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STATE OF NEBRASKA
OFFICIAL
JUL 24 1992
DEPT. OF JUSTICE

DATE: July 17, 1992

SUBJECT: Application of Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920, to Rules and Regulations Adopted and Promulgated by the Judicial Resources Commission

REQUESTED BY: Judge C. Thomas White, Chairman
Judicial Resources Commission

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

The Nebraska Legislature, in Laws 1992, LB 1059, § 7, created the Judicial Resources Commission ("Commission"), consisting of three judges appointed by the Nebraska Supreme Court, six members of the Nebraska State Bar Association ("NSBA") appointed by the Executive Council of the NSBA, and six Nebraska citizens appointed by the Governor. Section 10 of LB 1059 amends Neb. Rev. Stat. § 24-810 (Supp. 1991) by setting out the duties of the Commission. Section 10 requires the Commission to conduct a public hearing in districts where replacement of a district or county judge is necessary, where a change in the boundaries or number of various judicial districts is needed, or where an adjustment in the number of district or county judgeships needs to be made.

After holding a public hearing, § 10 of LB 1059 requires that the Commission determine whether a judicial vacancy exists and the location of that vacancy; whether a change in judicial district boundaries, number of districts, or number of judgeships is needed; or any combination of the above inquiries. Section 10 also specifies some of the factors the Commission is to consider in making these determinations. After the Commission has made its determinations, § 10 provides that the Commission "shall make a recommendation to the Legislature. If no changes in existing law

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are recommended by the commission, no legislative action shall be necessary . . . ."

Finally, § 10 states that "[t]he Judicial Resources Commission shall adopt and promulgate rules and regulations on the procedures to be followed in making the determinations [described above]." You have requested our opinion concerning whether the rules and regulations created by the Commission pursuant to § 10 of LB 1059 would be governed by the Administrative Procedure Act ("APA"), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987), thereby requiring approval by the Attorney General and Governor under §§ 84-905.01 and 84-908.

The APA applies to "agencies" of state government. Under the APA, "agency" is defined as:

> each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations, <u>except</u> the Adjutant General's office as provided in Chapter 55, the courts including the Nebraska Workers' Compensation Court, the Commission of Industrial Relations, the Legislature, and the Secretary of State with respect to the duties imposed by the Administrative Procedure Act . . . .

§ 84-901(1)(emphasis added).[1]

In order for the Judicial Resources Commission to fall within the definition of "agency" for purposes of the APA, it must (1) not be excepted from the statutory definition of "agency," as are the Adjutant General's office, courts, Commission of Industrial Relations, Legislature, and the Secretary of State; (2) be a commission "of the state government"; and (3) be authorized by law to make rules and regulations. § 84-901(1). Therefore, we must first determine whether the Commission falls within one of the exceptions listed in § 84-901(1).

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[1]Entities which have been characterized as "agencies" subject to the APA include the State Board of Equalization and Assessment, <u>Pentzien, Inc. v. State</u>, 227 Neb. 434, 418 N.W.2d 546 (1988); State Racing Commission, <u>B.T. Energy Corp. v. Marcus</u>, 222 Neb. 207, 382 N.W.2d 616 (1986); State Board of Education, <u>Richardson v. School Dist. No. 100</u>, 217 Neb. 359, 348 N.W.2d 873 (1984); Liquor Control Commission, <u>The Flamingo, Inc. v. Nebraska Liquor Control Comm'n</u>, 185 Neb. 22, 173 N.W.2d 369 (1969); and the State Railway Commission, <u>Yellow Cab Co. v. Nebraska State Railway Comm'n</u>, 175 Neb. 150, 120 N.W.2d 922 (1963).

The legislative history concerning LB 1059 indicates that the Legislature intended the Commission to be an advisory body charged with the duties of gathering information, holding hearings, and making recommendations to the Legislature, which would then adopt, reject, or modify the Commission's recommendations and take appropriate legislative action. In discussions of LB 1237, provisions of which were ultimately incorporated into LB 1059 regarding the Judicial Resources Commission, Senator Wickersham, an introducer of LB 1237, stated:

> I think it is important that we have a body to not only gather information but to evaluate it, to hold hearings in the areas that would be [a]ffected if we are to make changes in the allocation of our judicial resources, and then to report to us. The Judicial Resources Commission proposed in the legislation is an advisory body only . . . I am greatly concerned that we have an independent advisory body to report to the Legislature concerning the allocation of judicial resources.

