.06. As stated above, § 76-2239 allows the Board to "contract with or use" qualified individuals or companies to render technical assistance during the Board's investigation of complaints against appraisers. If the Board chose to "contract" with members of its technical review panel, the members would not be "state employees" for purposes of §§ 81-8,239.05 and 81-8,239.06 and would not be entitled to indemnification by the state or legal representation by the Attorney General. Thus, these contractors would be advised to carry their own insurance and employ a private attorney should liability arise.

B. "State Officers" and "State Officials"

298 Neb. Admin. Code 9.005 states that the Real Estate Appraiser Board may "obtain technical or investigatory assistance" upon receipt of a complaint, and that "[a]ll persons appointed to assist . . . shall report their findings, in writing, to the Board." (Emphasis added). Further, you have indicated that the Board is considering adopting a policy whereby the Board will select and appoint members of the technical review panel from

appraisers who volunteer to serve. If the panel is assembled by Board selection and appointment in this manner, members of the technical review panel probably would not be classified as contractors, and would instead be characterized as state officers or officials for purposes of the indemnification and legal representation statutes.

"Official" is defined as an "officer." Black's Law Dictionary 1084 (6th ed. 1990). "State officer" means one "who holds elective or appointive position in state government" and "whose duties concern the state at large or the general public." Id. at 1409 & 1407. Courts have defined "state officer" as one who is "clothed with functions which affect the public and duties assigned to them by state laws," People v. Elliott, 115 Cal. App. 2d 410, 415, 252 P.2d 661, 664 (1953), and one whose "duties and functions are coextensive with the State, and who receives his authority under the State laws and performs some of the governmental functions of the State," Texas Liquor Control Bd. v. Continental Distilling, 199 S.W.2d 1009, 1012 (Tex. Civ. App. 1947). See also Murphy v. Hurlbut Undertaking & Embalming Co., 346 Mo. 405, 142 S.W.2d 449 (1940) (state officer's official duties and functions are coextensive with the boundaries of the state); State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991) (discusses public officers and public office).

If the Board chooses to select and appoint panel members from a group of volunteers, the panel members may meet the definition of state officers or officials because the panel members would be appointed and directed by a state board to perform technical aspects of the Board's official complaint investigation process. The Board's investigatory powers and its ability to appoint technical assistants as part of its investigation process are created by statute and implemented by regulation. § 76-2239; 298 Neb. Admin. Code 9. Therefore, the panel would clearly be performing duties authorized by state law which concern the state at large or the general public.

Under this "appointment" method of panel selection, the members of the technical review panel would probably be classified as state officials and state officers, entitling them to indemnification under § 81-8,239.05 and legal representation by the Attorney General under § 81-8,239.06. It should be noted, however, that a court could certainly interpret these provisions differently, resulting in denial of the protection contained in §§ 81-8,239.05 and 81-8,239.06. Further, even if panel members were classified as state officials or state officers, these indemnification and legal representation provisions would not apply

in cases involving malfeasance in office, willful or wanton neglect of duty, or an act or omission occurring outside the course and scope of employment.

III. Conclusion

If the Board contracts with members of the technical review panel to render technical assistance in the complaint investigation process, the panel members would not be entitled to indemnification by the state or legal representation by the Attorney General under §§ 81-8,239.05 and 81-8,239.06. In contrast, if the Board selects and appoints panel members from a pool of volunteer appraisers, the panel members may be considered state officers or officials within the meaning of the above statutes. Characterization of these volunteers as state officers or officials would qualify them for state indemnification and legal representation if malfeasance in office or willful or wanton neglect of duty are not involved, and if the act or omission that is the basis of the legal action occurred in the course and scope of employment.

Sincerely,

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Approved By:

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13-107-6.92