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STATE OF NEBRASKA
OFFICIAL
MAY 28 1992
DEPT. OF JUSTICE

DATE: May 22, 1992

SUBJECT: Separation of Powers; Service by judges on the Judicial Resources Commission in light of State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991)

REQUESTED BY: Joseph C. Steele, Court Administrator
Administrative Office of the Courts/Probation

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 1059, enacted by the Legislature and signed by the Governor this spring, is an act relating to various facets of the court system in Nebraska. Section 7 of the bill creates the Judicial Resources Commission (Commission), a body made up of three judges appointed by the state supreme court, six members of the Nebraska State Bar Association appointed by the Executive Council of the Bar, and six Nebraska citizens appointed by the Governor. The Commission has various duties with respect to the analysis of judicial vacancies and judicial districts. You have requested our opinion concerning several aspects of the bill. In particular, you have asked if service by judges on the Commission would violate the holding in State ex rel Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991), which deals with Article II Section 1 of the Nebraska Constitution and the separation of governmental powers.[1] Our conclusions are set out below.

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[1] This is your second opinion request concerning the application of the Conway decision to judicial officers. See Opinion of the Attorney General No. 92022, February 18, 1992. You have yet a third request in this area pending.

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In the Conway case, the court held that state Senator Gerald Conway could not both serve in the Legislature and also act as an assistant professor at Wayne State College. The court indicated that such dual service violated Article II Section 1 of the Nebraska Constitution which requires the separation of governmental powers. In the course of the Conway opinion, the court stated the following rule which governs the application of Article II:

> ...article II prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch.

Id. at 782, 472 N.W.2d at 412. The judges who will serve on the Judicial Resources Commission under the terms of LB 1059 are obviously officers of the judicial branch of government. Therefore, you are concerned that their service on the Commission would make them either an officer or employee of another branch of government in contravention of the rule in Conway. After reviewing the provisions of LB 1059, we do not believe that the Conway decision prohibits service by judges on the Commission.

Under the provisions of LB 1059, members of the Commission will serve a term of six years. The bill contains provisions for filling vacancies on the Commission, and also provides that members of the Commission will be reimbursed for their actual and necessary expenses.

Section 10 of the bill sets out the duties of the Commission. In the event that replacement of a district or county judge is necessary, or in the event that a change in the number of judges or in the boundaries of judicial districts is needed, the Commission will hold a public hearing in the affected judicial district or districts and determine:

> (a) Whether a judicial vacancy exists and the location of that vacancy;
> (b) Whether the judicial district boundaries or the number of districts should be changed for county or district courts;
> (c) Whether the number of district or county judges should be increased, decreased or remain the same; or
> (d) Any combination of subdivisions (a), (b) and (c) of this subsection.

LB 1059, 92nd Nebraska Legislature, Second Session (1992). The Commission's determination must be based upon analysis of such things as judicial caseloads weighted by category, adequate access to the courts by litigants, population, other judicial duties,

travel time, and other factors determined by the Commission to be necessary to insure efficiency and service.

Section 10 of LB 1059 also provides that after making its determination, the Commission "shall make a recommendation to the Legislature, " and, if no changes in existing law are recommended by the Commission, no legislative action shall be necessary to fill a judicial vacancy. Subsections (4) and (5) of Section 10 go on to provide that the duties of the Judicial Nominating Commission with respect to selection of a new judge are triggered on:

> (a) the date the Governor approves legislation or the Legislature overrides a veto of legislation creating or moving a judicial vacancy, (b) ten days after the date of adjournment sine die by the Legislature in cases of a recommendation [by the Commission] on which action is required but no action is taken by the Legislature in its regular legislative session commenced following the recommendation, (c) the date of a designation of a principal office location by the Supreme Court, or (d) the date of the determination by the commission that there be no change.

LB 1059, 92nd Nebraska Legislature, Second Session (1992).

We do not believe that members of the Commission become employees in the legislative branch of government by virtue of their service on the Commission.[2] Therefore, to answer your question concerning the propriety of judges serving on the Commission under Conway, we must determine if members of the Commission become officers in the legislative branch of government through their service on the Commission.

The Nebraska Supreme Court has indicated that an office is "a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument and duties." State ex rel. O'Connor v. Tusa, 130 Neb. 528, 535-536, 265 N.W. 524, 528 (1936). However, in Conway, the court also indicated that, "[i]t may be said that 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." 238 Neb. at 771, 772, 472 N.W.2d at 407. As a result, a public office is "a

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[2] We assume that the Judicial Resources Commission is a part of the legislative branch of government on the basis of its advisory role to the Legislature.

governmental position, the duties of which invest the incumbent with some aspect of the sovereign power." Id.

The provisions of LB 1059 establish statutory appointment procedures for members of the Commission, a term of office and specific statutory duties. These are indicia of public office. Nevertheless, the Commission may only make recommendations to the Legislature within the scope of its charge. Its task is advisory, and it does not have the power to declare judicial vacancies, to change the boundaries of judicial districts or to change the number of judges. Under LB 1059, those powers remain with the Legislature as required by Article V, Sections 10 and 11 of the Nebraska Constitution. As a result, we do not believe that members of the Commission would exercise any powers of the legislative branch of government. Therefore, they are not officers in the legislative branch of government. Since Commission members are neither officers nor employees of the legislative branch, judges may serve on the Commission.

You next state, "I am soliciting your comments about the process used to appoint the judge members [of the Commission]." We are not entirely sure what you mean by that request. However, to the extent that you wish us to comment on the mechanics of the appointment process for the judge members of the Commission, it seems to us that the appointment process for those members would be left to the internal operating procedures of the supreme court.

Finally, you have requested our "analysis of the appropriateness" of the delegation of the authority to designate the primary office location of a county or district court judge to the supreme court. We do not believe that such a delegation is improper.

Article V Section 1 of the Nebraska Constitution provides, in pertinent part,

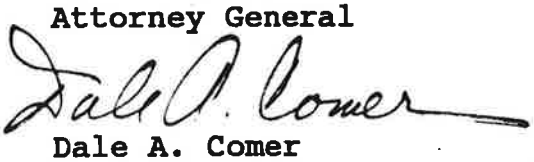
> In accordance with rules established by the Supreme Court and not in conflict with other provisions of the Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

It seems to us that this constitutional provision provides adequate authority for the Legislature to designate the supreme court as the entity which will determine the location of the primary office for county and district court judges. Such a determination would fit

within the court's constitutional administrative authority over the state court system.

Sincerely yours,

DON STENBERG
Attorney General



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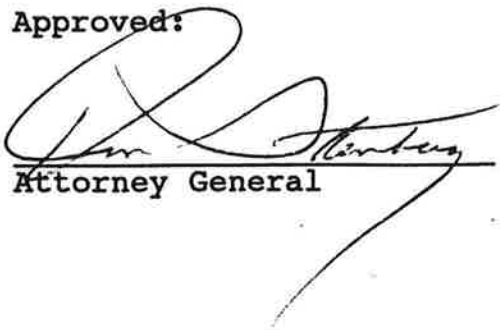

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