Hearing on LB 1059 and LB 1237 Before the Committee on Judiciary, 92nd Legis., 2nd Sess. 17-18 (Jan. 31, 1992) (emphasis added). See also id. at 13, 15 & 19 (advisory nature of Commission); Floor Debate on LB 1059 and LB 1237, 92nd Legis., 2nd Sess. 12438-12439 & 13178-13180 (Apr. 6 & 9, 1992) (description of Commission's advisory purpose, functions, and limited scope of authority; incorporation of LB 1237 as it concerns the Commission into LB 1059).

Because this legislative history clearly shows that the Commission was intended to be, in effect, an arm of the Legislature, it is necessary to determine whether the Commission falls within the "Legislature" exception to the definition of "agency" provided in § 84-901(1).

While the legislative history and Nebraska case law concerning § 84-901 do not indicate whether the Legislature intended that the words describing those entities that are excepted from the APA's definition of agency, such as "courts" and "Legislature," be interpreted broadly or narrowly, courts in other jurisdictions have held that such words should be interpreted broadly. Petition of Rhode Island Bar Ass'n, 118 R.I. 489, 374 A.2d 802 (1977) (where APA exempted legislature and courts from its definition of "agency," agencies covered by the APA were those not in the judicial or legislative branches); Babineaux v. Judicial Comm'n, 341 So. 2d 396 (La. 1976) (exception for "courts" in the Louisiana APA meant the judicial branch of state government). Therefore, the exception in Nebraska's APA for the "Legislature" seems broad enough to encompass entities in the legislative branch.

In Fireman's Ins. Co. v. Arkansas State Claims Comm'n, 301 Ark. 451, 784 S.W.2d 771 (1990), cert. denied, 111 S. Ct. 76 (1990), the court found that because the act creating the State Claims Commission made it an "arm" of the state legislature, reporting solely to the legislature, the Commission was not an "agency" within the meaning of the Arkansas APA, which excepted the "General Assembly" from its definition of "agency." Cf. Medical Laundry Serv. v. Board of Adjustment, 486 So. 2d 1305 (Ala. Civ. App. 1986) (where the State Board of Adjustment was an instrument and arm of the legislature, acted upon details which would be inconvenient for the legislature to address in session, performed a fact-finding function for the legislature, and acted within limits clearly defined by the legislature, the Board was not an "agency" subject to the Alabama APA, which excepted "the legislature and its agencies" from its definition of "agency").

Based upon its advisory role to the Legislature, we conclude that the Judicial Resources Commission is part of the legislative branch of our state government. See Op. Att'y Gen. No. 92073, f.n. 2 (May 28, 1992).[2] Further, because the Nebraska APA in § 84-901(1) exempts from its coverage "the Legislature," which may reasonably be interpreted to mean entities in the legislative branch, the Commission is not an "agency" under the APA. This conclusion makes it unnecessary to determine whether the Commission meets the second and third requirements for agency status under the APA.

Because the Commission is not an "agency" subject to the APA, any rules and regulations adopted and promulgated by the Commission pursuant to § 10 of LB 1059 would not be required to meet the procedural requirements set forth in the APA regarding approval by the Attorney General and Governor, §§ 84-905.01 & 84-908.

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[2]In that opinion, we noted that the Judicial Resources Commission does not actually exercise any powers of the legislative branch of government, so the Commission's members are not officers in the legislative branch. The opinion stated that the Commission only makes recommendations to the Legislature and does not have the power to declare judicial vacancies, change boundaries of judicial districts, or change the number of judges. Under LB 1059 and Neb. Const. art. V, §§ 10 and 11, those powers remain with the Legislature.

Sincerely,

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Attorney General

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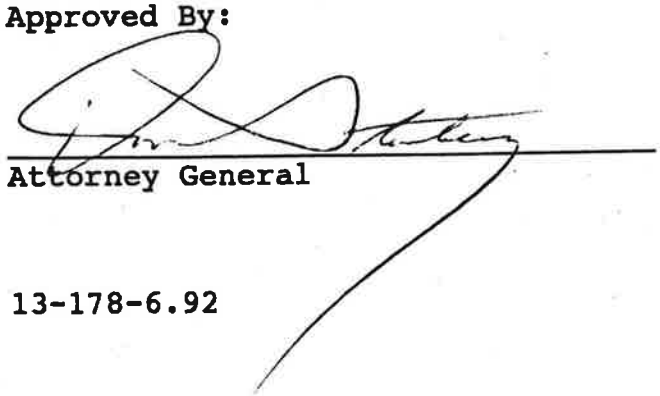
Assistant Attorney General

Approved By:



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